APPENDIX J:

COMPILATION OF PRIOR RELATION TO NATIONAL LEGAL TRENDS ENTRIES

This appendix contains the relation to national legal trends entries (hereinafter, "entries"), which the CCRC staff previously produced in conjunction with prior drafts of the statutory provisions addressed in the First Draft of Report #68 *Cumulative Update to the Revised Criminal Code (December 24, 2020)* (Report). These entries have been excerpted from the staff commentary accompanying those prior drafts and are presented in this appendix in the same form as when they were originally released.

These entries are included in this Report for reference purposes only, and should be viewed with a few important caveats in mind. First, these entries reflect the analysis of national legal trends that informed the CCRC staff's work at the time of their initial release. Since that time, however, the relevant national legal trends and/or staff's understanding of them may have subsequently changed or shifted. Second, these entries track older versions of proposed CCRC legislation, which may significantly depart from the corresponding CCRC legislation recommended in this Report. Third, the internal references and citations (e.g., supra and infras) utilized in these entries have not been updated, and, therefore, are no longer accurate.

Subtitle I. General Part.

Chapter 1. Preliminary Provisions.

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

Relation to National Legal Trends. Many states that have enacted comprehensive code reforms have added a short title,[1] set a prospective effective date,[2] and provided precise rules for determining when a crime occurs with respect to the effective date.[3] Similar provisions are part of the Model Penal Code and other proposed reform efforts.[4]

RCC § 22E-102. Rules of Interpretation.

Relation to National Legal Trends. Most states, particularly those that have undergone comprehensive criminal code reforms, codify rules concerning the interpretation of criminal statutes.[5] The content of states' codified rules of interpretation varies considerably, but usually combine a broad rule (or rules) of interpretation with a

[1] Ala. Code § 13A-1-1; Ark. Code Ann. § 5-1-101; Colo. Rev. Stat. Ann. § 18-1-101; Conn. Gen. Stat. Ann. § 53a-1; Del. Code Ann. tit. 11, § 101; Ga. Code Ann. § 16-1-1; Haw. Rev. Stat. Ann. § 701-100; 720 Ill. Comp. Stat. Ann. 5/1-1; Iowa Code Ann. § 701.1; Kan. Stat. Ann. § 21-5101; Ky. Rev. Stat. Ann. § 500.010; Me. Rev. Stat. tit. 17-A, § 1; Minn. Stat. Ann. § 609.01; Mo. Ann. Stat. § 556.011; Mont. Code Ann. § 45-1-101; Neb. Rev. Stat. Ann. § 28-101; N.H. Rev. Stat. Ann. § 625:1; N.J. Stat. Ann. § 2C:1-1; N.M. Stat. Ann. § 30-1-1; N.Y. Penal Law § 1.00; N.D. Cent. Code Ann. § 12.1-01-01; Or. Rev. Stat. Ann. § 161.005; 18 Pa. Stat. and Cons. Stat. Ann. § 101; Tex. Penal Code Ann. § 1.01; Utah Code Ann. § 76-1-101; Wash. Rev. Code Ann. § 9A.04.010; Wyo. Stat. Ann. § 6-1-101.

[2] Ala. Code § 13A-1-11; Ark. Code Ann. § 5-1-103; Colo. Rev. Stat. Ann. § 18-1-103; Conn. Gen. Stat. Ann. § 53a-2; Del. Code Ann. tit. 11, § 103; Ga. Code Ann. § 16-1-9; Haw. Rev. Stat. Ann. § 701-100; Kan. Stat. Ann. § 21-5103; Me. Rev. Stat. tit. 17-A, § 1; Mo. Ann. Stat. § 556.031; Mont. Code Ann. § 45-1-103; Neb. Rev. Stat. Ann. § 28-103; N.H. Rev. Stat. Ann. § 625:2; N.J. Stat. Ann. § 2C:1-1; Or. Rev. Stat. Ann. § 161.035; Utah Code Ann. § 76-1-102; Va. Code Ann. § 18.2-2; Wash. Rev. Code Ann. § 9A.04.010.

[3] Ala. Code § 13A-1-7; Ariz. Rev. Stat. Ann. § 13-101; Ark. Code Ann. § 5-1-103; Colo. Rev. Stat. Ann. § 18-1-103; Del. Code Ann. tit. 11, § 102; Ga. Code Ann. § 16-1-9; Haw. Rev. Stat. Ann. § 701-101; Kan. Stat. Ann. § 21-5103; Me. Rev. Stat. tit. 17-A, § 1; Mo. Ann. Stat. § 556.031; Mont. Code Ann. § 45-1-103; Neb. Rev. Stat. Ann. § 28-103; N.H. Rev. Stat. Ann. § 625:2; N.J. Stat. Ann. § 2C:1-1; N.M. Stat. Ann. § 30-1-2; N.Y. Penal Law § 5.05; N.D. Cent. Code Ann. § 12.1-01-01; Or. Rev. Stat. Ann. § 161.03; Utah Code Ann. § 76-1-103; Va. Code Ann. § 18.2-2; Wash. Rev. Code Ann. § 9A.04.010; Wyo. Stat. Ann. § 6-1-101.

[4] Model Penal Code § 1.01 *et seq.*; Illinois Proposed Criminal Code § 101 *et seq.*; Kentucky Proposed Penal Code § 500.101 *et seq*.

[5] Ala. Code § 13A-1-6; Alaska Stat. § 01.10.040(a); Ariz. Rev. Stat. Ann. § 13-104; Cal. Penal Code § 7(16); Colo. Rev. Stat. Ann. § 18-1-102; Conn. Gen. Stat. tit. 1, § 1-1(a); Del. Code Ann. tit. 11, § 203; Fla. Stat. Ann. § 775.021; Ga. Code Ann. § 1-3-1(b); Haw. Rev. Stat. Ann. § 701-104; Idaho Code § 73-102(1); Ky. Rev. Stat. Ann. § 500.030; La. Rev. Stat. Ann. § 1:3; Me. Rev. Stat. Ann. tit. 1, § 72(3); Mass. Gen. Laws Ann. ch. 4, § 6; Mich. Comp. Laws § 750.2; Minn. Stat. Ann. § 609.01; Miss. Code Ann. § 1-3-65; Mont. Code Ann. § 45-1-102; Neb. Rev. Stat. § 28-102; N.D. Cent. Code § 1-02-01; N.H. Rev. Stat. Ann. § 625:3; N.J. Stat. Ann. § 2C:1-2; N.Y. Penal Law § 5.00; Ohio Rev. Code Ann. § 2901.04; Okl. Stat. Ann. tit. 25, § 1; Or. Rev. Stat. Ann. § 161.025; 18 Pa. Stat. and Cons. Stat. Ann. § 105; S.D. Codified Laws § 22-1-1; Tenn. Code Ann. § 39-11-104; Tex. Penal Code Ann. § 1.05; Utah Code Ann. § 76-1-104.; Wis. Stat. Ann. § 990.01(1); Wyo. Stat. Ann. § 8-1-103(a)(i). *See* Zachary Price, *The Rule of Lenity As A Rule of Structure*, 72 FORDHAM L. REV. 885, 902 (2004) (collecting statutes).

rejection of the historic practice[6] of strictly construing criminal statutes. Many states' rules of interpretation explicitly reject strict construction,[7] and a few require liberal construction.[8] Also, several states direct that their statutes be interpreted according to their "common" or "ordinary" meaning, de facto abolishing strict construction.[9] Further, some states follow the approach of the Model Penal Code by requiring interpretations to follow statutorily-specified general purposes of the criminal code which do not refer to strict construction.[10] Even among states that do not otherwise follow the Model Penal Code's reference to general purposes, many states closely follow its language requiring interpretation of statutes "according to the fair import of their terms."[11]

The Revised Criminal Code differs from most jurisdictions by providing greater detail and clarity as to the appropriate rules of interpretation. Subsection (a) identifies the four bases for statutory interpretation generally recognized by current District law. The subsection does not use the Model Penal Code's more ambiguous language requiring interpretation of statutes "according to the fair import of their terms" and does not give special weight to the general and special purposes of a given statute. However, like many other jurisdictions, subsection (a) rejects the practice of strictly construing criminal statutes insofar as it specifies that the "plain meaning" of the text is to be used in interpretation.[12]

RCC § 22E-102 (b). Rule of Lenity

Relation to National Legal Trends. Nearly every state has recognized the rule of lenity in some form in its case law.[13] However, none have specifically codified a rule of

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[6] *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 198-199 (1985). *But see* Fla. Stat. Ann. § 775.021; Ohio Rev. Code Ann. § 2901.04(a) (codifying that criminal statutes should be strictly construed in favor of defendants).

[7] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PENN. L. REV. 335, 347 (2005); *see also*, Ariz. Rev. Stat. Ann. § 13-104; Del. Code Ann. tit. 11, § 203; Idaho Code § 73-102(1); Mich. Comp. Laws § 750.2 ; Mont. Code Ann. § 45-1-102(2); N.H. Rev. Stat. Ann. § 625:3; N.D. Cent. Code § 1-02-01 ; Or. Rev. Stat. § 161.025(2); S.D. Codified Laws § 22-1-1; Tex. Penal Code Ann. § 1.05 ; Utah Code Ann. § 76-1-106.

[8] Ky. Rev. Stat. Ann. § 500.030; see also Idaho Code § 73-102(1); N.D. Cent. Code § 1-02-01.

[9] Ala. Code § 13A-1-6; Alaska Stat. § 01.10.040(a); Cal. Penal Code § 7(16); Conn. Gen. Stat. tit. 1, § 1-1(a); Ga. Code Ann. § 1-3-1(b); Haw. Rev. Sat. § 1-14; La. Rev. Stat. Ann. § 1:3; Me. Rev. Stat. Ann. tit. 1, § 72(3); Mass. Gen. Laws Ann. ch. 4, § 6; Minn. Stat. § 645.08(1); Miss. Code Ann. § 1-3-65; Neb. Rev. Stat. § 28-102; Okl. Stat. Ann. tit. 25, § 1; Tenn. Code Ann. § 39-11-104; Wis. Stat. Ann. § 990.01(1); Wyo. Stat. Ann. § 8-1-103(a)(i).

[10] Ala. Code § 13A-1-6; Ariz. Rev. Stat. Ann. § 13-104; Colo. Rev. Stat. § 18-1-102; Del. Code Ann. tit. 11, § 203 720 Ill. Comp. Stat. Ann. 5/1-2 ; N.J. Stat. Ann. § 2C:1-2(a); 18 Pa. Cons. Stat. Ann. § 105; Wash. Rev. Code Ann. § 9A.04.020(2). *See also* Model Penal Code § 1.02 cmt. at 33 n.78 (cataloguing state codes based upon the MPC formulation of rule of fair import).

[11] Model Penal Code § 1.02(3) "The provisions of the Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions it shall be interpreted to further the general purposes stated in this Section and the special purposes of the particular provision involved."

[12] At least one DCCA opinion states that the District's rule of lenity provides for strict construction of criminal statutes. *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) ("On the other side of the scale, we must of course consider the rule of lenity, which provides that criminal statutes should be strictly construed and that genuine ambiguities should be resolved in favor of the defendant."). However, as discussed below, the rule of lenity is a second order rule of interpretation in the District that only applies if there is a failure to resolve the meaning based on the plain meaning and other methods of interpretation in subsection (a).

[13] Price, *supra* note 19, at 885, 901 n.109.

lenity.[14] The Model Penal Code also does not codify the rule of lenity per se; instead, it states that conflicting interpretations are to be resolved with reference to the general purposes of the Code.[15] Other proposed code reforms have also stated that statutes should be interpreted with reference to the general purposes of the code, but do not codify the rule of lenity.[16] The Revised Criminal Code, by contrast, codifies the rule of lenity and clarifies its distinctive role as a secondary canon of construction when other interpretive rules fail.

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

Relation to National Legal Trends. A handful of states have provisions in their criminal codes that describe the relevance of headings and captions.[17] Additionally, two recent code reform efforts have adopted a similar provision.[18]

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

Relation to National Legal Trends. Other jurisdictions that have undertaken comprehensive criminal code reform have included similar language in their statutes.[19] For example, Kansas provides that the criminal code "does not bar, suspend or otherwise affect any civil right or remedy, authorized by law to be enforced in a civil action, based on conduct which this code makes punishable. The civil injury caused by criminal conduct is not merged in the crime."[20] The Revised Criminal Code's language is substantially similar to Kansas and other jurisdictions' language.

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

Relation to National Legal Trends. The general rule of statutory construction that the "[s]pecific terms prevail over the general in the same or another statute which otherwise might be controlling"[21] appears to be accepted in every jurisdiction. This provision is common to reformed criminal codes in other jurisdictions,[22] and one recent code reform proposal has included language to the proposed text above, as well.[23]

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[14] However, as noted above, two states have codified rules of interpretation strictly construing criminal statutes in favor of defendants. Fla. Stat. Ann. § 775.021; Ohio Rev. Code Ann. § 2901.04(a).
[15] Model Penal Code § 1.02(3).
[16] Illinois Reform Project § 102; Brown Commission § 102.
[17] 720 Ill. Comp. Stat. Ann. 5/34-1; N.J. Stat. Ann. § 2C:1-1; Wash. Rev. Code Ann. § 9A.04.010.
[18] Illinois Reform Project § 102(3); Delaware Reform Project § 102(b).
[19] Ala. Code § 13A-1-8; Ariz. Rev. Stat. Ann. § 13-102; Colo. Rev. Stat. Ann. § 18-1-103; 720 Ill. Comp. Stat. Ann. 5/1-4; Kan. Stat. Ann. § 21-5105; Me. Rev. Stat. tit. 17-A, § 3; N.Y. Penal Law § 5.10; Or. Rev. Stat. Ann. § 161.045; 18 Pa. Stat. and Cons. Stat. Ann. § 107; S.D. Codified Laws § 22-2-1; Tenn. Code Ann. § 39-11-102; Tex. Penal Code Ann. § 1.03; Va. Code Ann. § 18.2-7; Wyo. Stat. Ann. § 6-1-103.
[20] Kan. Stat. Ann. § 21-5105.
[21] *Kepner v. United States*, 195 U. S. 100, 125 (1904).
[22] Ala. Code § 13A-1-7; Ariz. Rev. Stat. Ann. § 13-102; Conn. Gen. Stat. Ann. § 53a-2; Del. Code Ann. tit. 11, § 103; Haw. Rev. Stat. Ann. § 701-102; Kan. Stat. Ann. § 21-5103; Minn. Stat. Ann. § 609.015; Mo. Ann. Stat. § 556.031; N.H. Rev. Stat. Ann. § 625:7; N.J. Stat. Ann. § 2C:1-5; N.Y. Penal Law § 5.05; Or. Rev. Stat. Ann. § 161.035; 18 Pa. Stat. and Cons. Stat. Ann. § 107; Tex. Penal Code Ann. § 1.05; Utah Code Ann. § 76-1-103; Wash. Rev. Code Ann. § 9A.04.090; Wis. Stat. Ann. § 939.20.
[23] Illinois Proposed Criminal Code § 103(2);

Chapter 2. Basic Requirements of Offense Liability.

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

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

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[1] In practical effect, this means that the defendant in a criminal case may not be required to "prove the critical fact in dispute,"[2] which is to say any fact that serves to negate an element of the offense.[3]

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

> [U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by 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.[4]

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

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[1] *In re Winship*, 397 U.S. at 364.
[2] *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).
[3] *See Patterson v. New York*, 432 U.S. 197, 207 (1977).
[4] *In re Winship*, 397 U.S. at 364.
[5] For reform jurisdictions, *see* Ariz. Rev. Stat. Ann. § 13-115; Colo. Rev. Stat. Ann. § 18-1-402; Conn. Gen., Stat. Ann. § 53a-12; Del. Code Ann. tit. 11, § 301; Haw. Rev. Stat. Ann. § 701-115; 720 Ill. Comp. Stat. Ann. 5/3-1; 720 Ill. Comp. Stat. Ann. 5/3-2; Ind. Code Ann. § 35-41-4-1; Kan. Stat. Ann. § 21-5108; Me. Rev. Stat. tit. 17-A, § 101; Mo. Ann. Stat. § 556.056; N.H. Rev. Stat. Ann. § 625:10; N.J. Stat. Ann. § 2C:1-13; N.Y. Penal Law § 25.00; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.055; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-204; Tex. Penal Code Ann. § 2.01; Utah Code Ann. § 76-1-501; Wash. Rev. Code Ann. § 9A.04.100. For model codes, *see* Model Penal Code § 1.12 and Proposed Federal Criminal Code § 103. For recent code reform projects, *see* Kentucky Revision Project 500.106 and Illinois Reform Project § 107.
[6] *See, e.g.,* Model Penal Code § 1.12; N.J. Stat. Ann. § 2C:1-13.

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

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

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

The foregoing principles are reflected in all reform codes, which either explicitly or implicitly subject the objective elements and the culpability requirement of an offense to the proof beyond a reasonable doubt standard.[9] However, codification of a definition of "offense element" or its substantive equivalent is a minority trend. Only about a third of reform jurisdictions—though all of the model codes and recent code reform projects—codify a definition of a comparable phrase.[10] The definition of "offense element" provided in § 22A-201(b) is based on this minority practice. Its adoption will enhance the clarity and consistency of the Revised Criminal Code.

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

RCC § 22E-202 (d).

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

Historically, the objective part of a criminal offense—the *actus reus*—has been viewed as a single whole by the common law. More recently, though, American legal authorities have begun to recognize that the *actus reus* of an offense is actually comprised

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[7] *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980).
[8] *In re Winship*, 397 U.S. at 364.
[9] *See* sources cited *supra* note 7.
[10] For reform codes, *see* Ark. Code Ann. § 5-1-102; Del. Code Ann. tit. 11, § 232; Me. Rev. Stat. tit. 17-A, § 32; N.H. Rev. Stat. Ann. § 625:11; N.J. Stat. Ann. § 2C:1-14; 18 Pa. Stat. and Cons. Stat. Ann. § 103; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-501. For model codes, *see* Model Penal Code § 1.13(9) and Proposed Federal Criminal Code § 103(1). For recent code reform projects, s*ee* Kentucky Revision Project 501.202 and Illinois Reform Project § 202(1).
[11] *See, e.g.,* Model Penal Code § 1.13(9); Del. Code Ann. tit. 11, § 232; N.H. Rev. Stat. Ann. § 625:11; 18 Pa. Stat. and Cons. Stat. Ann. § 103.

of different kinds of "objective elements,"[12] which are "often distilled into three categories: the defendant's conduct, the attendant circumstances, and the results or consequences."[13] This change in perspective was driven by the insights of the Model Penal Code, whose drafters famously recognized that "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[14]

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

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

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

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

[14] Model Penal Code § 2.02 cmt. at 123.

[15] For example, when an attempt to commit an offense is charged, the result element of the target offense, if not already subject to a culpable mental state of at least knowledge, must be appropriately elevated under reform codes—a "rule of elevation" that generally *does not* apply to circumstance elements. *See, e.g.,* Model Penal Code § 5.01. Additionally, it is common to provide disparate definitions of "purposely" and "knowingly" contingent upon whether the objective element to which it applies is a result or circumstance. *See, e.g.,* Model Penal Code § 2.02(2).

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

[17] *State v. Crosby*, 154 P.3d 97, 102 (Or. 2007).

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

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

[20] Robinson & Grall, *supra* note 20, at 707.

and culpability as to a circumstance and a result,"[21] a problem that has plagued courts attempting to consistently and objectively apply this kind of legislative scheme.[22]

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

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

The foregoing framework, when viewed collectively, should make it easier to analytically separate what is usually inconsequential—the required bodily movement (or, where relevant, failure to make one)—from other aspects of a criminal offense that are more central to adjudging culpability, such as the required results of and circumstances surrounding that bodily movement.[27] One noteworthy implication of this framework, however, is that it treats all "issues raised by the nature of one's conduct"—for example, whether one's bodily movement amounts to use—"as circumstance elements."[28] It will, therefore, no longer makes sense to refer to "conduct crimes" under the Revised Criminal

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

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

[23] *See* sources cited *supra* note 22.

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

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

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

[27] For a fuller discussion of this point, *see* commentary on the voluntariness requirement, § 22A-203, and the culpable mental state requirement, § 22A-205.

[28] Robinson & Grall, *supra* note 20, at 712.

Code; every offense, under the prescribed framework, will be comprised of, at minimum, a conduct element and either a circumstance element or result element.[29]

RCC § 22E-202 (e).

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

RCC § 22E-202. Conduct Requirement.

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

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

Codification of the conduct requirement is a regular part of modern code reform efforts. Typically, however, reform jurisdictions codify the conduct requirement alongside the voluntariness requirement in a general provision that more broadly addresses the so-called "voluntary act doctrine."[33] This approach is based on Model Penal Code § 2.01(1), which establishes that "[a] person is not guilty of an offense unless his liability is based on

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

[30] Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002).

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

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

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

conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."[34]

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

RCC § 22E-202 (b). Act defined.

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

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

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

RCC § 22E-202 (c). Omission defined.

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

The scope of omission liability, as developed by the common law, is relatively

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

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

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

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

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

[39] *Id.*

narrow. Generally speaking, "a person has no criminal law duty to act to prevent harm to another, even if she can do so at no risk to herself, and even if the person imperiled may lose her life in the absence of assistance."[40] Rather, it is only where the person has a legal duty to act that omission liability is considered to be appropriate.

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

Codification of the foregoing principles of omission liability is a standard part of modern code reform efforts. A majority of reform jurisdictions codify a general provision that provides a basic definition of omission.[43] Among these reform jurisdictions, most address the limits of omission liability through their definition of omission.[44] This is in contrast to the approach developed by the Model Penal Code, which defines "omission" as a "failure to act" in one general provision,[45] and thereafter specifies in another general provision that "[l]iability for the commission of an offense may not be based on an omission unaccompanied by action unless" either "the omission is expressly made sufficient by the law defining the offense," or, alternatively, "a duty to perform the omitted act is otherwise imposed by law."[46]

The Revised Criminal Code, like most reform codes that statutorily address omission liability, incorporates the limitations on omission liability into the definition of omission under § 22A-202(b). This variance from the Model Penal Code is intended to enhance the accessibility and clarity of the Revised Criminal Code. It should, for example,

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[40] DRESSLER, *supra* note 4, at § 9.06(a).

[41] PAUL H. ROBINSON, CRIMINAL LAW DEFENSES,1 CRIM. L. DEF. § 86 (Westlaw 2016).

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

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

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

[45] Model Penal Code § 1.13(4).

[46] Model Penal Code § 2.01(3).

preclude courts and advocates from having to read two separate code provisions to understand the kinds of "omissions" that are relevant to criminal liability. And it also clarifies that, for purposes of the Revised Criminal Code, there is only one kind of "omission," namely, those sufficient to form the basis of criminal liability in the absence of an affirmative act.

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

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

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

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

Policy considerations aside, this position appears to have been adopted as a constitutional requirement by the DCCA in *Conley v. United States*.[51] In that case, the DCCA interpreted the U.S. Supreme Court's decision in *Lambert v. California*[52] 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."[53]

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[47] *United States v. Mancuso*, 420 F.2d 556, 559 (2d Cir. 1970).
[48] *Id.* (citing H.L.A. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB., at 422-25).
[49] Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602-03 (1958).
[50] *Id.*
[51] 79 A.3d at 273.
[52] 355 U.S. 225 (1957).
[53] *Conley*, 79 A.3d at 273. Whether the DCCA's interpretation of *Lambert* is consistent with the interpretation applied by other federal courts of appeal is unclear. *Compare Mancuso*, 420 F.2d at 559 and *United States v. Anderson*, 853 F.3d 313 (5th Cir. 1988) *with United States v. Shelton*, 325 F.3d 553, 564 (5th Cir. 2003) and *United States v. Hancock*, 231 F.3d 557, 563-64 (9th Cir. 2000); *see also Conley*, 79 A.3d at 293 (Thompson, J., dissenting).

RCC § 22E-203. Voluntariness Requirement.

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

The requirement of voluntariness is a central feature of the common law.[54] "At all events it is clear," as LaFave observes, "that criminal liability requires that the activity in question be voluntary."[55] Indeed, it has been argued that "a voluntary act is the most fundamental requirement of criminal liability."[56] The reason? "The concept of volition is tied to the notion that criminal law responsibility should only attach to those who are accountable for their actions in a very personal way."[57] As LaFave observes:

> The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.[58]

Given the centrality of the voluntariness requirement to American criminal law, "[a]t least forty-two jurisdictions" recognize it in some way.[59] Among reform jurisdictions, however, the standard approach is to codify the voluntariness requirement alongside the conduct requirement in a general provision that more broadly addresses the so-called "voluntary act doctrine."[60] Often, these general provisions are based on Model Penal Code § 2.01(1), which establishes that "[a] person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which

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[54] *See, e.g.,* OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881); 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).

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

[56] Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 92 (2015).

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

[58] LAFAVE, *supra* note 5, at § 6.1; *see* MPC § 2.01 cmt. at 214-15.

[59] Robinson et. al., *supra* note 6, at 92.

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

he is physically capable."[61] Among reform jurisdictions, the requirement of a voluntary act is "almost universally treated as a required element of every offense."[62]

The Revised Criminal Code similarly treats a voluntary act as a required element of every offense. In contrast to the standard legislative approach, however, it codifies the two underlying requirements separately: § 22A-203(a) of this provision codifies the voluntariness requirement, while § 22A-202(a) codifies the conduct requirement. This departure improves the clarity and precision of each requirement. The conduct requirement and the voluntariness requirement are conceptually distinct from one another,[63] and each serves different policy goals.[64] Therefore, individual consideration of whether each requirement is met, rather than considering both requirements together in the context of the voluntary act doctrine, is likely to lead to clearer and more consistent legal analysis.[65]

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

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

The requirement of voluntariness is a well-established part of Anglo-American criminal law.[66] Less clear, however, is what this requirement entails as a matter of course. Traditionally, the voluntariness requirement has been understood to require proof that a person's conduct is an external manifestation of will. For example, nineteenth century scholar John Austin defined a "voluntary act" as a "movement of the body which follows our volition,"[67] while Justice Oliver Wendell Holmes described it as a "willed" contraction of a muscle.[68] Other common law authorities have more nebulously defined the voluntariness requirement to require proof of "behavior that would have been otherwise if the individual had willed or chosen it to be otherwise."[69]

The drafters of the Model Penal Code, seeking to develop a general provision that would codify the voluntary act requirement for the first time, took a substantially different approach to the issue. First, Model Penal Code § 2.01(1) establishes that a person is not guilty of an offense in the absence of a "voluntary act or the omission to perform an act of which he is physically capable." Rather than define a "voluntary act" in the affirmative, however, the subsequent provision, § 2.01(2), lists the conditions that render an act *involuntary*.[70]

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[61] Model Penal Code § 2.01(2) later clarifies the conditions that render an act involuntary.
[62] PAUL H. ROBINSON, 2 CRIM. L. DEF. § 171 (Westlaw 2016).
[63] *See, e.g.,* DRESSLER, *supra* note 7, at § 9.02(a); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571-72 (2013).
[64] *See, e.g.*, Model Penal Code § 2.01 cmt. at 213-14; Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405–06 (1959); LAFAVE, *supra* note 5, at § 6.1.
[65] *See, e.g.,* DRESSLER, *supra* note 7, at § 9.02(a); Farrell & Marceau, *supra* note 13, at 1571-74.
[66] *See supra* notes 4-9 and accompanying text.
[67] 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).
[68] OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881).
[69] LAFAVE, *supra* note 5, at § 6.1.
[70] The relevant provision reads as follows:

Generally speaking, the Model Penal Code drafters' decision to address the issues underlying the voluntary act requirement was warmly received, "spurr[ing] countrywide implementation of a voluntary act requirement" in reform jurisdictions.[71] However, the specifics of the Model Penal Code approach have been widely criticized for failing to "specifically define the term 'voluntary.'"[72] Consistent with this criticism, reform jurisdictions have typically rejected the Model Penal Code's negative approach to defining voluntariness.[73] Instead, the standard approach employed by reform jurisdictions is to affirmatively define a voluntary act as an act "performed consciously as a result of effort or determination."[74] Nevertheless, most reform jurisdictions do codify—consistent with the Model Penal Code—that an omission which the person was "physically capable of performing" will alternatively satisfy the requirement of a voluntary act.[75]

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

The first departure is terminological: § 22A-203(b)(1) explicitly relates a person's physical ability to perform a legal duty to the voluntariness requirement, and, in so doing, more clearly applies a voluntariness analysis to omissions. This is in contrast to the

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> The following are not voluntary acts within the meaning of this section:
>
> (a) a reflex or convulsion;
>
> (b) a bodily movement during unconsciousness or sleep;
>
> (c) conduct during hypnosis or resulting from hypnotic suggestion;
>
> (d) a bodily movement that otherwise is not the product of the effort or determination of the actor, either conscious or habitual.

Model Penal Code § 2.01(2).

[71] Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 277 (2002).

[72] *Id.*

[73] *See* Mont. Code Ann. § 45-2-101; Ohio Rev. Code Ann. § 2901.21.

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

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

standard approach of treating the physical capacity to perform an omission as an alternative to the voluntariness requirement. This departure clarifies the law and finds support in an array of legal authorities.

The fact that a "voluntary omission" is an omission that the "defendant is physically capable" of performing is made explicit in at least one reform code,[76] while the general point is communicated through the Model Penal Code commentary, which observes that "the demand that an act or omission be voluntary [should] be viewed as a preliminary requirement of culpability."[77] Likewise, the idea that "omissions can be thought of as either voluntary or involuntary" is widely recognized in legal commentary; various commentators have underscored the extent to which "[a]n omission to perform an act of which the person is not physically capable [is] . . . an involuntary omission."[78]

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

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

> [P]ersons who, although not otherwise responsible for their involuntary actions, are, nonetheless, responsible for allowing their involuntariness to jeopardize others. Thus, persons who are not otherwise responsible for physical conditions that cause them to lose consciousness (e.g., epilepsy, diabetes, concussion) are, nonetheless, responsible if, knowing or having reason to know that they are susceptible to unconsciousness, they place themselves in settings in which their conditions present an unjustified risk to others (e.g., driving). By the same token, standards of responsibility are also different for persons who, while knowing or having reason to know that intoxication on their part presents an unjustified risk to others, nonetheless, voluntarily intoxicate themselves. Thus, nearly every jurisdiction takes the view that, although involuntariness ordinarily exculpates persons of responsibility for what they do, it does not exculpate persons whose involuntariness is the product of prior voluntary intoxication.[79]

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[76] Haw. Rev. Stat. Ann. § 702-200.

[77] Model Penal Code § 2.01 cmt. at 216.

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

[79] Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, (1999). For relevant case law, *see State v. Welsh*, 508 P.2d 1041, 1044 (Wash. Ct. App. 1973); *Lewis v. Georgia*, 27 S.E.2d 659, 661 (Ga. 1943); *Fulcher v. State*, 633 P.2d 142, 147 (Wyo. 1981). For relevant commentary, *see* Eunice A. Eichelberger, *Annotation, Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R.4th 1067 (1984);

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

This control-based standard brings with it a variety of benefits. First, it is intuitive: all legal authorities seem to agree that control is at the heart of voluntariness determinations. Insofar as code reform work is concerned, for example, the Model Penal Code commentary notes that the term voluntary "focuses upon conduct that is within the control of the actor,"[80] while Professor Lloyd Weinreb, writing for *Working Papers of the National Commission on Reform of Federal Criminal Laws*, argues for the following statutory definition of voluntariness: "A person does not engage in conduct voluntarily if the conduct is not subject to [that person's] control."[81] This focus on control is also at the heart of much scholarly work on voluntariness. For example, Professors Ian P. Farrell & Justin F. Marceau argue that "th[e] ability to do otherwise [is] the *sine qua non* of voluntariness,"[82] while Professor H.L.A. Hart has also emphasized the same "fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it."[83]

Second, a control-based standard provides a more transparent means of addressing the "time-framing" problem inherent in particularly challenging voluntariness assessments. The most famous example of this problem is the New York Court of Appeals case of *People v. Decina*, which involved a defendant with a prior history of seizures who made a conscious decision to not take his medication and then got behind the wheel of a car, only to suffer from an epileptic seizure on the road during which he caused the death of four children.[84] For his actions—and in light of Decina's knowledge that he was subject to epileptic seizures—Decina was prosecuted for negligent homicide.[85]

On appeal, the New York Court of Appeals was presented with a difficult question of "time-framing."[86] On the one hand, if the court "construct[ed] an extremely narrow time-frame—specifically, the conduct at the instant the car struck the victims—[the defendant's] conduct did not include a voluntary act."[87] But if, on the other hand, the court applied "[a] broader time-frame" it "would include the voluntary acts of entering the car, turning the ignition key, and driving."[88] The New York Court of Appeals ultimately chose

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Monrad G. Paulson, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 7; Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

[80] Model Penal Code § 2.01 cmt. at 215.

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

[82] Marceau & Farrell, *supra* note 13, at 1579.

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

[84] *People v. Decina*, 138 N.E.2d 799, 803, 807 (N.Y. 1956).

[85] *Id.*

[86] DRESSLER, *supra* note 7, at § 9.02.

[87] *Id.*

[88] *Id.*

the latter view, relying on the voluntary conduct of the defendant prior to the seizure as the basis for potential liability.[89]

The modern legislative approach to the voluntary act doctrine clearly endorses the outcome and approach taken in *Decina*; however, it does so by providing courts with hidden discretion to broaden the time frame as widely as it deems necessary. The relevant language contained in the Model Penal Code and incorporated into many reform codes reads: "A person is not guilty of an offense unless his liability is *based on conduct that includes* a voluntary act or the omission to perform an act of which he is physically capable."[90] What precisely the italicized language means is less than clear. For example, "the Code does not say that liability must be based on a voluntary act, or based on conduct that is a voluntary act. Liability need only be based on conduct that 'includes' a voluntary act."[91] At the very least, though, what is clear is that the term "includes" was intended to provide courts with sufficient leeway to capture cases such as *Decina*[92] (though it may also capture other situations where liability would be inappropriate.[93])

Rather than utilize the "notoriously cryptic"[94] term "includes" to address difficult cases implicating voluntariness determinations, the Revised Criminal Code relies on the more transparent phrasing of "otherwise subject to the person's control." This provides an explicit standard to guide judicial time framing assessments, capacious enough to account for the "enormous diversity in the ways that people can become unconscious as well as the situations and acts they may experience."[95] Admittedly, this standard is itself quite vague. However, such vagueness is unavoidable given the nature of the moral principle underlying voluntariness assessments. Moreover, vagueness of this nature also has its own advantages, namely, it can "accommodate new research on voluntariness" while nonetheless "keep[ing] the main statement of criminal liability accurate."[96] In accordance

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

[90] Model Penal Code § 2.01(1).

[91] Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2441(2007).

[92] Analyzing the *Decina* decision, the commentary to the Model Penal Code explains that "[t]he entire course of the defendant's conduct . . . *included* a voluntary act, and me[ets] the principle under discussion here." Model Penal Code § 2.01 cmt. at 218.

[93] If interpreted literally, the "includes" standard could result in some unintuitive outcomes. Consider, for example, *Martin v. State*, in which the Alabama Court of Appeals overturned a public intoxication conviction where "[o]fficers of the law arrested [the defendant] at his home [where he was already drunk] and took him onto the highway, where he allegedly committed the proscribed conduct, viz. manifested a drunken condition by using loud and profane language." 17 So. 2d 427, 428 (Ala. Ct. App. 1944). The defendant in *Martin* engaged in conduct that "includes" a voluntary act and had satisfied the objective elements of a public intoxication offense. Still, the Alabama Court of Appeals was unwilling to hold the actor responsible for his actions. *Id.* Also relevant is a line of cases involving actors with contraband on their person who are arrested and then brought to a jail without an opportunity to dispose of the contraband. Generally speaking, courts have found liability inappropriate in these situations on grounds of involuntariness. *See, e.g., State v. Cole*, 164 P.3d 1024 (N.M. Ct. App. 2007); *State v. Eaton*, 177 P.3d 157 (Wash. Ct. App. 2008); *Fontaine v. State*, 762 A.2d 1027 (Md. Ct. Spec. App. 2000). Here again, however, these actors have engaged in conduct that "includes" a voluntary act.

[94] Husak, *supra* note 41, at 2441.

[95] Denno, *supra* note 21, at 358.

[96] *Id*. Professor Denno argues that the language of consciousness, effort, and determination reflected in the first prong of § 22A-203(b) and utilized in state codes fails to adequately capture our contemporary understanding of the mind, and explains why future scientific developments concerning the human mind may

with the foregoing analysis, § 22A-203(b) employs a distinctive yet accessible approach to addressing issues of voluntariness.

RCC § 22E-204. Causation Requirement.

1. § 22E-204(a)—Causation Requirement

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

It is an axiomatic common law principle that for offenses with result elements there be a causal connection between the defendant's conduct and the resulting harm.[97] Courts have developed this requirement of a causal connection to determine whether responsibility for a resulting harm can fairly be assigned to the defendant's conduct, or alternatively, whether responsibility is instead attributable to other people or forces in the world. In making this kind of assessment, judges divide their analysis into two distinct components: factual causation and legal causation.[98] Both components are typically treated as offense elements, the existence of which must be proven beyond a reasonable doubt.[99]

Codification of a causation requirement is frequently, but not invariably, a part of modern code reform efforts. Nearly half of reform jurisdictions—as well as all of the major model codes and recent comprehensive code reform projects—incorporate general causation provisions.[100] All such provisions state various principles related to causation; none, however, simply establish up front the two basic components that comprise causation: factual causation and legal causation. That is the approach reflected in § 22A-

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place further strain on this mind/body language. *Id.* at 358-59. The open-textured nature of the control prong is well-situated to deal with this, however: it provides courts and juries with a clearly articulated and easily accessible alternative "normative anchor" from which to view developments in the mind sciences to the extent they're relevant to the issue of voluntariness. *Id.* However, it does so without unnecessarily complicating the easy cases.

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

[98] As the U.S. Supreme Court in *Burrage v. United States* recently observed:

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

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

[99] *See, e.g., Henderson v. Kibbe*, 431 U.S. 145 (1977); *State v. Crocker*, 431 A.2d 1323 (Me. 1981); *Commonwealth v. Green*, 383 A.2d 877 (Pa. 1978).

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

204(a), which is both clearer and better fits existing case law than the approach to codification applied in reform jurisdictions.

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

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

The traditional common law articulation of the factual causation requirement is that there can be no criminal liability for resulting social harm "unless it can be shown that the defendant's conduct was a cause-in-fact of the prohibited result."[101] In order to make this determination, courts have typically posed the following question: "But for the defendant's conduct, would the social harm have occurred?" If the answer is "no," then courts are likely to deem a defendant the factual cause of the result. Any defendant whose conduct does not satisfy this test, in contrast, is unlikely to be deemed a factual cause with one rare exception: "where two causes, each alone sufficient to bring about the harmful result, operate together to cause it."[102] As the U.S. Supreme Court has observed:

> [I]f A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head . . . also inflicting [a fatal] wound; and B dies from the combined effects of the two wounds, A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event).[103]

To address this "unusual" situation, courts have devised one or more forms of a "special rule" to ensure that the accused does not escape liability, including the substantial factor test, discussed *supra*, in addition to specific bright line rules, such as that proposed in § 22A-204(b)(ii).[104]

Codification of a definition of factual cause is a key feature of general causation provisions that have been adopted in the context of modern code reform efforts. All twelve of the reform jurisdictions that incorporate a general provision on causation—along with the Model Penal Code, the Proposed Federal Criminal Code, and the most recent code reform projects—codify a definition of factual causation comprised of the concept of "but for" causation reflected in § 22A-204(b)(i).[105] That being said, only five state criminal

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[101] *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990).

[102] LAFAVE, *supra* note 2, at § 6.4. As the U.S. Supreme Court recently observed, "[t]he concept of actual cause 'is not a metaphysical one but an ordinary, matter-of-fact inquiry into the existence . . . of a causal relation as laypeople would view it.'" *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) (quoting 4 F. HARPER, F. JAMES, & O. GRAY, TORTS § 20.2, p. 100 (3d ed. 2007)).

[103] *Burrage*, 134 S. Ct. at 892.

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

[105] For reform jurisdictions, *see* Ala. Code § 13A-2-5; Ariz. Rev. Stat. Ann. § 13-203; Ark. Code Ann. § 5-2-205; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Me. Rev. Stat. tit. 17-A, § 33; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; N.D. Cent. Code Ann.

codes specifically address the situation of multiple causes—i.e., where the conduct of multiple actors contributes to a result—that is addressed in § 22A-204(b)(ii).[106]

Unfortunately, the relevant state code provisions—modeled on the causation provision contained in the Proposed Federal Criminal Code—are not a model of clarity; they combine both the standard but for test and the multiple causes test into one confusing formulation.[107] A clearer approach is that applied in two recent code reform projects, which contain general causation provisions that individually codify these tests in separate provisions.[108]

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

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§ 12.1-02-05; 18 Pa. Stat. and Cons. Stat. Ann. § 303; Tex. Penal Code Ann. § 6.04. For model codes, *see* Model Penal Code § 2.03 and Proposed Federal Criminal Code § 305. For recent code reform projects, *see* Kentucky Revision Project § 501.203 and Illinois Reform Project § 203.

[106] *See* Ala. Code § 13A-2-5; Ark. Code Ann. § 5-2-205; Me. Rev. Stat. tit. 17-A, § 33; N.D. Cent. Code Ann. § 12.1-02-05; Tex. Penal Code Ann. § 6.04.

[107] For example, the factual causation test applied in the Maine Penal Code reads:

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

Me. Rev. Stat. tit. 17-A, § 33.

[108] For example, § 203(2) of the Illinois Reform Project reads:

> (1) Conduct is the cause of a result if:
>
> > (a) the conduct is an antecedent but for which the result in question would not have occurred; and
> >
> > (b) the result is not too remote or accidental in its occurrence, and not too dependent upon another's volitional act, to have a just bearing on the actor's liability or on the gravity of his offense; and
> >
> > (c) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.
>
> (2) Concurrent Causes. Where the conduct of two or more persons each causally contributes to a result and each alone would have been sufficient to cause the result, the requirement of Subsection (1)(a) of this Section is satisfied as to both persons.

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

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

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

The concept of legal causation is well-established at common law.[109] It generally "refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged."[110] Traditionally, courts evaluate whether this requirement is met is by focusing on "reasonable foreseeability," which, according to many judges, is the "linchpin" of the legal causation analysis.[111] What, precisely, "reasonably foreseeability" means, however, is less than clear and often muddied by the fact that courts have developed labyrinthine rules incorporating additional concepts, such as "superseding intervening cause," "responsive intervening causes," "direct causes," and "remote causes," to resolve the relevant issues.[112] In the final analysis, all such rules ultimately require the fact finder to consider whether, due to intervening forces or acts, "it no longer seems fair to say that the [social harm] was 'caused' by the defendant's conduct."[113]

There is, then, an inherent level of subjectivity at the heart of legal causation—as the U.S. Supreme Court has remarked, "the principle of legal caus[ation] is hardly a rigorous analytical tool."[114] This is perhaps one reason why legal causation has not played a prominent role in comprehensive reform efforts. For example, among the twelve jurisdictions that incorporate a general provision on causation, only seven address legal causation.[115] And while the Model Penal Code's general provision on causation does address legal causation, the Proposed Federal Criminal Code's general provision on causation does not.[116] In explaining their decision not to codify legal causation, the drafters of the Proposed Federal Criminal Code note the difficulty of reducing the requirement of legal causation to "readily understood rules."[117]

Another reason for the relative lack of popularity of this issue in modern code reform efforts is that the central model for such reform, the Model Penal Code, applies a "fresh approach"[118] to the issue that is complex, blends *mens rea* issues with causation issues, and appears to constitute an unjustified departure from the common law view of

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[109] *See, e.g.*, LAFAVE, *supra* note 2, at § 6.4.
[110] *Paroline*, 134 S. Ct. at 1719.
[111] *State v. Dunn*, 850 P.2d 1201, 1215 (Utah 1993); *see Johnson v. State*, 224 P.3d 105, 111 (Alaska 2010); *State v. Wieckowski*, 2011-Ohio-5567, ¶¶ 22-24, 2011 WL 5143183 (Ohio Ct. App. 2011); *State v. Pelham,* 824 A.2d 1082, 1093 (N.J. 2003).
[112] *See* DRESSLER, *supra* note 2, at § 14.03.
[113] *State v. Malone*, 819 P.2d 34, 37 (Alaska Ct. App. 1991).
[114] *Blue Shield of Va. v. McCready,* 457 U.S. 465, 478 n.13 (1982).
[115] *See* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.
[116] *Compare* Model Penal Code § 2.03 *with* Proposed Federal Criminal Code § 305.
[117] 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)).
[118] Model Penal Code § 2.03 cmt. at 254.

legal causation.[119] Without a strong model to rely on, therefore, many reform jurisdictions may have opted to ignore the topic altogether. The silence on legal causation in many reform codes is unfortunate, however, given that the detailed rules developed by the courts to address such problems in specific cases are themselves quite confusing. Furthermore, buried within the Model Penal Code's confusing legal causation provisions is a general standard—"not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense"—that would have significantly simplified and improved upon the common law approach to legal causation had it been employed independent of the other problematic aspects of the Model Penal Code.[120]

The handful of reform codes that did adopt the Model Penal Code approach to legal causation benefit from this general standard; however, in these jurisdictions it comes at the costs associated with incorporating *mens rea* considerations into the legal causation analysis.[121] It is therefore noteworthy that the courts in at least a few reform jurisdictions that never adopted a general provision on legal causation appear to have retained the common law requirement of reasonable foreseeability, and, at the same time, rely on the

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[119] The full text of the Model Penal Code approach to legal causation contained in § 2.03 reads:

> (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
>
> (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
>
> (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.
>
> (3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense.
>
> (4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

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

[120] Robinson, *supra* note 44, at 1.

[121] *See, e.g.,* Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; Haw. Rev. Stat. Ann. § 702-214; Del. Code Ann. tit. 11, § 261.

Model Penal Code's general standard through case law to give voice to it.[122] A similar approach is likewise reflected in the legal causation provision incorporated into one of the most recent code reform projects, which utilizes a general standard similar to that employed in the Model Penal Code to address legal causation independent of *mens rea* considerations (though there is no reference to reasonable foreseeability).[123]

The approach to legal causation applied in § 22A-204(c) is consistent with the foregoing authorities. The first sentence establishes that legal causation exists where it can be proven that the result was a reasonably foreseeable consequence of the person's conduct, while the second sentence clarifies that whether a consequence is reasonably foreseeable depends on whether the causal connection between the defendant's conduct and the occurrence of the resulting harm was "too remote, accidental, or dependent upon an intervening force or act to have a just bearing on the person's liability."[124] The explanatory note accompanying § 22A-204(c) provides various factors that the factfinder might bring to bear on this evaluation.

Admittedly, the foregoing language—like that employed in a handful of reform codes—remains "question-begging."[125] However, the same problem similarly plagues the confusing common law rules on legal causation, which only mask—but do not ameliorate—the subjective nature of the inquiry at hand.[126] There are simply limits on how precise any formulation of a normative judgment, such as that entailed by legal causation, can be made.[127] Still, providing courts and juries with an intuitive and transparent standard—guided by an explanation of the relevant factors to be considered—is more likely to lead to consistent, fair outcomes than providing no guidance at all.[128] Accordingly, that is the approach to legal causation taken in § 22A-204(c).

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

Relation to National Legal Trends. Section 22A-205 is generally in accordance with common law principles concerning the role of *mens rea* as a necessary offense

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

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

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

[125] WEINREB, *supra* note 42, at 145; *see* Larry Alexander, *Crime and Culpability*, 1994 J. CONTEMP. LEGAL ISSUES 1, 14 (1994).

[126] One advantage of "putting the issue squarely to the jury's sense of justice is that it does not attempt to force a result which the jury may resist." Model Penal Code § 2.03 cmt. at 260.

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

[128] Robinson, *supra* note 26, at 441-43. This is particularly true given that it "is not sufficient merely to tell the jury that they must find the defendant was . . . the proximate cause of the results." LAFAVE, *supra* note 2, at § 6.4 (collecting cases).

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

For centuries, it has been widely accepted that "*mens rea* in some form [is] a defining and irreducible characteristic of the criminal law."[129] Yet both the precise form of *mens rea* and the institution appropriately charged with determining it have undergone significant shifts and changes. Prior to the mid-twentieth century, for example, the judiciary was the institution first and foremost in charge of setting *mens rea* policy—a product of the fact that many offenses were entirely judge-made, and even those that were statutorily based rarely, if ever, clearly specified the contours of the governing culpability requirement.

In carrying out this role, courts did not view criminal offenses as comprised of various objective elements to which some culpable mental state might independently apply. Instead, they viewed the *actus reus* of an offense as a singular concept, subject to an "umbrella culpability requirement that applie[s] in a general way to the offense as a whole."[130] And this umbrella culpability requirement was often quite simplistic, indicating "little more than immorality of motive,"[131] a "vicious will,"[132] or an "evil mind."[133] To the extent courts recognized distinctions in culpable mental states at common law, they were often pitched at the offense level, revolving around whether an offense was one of "specific intent," "general intent," or, in the rare case, one of "strict liability."[134]

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

The results of the foregoing state of affairs were decades of confusion, uncertainty, and litigation. By the 1950s, the situation was, as Justice Jackson famously described it, one of "variety, disparity and confusion" in "definitions of the requisite but elusive mental

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[129] *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 492 (E.D.N.Y. 1993)

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

[131] Francis B. Sayre, *The Present Signification of Mens Rea in the Criminal Law, in* HARVARD LEGAL ESSAYS 399, 411-12 (1934).

[132] 4 WILLIAM BLACKSTONE, COMMENTARIES at 21.

[133] 1 JOEL P. BISHOP, CRIMINAL LAW § 287 (9th ed. 1923).

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

element."[135] Recognition of these abysmal conditions set the stage for the re-envisioning of *mens rea* during the latter half of the mid-twentieth century, which was driven, in large part, by the work of the Model Penal Code.

The drafters of the Model Penal Code understood that offense analysis-based culpability evaluations were primarily responsible for the "inconsistent and confusing" law of *mens rea* that had developed.[136] The primary problem, as the Model Penal Code drafters viewed it, was that the common law approach ignored the fact that "[c]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[137] At the same time, the more recent proliferation of culpable mental state terminology in criminal statutes failed to recognize that "for purposes of liability (as distinguished from sentence) only four concepts"—namely, purpose, knowledge, recklessness, and negligence—"are needed to prescribe the minimal requirements and lay the basis for distinctions that may usefully be drawn."[138] Both of these analytical insights pervade the Model Penal Code's general part; however, they are most explicitly articulated in the Code's culpable mental state requirement, § 2.02(1), which establishes that "each material element of the offense" must be evaluated in light of the culpable mental states of "purposely, knowingly, recklessly or negligently."[139]

Codification of comparable provisions is a well-established part of modern code reform efforts.[140] Through such provisions, reform codes recognize that "[t]he mental ingredients of a particular crime may differ with regard to the different elements of the crime,"[141] while, at the same time, communicate that "the four degrees of culpability" contained in the Model Penal Code hierarchy "express the significant distinctions found by the courts, and are adequate for all the distinctions which can and should be made to accomplish the purposes of a [] criminal code."[142]

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

[136] PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 198-99 (2d ed. 1986).

[137] *E.g., United States v. Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code § 2.02 cmt. at 123).

[138] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1426 (1968).

[139] *Id.*

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

[141] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.1 (Westlaw 2016).

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

The Model Penal Code's two central analytical insights regarding *mens rea* have thus been transformed into the "representative modern American culpability scheme."[143] What has not become part of this scheme, however, is the controversial policy decision at the heart of § 2.02(1) and many other Model Penal Code general provisions that is sometimes referred to as the "principle of correspondence."[144]

The principle of correspondence dictates that proof of some culpable mental state must be required with respect to every objective element of an offense.[145] It is clearly reflected in Model Penal Code § 2.02(1), which establishes that with the exception of "violations" punishable by a fine only, "a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . . with respect to each material element of the offense." The foregoing approach was intended by the Model Penal Code drafters to represent a "frontal attack on absolute or strict liability . . . whenever the offense carries a possibility of sentence of imprisonment."[146]

The abolition of strict liability envisioned by the Model Penal Code drafters does not appear to have been realized in practice. For example, reform jurisdictions frequently depart—whether explicitly, through statutory modifications to key general provisions limiting strict liability, or implicitly, through judicial interpretations that authorize strict liability—from the Model Penal Code's commitment to ensuring that a culpable mental state apply to each and every objective element of an offense.[147] Nor, for that matter, has a rule that "would require the courts to assign some mental state to every objective element of every offense" been embraced by courts or legislatures outside of reform jurisdictions.[148] Instead, the most widely accepted principle governing strict liability, if one exists, is that the legislature should be careful to specify the situations in which it intends for it to apply.

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

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

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[143] Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692 (1983).
[144] *E.g.,* ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 76 (6th ed. 2007); VICTOR TADROS, CRIMINAL RESPONSIBILITY 93-97 (2005).
[145] Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).
[146] Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 595 (1963).
[147] For a comprehensive overview of the relevant legal trends, *see* Brown, *supra* note 46.
[148] Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 772 (2012).

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

To be sure, courts and legislatures sometimes refer to conduct being committed purposely, knowingly, recklessly, or negligently. However, insofar as the conduct to which they are referring are mere bodily movements, the intended meaning appears to be that the bodily movement at issue was voluntary—i.e., a product of conscious effort and determination (or was otherwise subject to the actor's control). Importantly, though, requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability.[149] This explains why the failure to clearly distinguish between voluntariness (which applies to acts, or, where relevant, the failure to act) and culpable mental states (which apply to results and circumstances) has at times led various courts to unwittingly impose strict liability (or negligence liability) in the context of serious felony offenses.[150] By speaking of conduct committed purposely, knowingly, recklessly, or negligently, these courts believed themselves to be imposing a culpable mental state requirement, when, in reality, they were merely restating the requirement of voluntariness.[151]

To avoid such problems from occurring under the Revised Criminal Code, § 22A-205 establishes a form of element analysis that focuses solely on the culpable mental states, if any, governing results and circumstances. (Note, however, that all "issues raised by the nature of one's conduct"—for example, whether one's bodily movement amounts to a taking or use—are treated "as circumstance elements."[152]) This variance appears to have been followed in at least one reform jurisdiction, which defines culpable mental states with respect to result and circumstance elements, but not conduct elements.[153] And it also finds support in legal commentary, which highlights the extent to which requiring proof of *mens rea* as to conduct unnecessarily "duplicates the voluntariness requirement."[154] That

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

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

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

[152] Robinson & Grall, *supra* note 44, at 712.

[153] *See* Me. Rev. Stat. tit. 17-A, § 35.

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

"[c]onduct culpability does nothing more than encompass the voluntariness requirement,"[155] however, means it is "unduly confusing, and not analytically helpful, to retain this category."[156]

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

Section 22A-205 also provides a clear definition of strict liability, which is by itself noteworthy. Reform codes typically do not define the phrase, while American legal authorities have generally been unable to agree on what "strict liability" actually means.[157] At the heart of the confusion is a failure to recognize the difference between "pure" strict liability crimes, which do not require proof of a culpable mental state as to any of an offense's objective elements, and "impure" strict liability crimes, which do not require proof of a culpable mental state as to only some of the offense's objective elements.[158] Given this potential for confusion, the clearer definition is that "[l]iability is strict if it requires no proof of fault as to an aspect of the offence: while *mens rea* must be proved as to some elements in the offence definition, it need not be proved as to every fact, consequence or circumstance necessary for the commission of the offence."[159]

Such an approach is not only more consistent with element analysis, but it also provides the ability to distinguish between both kinds of strict liability, for elements or the offense as a whole. It is, therefore, the approach followed in § 22A-205, which clarifies that a strict liability offense is any offense for which a person can be held criminally liable

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[155] Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983).

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

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

[158] Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

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

without regard to the person's blameworthiness or fault as to a single result or circumstance. (That no culpable mental state applies to any of the results and circumstances in an offense definition simply means the offense is one of "pure," rather than "partial," strict liability.)

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

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

Relation to National Legal Trends. Subsections (a), (b), and (c) are generally in accordance with the common law and widespread legislative practice. In a departure from national legal trends, however, the definitions of purpose and knowledge contained in subsections (b) and (c) have been clarified, simplified, and rendered more consistent. In addition, subsection (c) incorporates a purely subjective definition of intent for use in inchoate crimes, which is a novel, but non-substantive, revision to modern culpability schemes.

"The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness."[160] In other words, the common law view was that "a person who acts (or omits to act) *intends* a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; [or] (2) when he *knows* that that result is *practically certain* to follow from his conduct, whatever his desire may be as to that result."[161]

In a departure from the common law, the drafters of the Model Penal Code opted to separate the *awareness* sense of intent from the *desire* sense of the term, labeling the former "knowledge" and applying the label of "purpose" to the latter. [162] The relevant definitions, Model Penal Code §§ 2.02(2)(a) and (b), read as follows:

> (a) Purposely.
>
> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
>
> (b) Knowingly.

[160] *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).
[161] LAFAVE, *supra* note 14, 1 SUBST. CRIM. L. § 5.2; *see also Tison v. Arizona*, 481 U.S. 137, 150 (1987).
[162] Under the Model Penal Code, acting "purposefully," "with purpose," "intentionally," or "with intent" with respect to a result element all mean that the result is the actor's "conscious object." Model Penal Code § 1.13.

> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

"The essence of the narrow distinction" between purpose and knowledge under the Model Penal Code "is the presence or absence of a positive desire."[163] With respect to results, for example, Model Penal Code § 2.02(a)(i) provides that acting "purposefully" means that the result is the actor's "conscious object," while Model Penal Code § 2.02(b)(ii) provides that acting "knowingly" with respect to a result means that the actor "is aware that it is practically certain that his conduct will cause a particular result." The same basic divide between "will[ing] that the act . . . occur [and] willing to let it occur" shows up in the context of elements involving the nature of one's conduct.[164] Subsection (a)(i) provides that a person acts "purposefully" with respect to an "element [that] involves the nature of his conduct" if it "is his conscious object to engage in conduct of that nature," while Model Penal Code § 2.02(b)(i) provides that acting "knowingly" with respect to an "element [that] involves the nature of his conduct" if "he is aware that his conduct is of that nature."

The foregoing distinctions reflects a simple but widely shared moral intuition: all else being equal, desiring to cause a given harm is more blameworthy than being aware that it will almost surely result from one's conduct.[165] The intuition is also one with a strong legal basis—as the U.S. Supreme Court in *United States v. Bailey* observed:

> In certain narrow classes of crimes [the] heightened culpability [of purpose] has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy . . . Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[166]

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[163] PAUL ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 43 (1997).

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

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

[166] *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, "that purpose is rarely the required mens rea for the commission of a crime." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code

Codification of the Model Penal Code definitions of purpose and knowledge is a standard part of modern code reform efforts. The overwhelming majority of reform jurisdictions codify definitions of purpose (or its substantive equivalent[167]) and knowledge modeled on those proposed by the Model Penal Code.[168] Likewise, in those jurisdictions that never modernized their codes, many courts have adopted similar definitions of purpose and knowledge through the common law.[169]

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

First, the definitions of purpose and knowledge contained in the Revised Criminal Code collectively differ from the Model Penal Code with respect to their treatment of conduct elements. The Model Penal Code definitions of purpose and knowledge separately address result, circumstance, and conduct elements.[170] In contrast, the definitions of purpose and knowledge contained in the Revised Criminal Code address only results and circumstances; they do not reference conduct elements at all. This reflects the Revised Criminal Code's broader decision to exclude conduct elements from the culpable mental state analysis, which, as discussed in the Commentary on RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to substantially simplify the task of element analysis, and to enhance the clarity of District law.

Second, the element-sensitive definitions of purpose with respect to results and circumstances contained in the Revised Criminal Code revise the comparable Model Penal Code definitions in a few important ways. Both definitions of purpose in the Revised Criminal Code reference a "conscious desire," and, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code's definition of purpose as to a

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drafters recognized, "th[e] distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt., at 234.

[167] Note, for example, that most reform codes apply the label "intent" to what the Model Penal Code otherwise refers to as "purpose." LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2; *see infra* note 39 (collecting statutory citations).

[168] *See* Ala. Code § 13A-2-2; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-202; Colo. Rev. Stat. Ann. § 18-1-501; Conn. Gen. Stat. Ann. § 53a-3; Del. Code Ann. tit. 11, § 231; Haw. Rev. Stat. Ann. § 702-206; 720 Ill. Comp. Stat. Ann. 5/4-5; Ind. Code Ann. § 35-41-2-2; Kan. Stat. Ann. § 21-5202; Me. Rev. Stat. tit. 17-A, § 35; Minn. Stat. Ann. § 609.02; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 626:2; N.Y. Penal Law § 15.05; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-302; Tex. Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103; Wash. Rev. Code Ann. § 9A.08.010.

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

[170] *See* Model Penal Code § 2.02(2)(b)-(c).

result in subsection (a)(1), this constitutes a minor terminological revision to the comparable Model Penal Code definition, which references an actor's "conscious object" to cause a particular consequence.[171] The language of "conscious desire" seems to more intuitively capture that which is at the heart of purpose than that of "conscious object."[172] In contrast, use of the phrase "conscious desire" in the Revised Criminal Code's definition of purpose as to a circumstance in subsection (a)(2) constitutes a more substantive revision to the comparable Model Penal Code definition.

Consider that under the Model Penal Code, a person acts "purposefully" with respect to circumstances if "the person is *aware* of the existence of such circumstances or the person *believes* or *hopes* that they exist."[173] This definition is noteworthy not only because it looks so different than the Model Penal Code definition of purpose as to results, but also because it looks so similar to the Model Penal Code definition of knowledge as to a circumstance. For example, Model Penal Code § 2.02(b)(i) similarly provides that an individual acts "knowingly" with respect to circumstances if the person is "*aware* . . . that such circumstances exist." Proof of mere awareness will thus satisfy both the Model Penal Code definitions of purpose and knowledge as to a circumstance, which, in practical effect, means that the distinction between the presence or absence of a positive desire—otherwise reflected in the Model Penal Code definitions of purpose and knowledge as to results—is effectively ignored. The reason? The Model Penal Code's text and explanatory notes are unclear.[174] And "[n]owhere in the Comments to the Model Penal Code is this anomaly . . . explained."[175]

This anomaly is problematic for two reasons. First, if the statutory basis of the narrow distinction between purpose and knowledge with respect to a result is the presence or absence of a positive desire, one would assume—for basic organizational reasons—that the same treatment would be afforded to circumstance elements. Second, the same moral arguments that support the desire/belief distinction in the context of results similarly apply

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

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

[173] Model Penal Code § 2.02(a)(ii).

[174] *But see infra* note 62 for a potential explanation that relates to the drafting of inchoate offenses.

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

to circumstances.[176] By failing to maintain this distinction, therefore, the drafters of the Model Penal Code produced a more complex general part, which fails to respect the basic principle "that purpose should be regarded as a more serious mental state than knowledge."[177]

Consistent with the foregoing analysis, the Revised Criminal Code treats a "conscious desire" as the *sole* basis for finding purpose as to a circumstance under subsection (a)(2). When viewed in light of the definition of purpose as to a result subsection (a)(1), this produces a simpler culpable mental state hierarchy that allows legislators to draft more proportionate offenses.[178]

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

Consider that the Model Penal Code definition of knowledge as to a circumstance in § 2.02(2)(c)(ii) generally references an actor's "aware[ness] that such circumstances exist."[179] Just what level of awareness is necessary? It's unclear from the text of the Model Penal Code. The commentary accompanying this definition fleetingly acknowledges that "'knowledge' [in this context] will often be less than absolute certainty," but fails to specify how much less.[180]

Further complicating matters is the general provision in the Model Penal Code intended to address the issue of willful blindness, § 2.02(7), which broadly declares that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[181] Situations involving willful blindness aside, the provision's general reference to knowledge of a fact being established by proof of "aware[ness] of a high probability" seems to control the narrower language of "aware[ness]" of a circumstance referenced in the definition of knowledge under Model

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[176] *See, e.g.,* LARRY ALEXANDER & KIMBERLY FERZAN, CRIME & CULPABILITY: A THEORY OF CRIMINAL LAW 40 (2009). As one commentator observes:

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

Wesson, *supra* note 46, at 174.

[177] Wesson, *supra* note 46, at 174.

[178] *See* sources cited *supra* note 47.

[179] Model Penal Code § 2.02(2) cmt. 13 at 236.

[180] *Id*.

[181] Model Penal Code § 2.02(7).

Penal Code § 2.02(2)(c)(ii) "since it is a weaker requirement."[182] But if that's true, then one might question what the difference between awareness as to a practical certainty and awareness as to a high probability amounts to—or whether it's worth recognizing this distinction through a criminal code at all.[183]

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

The consistency and ease of use reflected in the definition of knowledge contained in RCC §§ 206(b)(1) and (2) is bolstered by the clarity in statutory drafting afforded by the equivalent definitions of intent in RCC §§ 206(c)(1) and (2). These definitions of intent provide the legislature with a means of more clearly drafting inchoate offenses comprised of a knowledge-like culpable mental state applicable to one or more results and/or circumstances that need not actually occur or exist.[184]

The Revised Criminal Code's novel statutory provisions on intent seek to remedy a recognized "linguistic problem" underlying the Model Penal Code's culpability scheme.[185] As discussed above, the Model Penal Code separately codifies the alternative

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

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

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

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

[185] Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998); *see, e.g.,* Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal*

desire and belief states that comprise the traditional understanding of intent as "purpose" and "knowledge," respectively.[186] While this separation has a variety of benefits—and, for that reason, is reflected in the Revised Criminal Code—it also creates at least one notable issue: it makes it difficult to clearly draft inchoate offenses that incorporate a core culpable mental state requirement equivalent to common law intent.

At the heart of the problem is the fact that the culpable mental state under the Model Penal Code that most accurately translates common law intent is labeled "knowledge."[187] While equivalent to common law intent, the term knowledge implies a basic correspondence between a person's subjective belief concerning a proposition and the truth of that proposition, which the term intent does not otherwise imply. This communicative distinction can lead to problems in the drafting of inchoate offenses, where the phrase "with knowledge" is used as a means of translating "with intent."

To illustrate, consider a hypothetical offense that prohibits "assault with knowledge of killing." Assuming the drafter's goal is to create an inchoate offense that—like the common law offense of assault with intent to kill—provides for liability in the absence of death, use of the term "knowledge" in this context is, at minimum, confusing. As one commentator phrases it, "[k]nowledge would not be the proper way to describe this mental state, because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur."[188] More substantively, however, the phrase "with knowledge of killing" risks leaving the reader with the mistaken impression that the relevant result must actually be realized, thereby obscuring the offense's inchoate status.

The Model Penal Code appears to avoid these communicative issues by employing two different strategies. For some inchoate offenses, the Model Penal Code utilizes the phrase "with purpose" (or its substantive equivalent[189]) in lieu of the phrase "with intent."[190] This substitution avoids any of the communicative issues noted above; however, it also seems to potentially exclude those who act with a sufficiently strong belief concerning the likelihood of a result[191] from the scope of inchoate liability.[192] For other

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Code and Beyond, 35 STAN. L. REV. 681, 758 n.301 (1983); LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2.

[186] Model Penal Code § 2.02(a)(i)-(ii).

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

[188] Michaels, *supra* note 56, at 1032 n.330.

[189] As noted *supra* note 38, most modern criminal codes utilize the term "intent" for their highest culpable mental state—what the Model Penal Code otherwise defines as purpose. Indeed, the Model Penal Code itself provides that "'intentionally' or 'with intent' means purposely." Model Penal Code § 1.13(12).

[190] *See, e.g.,* Model Penal Code § 221.1 (Burglary); Model Penal Code 223.2 (Theft).

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

[192] Illustrative is the core culpable mental state at issue in a generic theft offense, which implicates the unrealized result of a permanent deprivation. *See* Kenneth W. Simons, *Is Complexity A Virtue? Reconsidering Theft Crimes Book Review of Stuart Green, Thirteen Ways to Steal A Bicycle: Theft Law in*

inchoate offenses, in contrast, the Model Penal Code employs the term "belief" as a stand in for the term "knowledge."[193] Notably, however, this term is never defined, which raises a host of questions concerning the meaning of the term "belief"—as well as its relationship with the Model Penal Code's other general culpability provisions.[194]

To better address the above issues, the Revised Criminal Code provides an alternative to knowledge, the term intent, specifically crafted to facilitate the clear expression of a knowledge-like core culpable mental state requirement in the context of inchoate crimes. The phrase "with intent," in conjunction with RCC §§ 206(c)(1) and (2), communicates that a subjective belief (as to a practical certainty) concerning the likelihood that a given result will occur or that a circumstance exists may provide the basis for liability, without misleadingly suggesting that the relevant results and/or circumstances it modifies need to occur or exist (as would otherwise be the case under the phrase "with knowledge").[195]

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

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the Information Age, 47 NEW ENG. L. REV. 927, 937 (2013). Requiring proof that the defendant consciously desired to permanently deprive the victim, as would be the case under a "with purpose" translation of this core culpable mental state, risks excluding from liability some textbook instances of theft. Consider, for example, a person who takes his neighbor's food in order to feed his hungry children. In this scenario, it's unclear whether the person acts "with purpose" to permanently deprive since he desires to help his children, not to withhold or dispose of property. *See Rosemond v. United States*, 134 S. Ct. 1240, 1252 (2014) (Alito, J., concurring in part and dissenting in part) (citing V. HUGO, LES MISÉRABLES 54 (Fall River Press ed. 2012)). Even still, this actor is likely to be practically certain that his conduct will result in a permanent deprivation to the neighbor. The same can also be said about the aspiring gang member who collects unattended backpacks at school as a rite of initiation. At the time of the takings, the person's desire is to gain entry into the gang, not to withhold or dispose of property—though he may be practically certain that his conduct will result in a permanent deprivation to the owners of the backpacks. In both of these examples, the actors' culpable beliefs seem to constitute a sufficient basis to ground a theft conviction, and this holds true even if the actors *regret* the withholding or disposition of property, and *wish* their goals—child satiety and gang affiliation, respectively—could be achieved some other way. *See, e.g.,* LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2. This illustrates why a "with purpose" translation of the common law's "with intent" requirement is potentially problematic, namely, in most situations "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results." *Id.*

[193] *See, e.g.,* Model Penal Code § 5.01(Attempts); Model Penal Code § 223.6 (Receiving Stolen Property).

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

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

§§ 22E-206(d) & (e)—Recklessness & Negligence Defined

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

The idea that non-intentional conduct can appropriately serve as the basis for criminal liability under certain circumstances has been long recognized by the common law.[196] However, while courts agreed "that something more was required for criminal liability than the ordinary negligence which is sufficient for tort liability,"[197] the nature of this "something extra"—above and beyond the basic unreasonableness at the heart of civil negligence—was nevertheless the source of much confusion.[198]

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

> (c) Recklessly.
>
> A person acts recklessly with respect to a material element of an offense when the person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. [The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.][199]
>
> (d) Negligently.
>
> A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. [The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to him, involves a gross deviation from the

[196] LAFAVE, *supra* note 14, at § 5.4.
[197] *Id.*
[198] *Id.*
[199] This statutory language defining the "reckless" culpable mental state has been edited since this discussion of national legal trends was drafted. CCRC staff did not conduct research of national legal trends with respect to the updated statutory language.

standard of care that a reasonable person would observe in the actor's situation.][200]

These definitions provide for criminal liability in two different kinds of situations involving non-intentional conduct. The first, captured by the term recklessness, "involves conscious risk creation."[201] By requiring awareness of a risk, recklessness "resembles acting knowingly," though importantly "the awareness is of [a] risk [that falls] short of [a] practical certainty."[202] The second situation, captured by the term negligence, also implicates risk creation, but here liability is assigned based upon the actor's failure to perceive the risk. Negligence can therefore be "distinguished from acting purposely, knowingly, or recklessly in that it does not involve a[ny] state of awareness."[203]

Setting aside the key distinction between conscious and inadvertent risk creation (or risk taking), recklessness and negligence, as defined by the Model Penal Code, share many important similarities. For example, the first clause of each definition establishes that both culpable mental states involve the disregard of a risk that is "substantial and unjustifiable." Such language was intended to exclude a wide range of activities that involve risk creation or risk taking from falling within the scope of criminal liability.[204] For example, opening an umbrella in a crowded public space, hitting a golf ball on a driving range, performing open-heart surgery, or building a skyscraper all entail some level of risk. In the typical case, however, these risks will be beyond the reach of the criminal law either because they are insubstantial—for example, in the case of opening an umbrella in a crowded public space—or because even if they are substantial, they are justified under the circumstances—for example, in the case of a surgeon performing open-heart surgery.[205]

Likewise, the second clauses of the Model Penal Code definitions of recklessness and negligence both require that the person's conduct have been sufficiently unjustifiable and blameworthy to justify a criminal conviction.[206] The specific standard provided is that of a "gross deviation" from a reasonable standard of care, which, under both definitions, entails a consideration of the "nature and degree" of the risk, "the nature and purpose of the actor's conduct and the circumstances known to him," and "the standard of conduct" that a reasonable person "would observe in the actor's situation."[207] The Model Penal Code drafters believed that such language, when viewed as a whole, would appropriately require "the jury [to comprehensively] evaluate the actor's conduct and determine whether it should be condemned."[208]

The Model Penal Code definitions of recklessness and negligence, like those of purpose and knowledge, have been quite influential. Insofar as legislative practice is

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[200] This statutory language defining the "negligent" culpable mental state has been edited since this discussion of national legal trends was drafted. CCRC staff did not conduct research of national legal trends with respect to the updated statutory language.

[201] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1438-39 (1968)

[202] *Id.*

[203] *Id.*

[204] Model Penal Code § 2.02 cmt. at 237, 241.

[205] *Id.*

[206] *Id.*

[207] *See id.*

[208] *Id.*

concerned, for example, "[a]t least 24 state statutes follow the Model Penal Code's definitions of recklessness and negligence."[209] Likewise, many courts in jurisdictions that never modernized their codes have opted to adopt Model Penal Code-based definitions of recklessness and negligence through case law.[210] (The U.S. Sentencing Commission also opted to incorporate the Model Penal Code definitions of recklessness and negligence into the U.S. Sentencing Guidelines.[211])

It's important to highlight, however, that state legislatures and courts rarely seem to adopt the Model Penal Code definitions of recklessness and negligence wholesale. Instead, they typically revise the definitions in one or more ways in the course of enactment. To take just a few examples: (1) some reform jurisdictions omit reference to the requirement of justifiability in their definitions of recklessness and/or negligence[212]; (2) some reform jurisdictions omit reference to the magnitude of the risk in their definitions of recklessness and/or negligence[213]; and (3) a majority of reform jurisdictions omit one or more terms and phrases from the gross deviation analysis employed in their definitions of recklessness and/or negligence.[214]

Modifications aside, it is nevertheless clear that the Model Penal Code definitions of recklessness and negligence today constitute the general standards for risk-based fault in the criminal law.[215] The definitions of recklessness and negligence incorporated into the Revised Criminal Code reflect these general standards. For example, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), implicate the disregard of a substantial risk, while recklessness, but not negligence, requires proof that the person was aware of the substantial risk being disregarded. Likewise, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), employ a situation-specific gross deviation standard. There are, however, a few important ways in which the definitions of

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

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

[211] *See, e.g.,* U.S.S.G. § 2A1.4.

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

[213] Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Mont. Code Ann. § 45-2-10.

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

[215] *See Brown*, 520 U.S. at 422.

recklessness and negligence incorporated into the Revised Criminal Code depart from the Model Penal Code approach.

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

The Model Penal Code approach is to define acting recklessly or negligently, as the case may be, "with respect to a material element of an offense."[216] Not only does this fail to clearly distinguish between reckless/negligent risk creation (for results) and reckless/negligent risk taking (for circumstances)—a distinction that is otherwise evident in the Model Penal Code's two-part definition of purpose and knowledge—but it implies that recklessness and negligence potentially apply to conduct elements as well. To enhance the precision of the law, therefore, the Revised Criminal Code provides element-sensitive definitions of recklessness and negligence that clearly distinguish between results and circumstances. Notably absent from these definitions, however, is any reference to conduct elements. This reflects the Revised Criminal Code's broader approach of excluding conduct elements from the culpable mental state analysis, which, as discussed in the commentary on RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to simplify the task of element analysis, and to enhance the clarity of District law.

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

The first ambiguity relates to the phrase "substantial and justifiable" utilized in the Model Penal Code definition of recklessness. Model Penal Code § 2.02(2)(c) provides that "[a] person acts recklessly . . . when the person *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from the person's conduct." Left unspecified is what, precisely, the defendant must have been aware of. For example, potential interpretations of the foregoing language include awareness that: (1) *any* risk existed (which risk was, in fact, substantial and unjustifiable); (2) a *substantial* risk existed (which risk was, in fact, unjustifiable); or (3) that a *substantial and unjustifiable* risk existed.[217] Though the text of the Model Penal Code weakly suggests the third interpretation, no jurisdiction appears to apply this approach, which would require proof that the defendant was aware of the unjustifiable nature of his conduct, in practice.[218] Nor does it appear to have been intended by the Model Penal Code drafters.[219] Rather, as highlighted by a wide range of legal authorities, the second interpretation—that the awareness must encompass a risk's substantiality but not its unjustifiability—seems to be the most appropriate reading.[220]

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[216] *See* Model Penal Code § 2.02(2)(c)-(d).
[217] *See* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1379 n.130 (1992).
[218] *See* LAFAVE, *supra* note 14, at § 5.4.
[219] *See* Model Penal Code § 2.02 cmt. at 238.
[220] *See* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 362 (1981); Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 594-95 (2005); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 383 n.48 (1994); Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character?"*, 6 BUFF. CRIM. L. REV. 219, 226 n.11 (2002).

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

The second significant textual ambiguity reflected in the Model Penal Code definitions of recklessness and negligence concerns "the relationship between the requirement that the risk be "[]unjustifiable" and that which requires the risk to be such that its disregard involves a "gross deviation" from the "standard of conduct that a law-abiding person would observe in the actor's situation."[221] On the one hand, the text of the Model Penal Code separates these two requirements into distinct clauses, which seems to indicate that the justifiability analysis and the gross deviation analysis are independent from one another. On the other hand, the manner in which the Model Penal Code commentary discusses these requirements strongly suggests that the justifiability analysis merely comprises part of, and is therefore necessarily included within, the gross deviation analysis.[222] The latter position also finds support in a wide range of legal authorities, including the various reform codes that omit any reference to justifiability from the definitions of recklessness and negligence.[223]

Consistent with the foregoing authorities, the definitions of recklessness and negligence incorporated into the Revised Criminal Code similarly omit any reference to justifiability. In practical effect, this means that the requirement of a gross deviation constitutes the sole basis for evaluating whether the disregard of a substantial risk is culpable enough to be criminalized under the Revised Criminal Code.[224] Which raises the following question: how, precisely, does the gross deviation analysis operate in practice?

This is perhaps the most important ambiguity contained in the Model Penal Code definitions of recklessness and negligence given the key role that the gross deviation analysis plays in distinguishing civil liability from criminal liability.[225] With respect to the gross deviation analysis, both Model Penal Code definitions generally reference a consideration of the "nature and degree" of the risk, "the nature and purpose of the actor's conduct," and that the evaluation should account for "the circumstances known to [the actor]" as well as the actor's "situation." How all of this is ultimately to be put together by

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[221] Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 341-42 (2006).
[222] Model Penal Code § 2.02 cmt. at 237, 241.
[223] *See, e.g.,* Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Wash. Rev. Code Ann. § 9A.08.010; Mont. Code Ann. § 45-2-10; Wechsler, *supra* note 99, at 1438; Joshua Dressler, *Does One Mens Rea Fit All?: Thoughts on Alexander's Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 955, 958 (2000).
[224] Note, however, that the explanatory note on recklessness and negligence generally clarifies that the justifiability calculus is part of the gross deviation analysis, while the factors bearing on the gross deviation analysis highlighted in the explanatory note explicitly incorporate the standard justifiability considerations. *See, e.g,* Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 10 (2009); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006).
[225] *See, e.g., Williams v. State*, 235 S.W.3d 742, 752-53 (Tex. Crim. App. 2007); *Pagotto v. State*, 732 A.2d 920, 922-26 (Md. Ct. App. 1999), aff'd, 361 Md. 528 (2000).

the factfinder is less than clear, however.[226] The commentary at times gestures towards answers, noting, for example, that "less substantial risks might suffice for liability if there is no pretense of any justification for running the risk,"[227] as well as the fact that "moral defects can [only] properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them."[228] But the drafters of the Model Penal Code did not reduce the relevant insights to a formula that can easily be applied by the fact-finder in a particular case.

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

The language of the Revised Criminal Code is intended to redress the above ambiguity surrounding the gross deviation analysis. Under RCC §§ 206(d) and (e), the factfinder is asked to simply consider whether the person's conduct *viewed as a whole* amounted to a gross deviation from a reasonable standard of care given the person's situation. In many cases, mere recitation of this simple statement should be satisfactory. Where, however, further precision is necessary, the explanatory note provides a more precise formula culled from a wide range of legal authorities, which clarifies the relevant considerations that should be brought to bear on whether the actor's conduct constitutes a gross deviation.[229]

It's worth noting that this formula also provides the basis—as reflected in RCC § 206(d)(3)—for more clearly distinguishing between normal recklessness and the special form of enhanced recklessness that is sometimes applied in murder and aggravated assault offenses employed across the country.[230] In reform jurisdictions, this enhanced recklessness is most frequently articulated through the requirement of acting "recklessly

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[226] *See, e.g.,* Treiman, *supra* note 118, at 358; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).
[227] Model Penal Code § 2.02 cmt. at 243.
[228] *Id.*
[229] For example, in Alaska:

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

Neitzel v. State, 655 P.2d 325, 337 (Alaska Ct. App. 1982); *see Jeffries v. State*, 169 P.3d 913, 916 (Alaska 2007). For general support for application of a multi-factor approach, as well specific support for the considerations stated in the explanatory note, *see* Robinson, *supra* note 95, at 453; LAFAVE, *supra* note 14, at § 5.4; Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, 2012 LAW & CONTEMP. PROBS. 83, 86.
[230] *See, e.g.,* Michaels, *supra* note 89; LAFAVE, *supra* note 14, at § 14.4.

under circumstances manifesting extreme indifference to the value of human life."[231] The foregoing language is directly drawn from the Model Penal Code definitions of murder and aggravated assault.[232] It is premised on the view—endorsed by the Model Penal Code drafters—that reckless conduct can, under certain circumstances, be so extreme that it as culpable as knowing or purposeful conduct.[233]

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

> Whether recklessness is so extreme that it demonstrates similar indifference [to human life] is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.[234]

There are two problems with this "'I know it when I see it approach" to *mens rea*.[235] First, "[i]n the absence of a legal framework that provides an intelligible basis for making the critical distinctions in *mens rea*, it seems highly likely that arbitrary and discriminatory factors could be used by decisionmakers—whether consciously or unconsciously—to fill in the gap."[236] Second, case law and scholarly commentary indicate that the contours of enhanced recklessness can be fleshed out in a more coherent fashion.[237] The relevant factors courts apply, and which have been proposed by commentators, tend to be no different than those applicable to normal recklessness—and which are reflected in the explanatory note.[238] (Indeed, at least one jurisdiction appears to have successfully asked jurors to apply a comparable four-factor test to distinguish between normal recklessness and enhanced recklessness in the context of homicide for over three decades.[239])

Consistent with the foregoing authorities, the Revised Criminal Code addresses the culpable mental state of enhanced recklessness as follows. Subsection (d)(3) establishes that "[a] person's reckless conduct occurs 'under circumstances manifesting extreme

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

[232] *See* Model Penal Code §§ 210.2(b), 211.1(2)(a).

[233] *See* Model Penal Code § 210.2 cmt. at 21-22.

[234] *See id.*

[235] John C. Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder,* 57 DUKE L.J. 425, 444 (2007).

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

[237] *See* sources cited *supra* note 127.

[238] *See* sources cited *supra* note 127.

[239] *See Jeffries*, 169 P.3d at 916; *Neitzel v. State*, 655 P.2d at 336.

indifference' to the interests protected by an offense when such conduct constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." This clarifies that enhanced recklessness, whenever it is employed in the Revised Criminal Code, entails proof of normal recklessness plus an extreme (rather than gross) deviation. The factors elucidated in the underlying explanatory note, in turn, provide an intelligible basis for identifying an extreme deviation, and distinguishing it, where necessary, from a gross deviation.

Admittedly, the foregoing framework requires the exercise of a significant amount of discretion. But so does any other approach to enhanced recklessness. There simply are limits on the precision of any formulation of a normative judgment, such as that entailed by enhanced recklessness.[240] Still, providing courts and juries with a standard—guided by an explanation of the relevant factors to be considered—seems more likely to lead to consistent and fair outcomes than providing no guidance at all.[241]

§ 206(f)—Proof of Greater Culpable Mental State Satisfies Requirement for Lower

Relation to National Legal Trends. Subsection (f) reflects the common law and legislative practice among reform jurisdictions.

Courts have long recognized that "the kaleidoscopic nature of the varying degrees of mental culpability"[242] specified by legislatures ultimately amount to little more than "fine gradations along but a single spectrum of culpability."[243] It is well-established among common law authorities, for example, that criminal intent and criminal recklessness lie on a *mens rea* continuum, with the latter representing a subset of the former,[244] such that "it is impossible to commit a crime intentionally without concomitantly committing that crime recklessly."[245]

The hierarchical relationship between the culpable mental states employed in the Model Penal Code is addressed by § 2.02(5), which serves two separate functions.[246] Substantively speaking, it clarifies that purpose is more culpable than knowledge, which is

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[240] Robinson, *supra* note 95, at 451-52.
[241] *Id.*
[242] *People v. Green*, 56 N.Y.2d 427, 432 (1982).
[243] *People v. Cameron*, 506 N.Y.S.2d 217, 218 (1986) (citing *Green,* 56 N.Y.2d at 433).
[244] *United States v. Shaid,* 916 F.2d 984, 990 (5th Cir. 1990) (citing *United States v. Welliver*, 601 F.2d 203, 209–10 (5th Cir. 1979) *United States v. Reynolds*, 573 F.2d 242, 244-45 (5th Cir. 1978); *United States v. Wilson*, 500 F.2d 715, 720 (5th Cir. 1974)).
[245] *Green,* 56 N.Y.2d at 433 (quoting *People v. Stanfield*, 36 N.Y.2d 467 (1975)). LaFave believes this to be a "quite logical" outcome that is consistent with the case law. LAFAVE, *supra* note 14, at § 5.4 (citing *State v. Stewart*, 122 P.3d 1269 (N.M. 2005); *Simmons v. State*, 72 P.3d 803 (Wyo. 2003)).
[246] The relevant provision reads:

> **Substitutes for Negligence, Recklessness and Knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Model Penal Code § 2.02(5).

more culpable the recklessness, which is more culpable than negligence.[247] So, for example, "if [a] crime can be committed recklessly, it is no less committed if the actor acted purposely."[248] As a drafting matter, however, this provision "makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires."[249]

Codification of a general provision based on Model Penal Code § 2.02(5) is a standard part of modern code reform efforts. Most reform jurisdictions—as well as all of the major model codes and recent code reform projects—codify a general provision comparable to Model Penal Code § 2.02(5).[250] Several courts in jurisdictions that have not modernized their criminal codes have also recognized the virtues of this "common legal notion"[251] and similarly apply it through case law.[252] Consistent with the foregoing trends, RCC § 206(f) incorporates a substantively identical provision into the Revised Criminal Code.

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

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

Relation to National Legal Trends. Subsection (a) generally reflects common law interpretive principles and legislative practice in reform jurisdictions.

"In ordinary English, where a transitive verb has an object, listeners in most contexts assume that an adverb (such as knowingly) that modifies the transitive verb tells the listener how the subject performed the entire action, including the object as set forth in the sentence."[253] It is, therefore, unsurprising that judges typically make the same assumption while attempting to discern the meaning of criminal statutes—indeed, "the manner in which the courts ordinarily interpret criminal statutes is fully consistent with this ordinary English usage."[254] For example, "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with [a culpable mental state such as] the

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[247] *See id.*
[248] Explanatory Note on Model Penal Code § 2.02(5).
[249] *Id.*
[250] For reform jurisdictions, *see* Ala. Code § 13A-2-4; Alaska Stat. Ann. § 11.81.610; Ariz. Rev. Stat. Ann. § 13-202; Ark. Code Ann. § 5-2-203; Colo. Rev. Stat. Ann. § 18-1-503; Del. Code Ann. tit. 11, § 253; Haw. Rev. Stat. Ann. § 702-208; Kan. Stat. Ann. § 21-5202; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.021; Mont. Code Ann. § 45-2-102; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.115; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-104; Wash. Rev. Code Ann. § 9A.08.010. For model codes, *see* Proposed Federal Criminal Code § 302(4). For recent reform projects, *see* Kentucky Revision Project § 501.206; Illinois Reform Project § 205.
[251] *Kolstad v. Am. Dental Ass'n*, 139 F.3d 958, 970 (D.C. Cir. 1998) (Randolph, J., concurring).
[252] *See, e.g., United States v. Nguyen*, CRIM.A. 99-210, 1999 WL 1220761 (E.D. La. Dec. 15, 1999); *State v. Stewart*, 122 P.3d 1269, 1278 (N.M. 2005); *O'Brien v. State*, 45 P.3d 225, 232 (Wyo. 2002); *State v. Smith*, 441 A.2d 84, 92 (Conn. 1981); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 56 (2010) (Breyer, J., dissenting).
[253] *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).
[254] *Id.* at 652.

word 'knowingly' as applying that word to each element"[255]—what is considered the "normal, commonsense reading of a subsection of a criminal statute."[256]

Consistent with this approach to reading criminal statutes, the drafters of the Model Penal Code codified a rule of distribution governing enumerated culpable mental states in § 2.02(4).[257] This rule establishes that, where an offense definition specifies one culpable mental state, the courts are to apply that culpable mental state to all of the objective elements of that offense, subject to legislative intent to the contrary. The commentary supporting the Model Penal Code provision suggests that this rule will embody the most likely legislative intent—the "normal probability" is that an articulated culpability requirement "was designed to apply to all material elements."[258]

Codification of a rule of distribution based on Model Penal Code § 2.02(4) is a standard part of modern code reform efforts. A majority of reform jurisdictions codify a general provision comprised of a rule based on Model Penal Code § 2.02(4).[259] And in those jurisdictions that lack statutory rules of interpretation in their criminal codes, courts at times have specifically endorsed Model Penal Code § 2.02(4)—or something like it—through case law.[260]

Consistent with the foregoing legal trends, § 22A-207(a) incorporates a comparable rule of distribution into the Revised Criminal Code. There are, however, two important variances between § 22A-207(a) and the standard legislative approach reflected in reform codes. The first variance is that whereas the standard legislative approach is to only apply the rule of distribution to offenses that use a single culpable mental state but do not "distinguish[] among the material elements thereof," § 22A-207(a) applies even where an offense definition does distinguish between such elements to some degree. The second variance is that the general exception to the rule incorporated into the standard legislative approach—when "a contrary purpose plainly appears"—is replaced with a reference to the more precise rules governing strict liability in § 22A-207(b).

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[255] *Id.*; *see, e.g., Liparota v. United States*, 471 U.S. 419 (1985).
[256] *United States v. X–Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring).
[257] The relevant provisions reads:

> **Prescribed Culpability Requirement Applies to All Material Elements.** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

Model Penal Code § 2.02(4).
[258] Model Penal Code § 2.02 cmt. at 129.
[259] Ala. Code § 13A-2-4; Ariz. Rev. Stat. Ann. § 13-202; Ark. Code Ann. § 5-2-203; Colo. Rev. Stat. Ann. § 18-1-503; Conn. Gen. Stat. Ann. § 53a-5; Del. Code Ann. tit. 11, § 252; Haw. Rev. Stat. Ann. § 702-207 ; Ind. Code Ann. § 35-41-2-2; 720 Ill. Comp. Stat. Ann. 5/4-3; Me. Rev. Stat. tit. 17-A, § 34; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.Y. Penal Law § 15.15; N.D. Cent. Code Ann. § 12.1-02-02; 18 Pa. Stat. and Cons. Stat. Ann. § 302.
[260] *See, e.g., United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1239 (D.C. Cir. 2008); sources cited *supra* notes 4-7.

These modest variances are necessary to facilitate the clear and consistent interpretation of the District's criminal statutes.[261] For example, even where an offense definition does apply distinct mental states to different aspects of an offense, there still remain questions about whether and to what extent the enumerated mental states were intended to "travel." Subsection (a) more precisely establishes that, as a general rule, a specified culpable mental state stops traveling when another culpable mental state is specified, in which case the latter culpable mental state travels, and so on and so forth. Likewise, the exception to the general rule of distribution reflected in reform codes—when "a contrary purpose plainly appears"—is ambiguous. Subsection (a) supplants it with the more precise rules governing strict liability in § 22A-207(b).

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

Relation to National Legal Trends. Subsection (b) is broadly consistent with legislative practice among reform jurisdictions.

Application of strict liability to at least some objective elements in felony offenses is, as noted in the commentary to § 22A-205, well established in American criminal law. Less well established is the manner in which the application of strict liability to one or more objective elements in felony offenses should be communicated as a matter of legislative drafting. This is likely a product of the fact that the Model Penal Code generally does not recognize the application of strict liability to one or more objective elements in felony offenses. In the absence of a strong model, a variety of approaches have proliferated in the states.[262]

There are two principal ways that reform codes address strict liability in their general part. The first is a general provision which establishes that strict liability applies to any "element of [a] crime as to which it is expressly stated that it must 'in fact' exist."[263] The second is a general provision which broadly establishes that strict liability applies to an objective element whenever a statute "clearly" or "plainly" indicates a legislative intent to impose strict liability.[264]

The Revised Criminal Code incorporates slightly modified versions of both approaches. For example, § 22A-207(b)(i) specifically dictates that "[a] person is strictly liable for any result or circumstance in an offense . . . [t]hat is modified by the phrase 'in fact.'" This is substantively similar to the first approach used in reform codes; however, the phrase "expressly stated" has been replaced with the term "modified," which more clearly and directly expresses the requisite relationship. In contrast, § 22A-207(b)(ii) more generally establishes that "[a] person is strictly liable for any result or circumstance in an offense . . . [when] legislative intent explicitly indicates strict liability applies." This is substantively similar to the second approach used in reform codes; however, rather than use vague terms such as "clearly" or "plainly," § 22A-207(b)(ii) uses the narrower and

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[261] For a comprehensive discussion of the problems reflected in the Model Penal Code's rules of interpretation, *see* Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

[262] For a comprehensive overview of the treatment of strict liability in the states, *see* Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

[263] *See, e.g.*, Me. Rev. Stat. tit. 17-A, § 34; N.D. Cent. Code Ann. § 12.1-02-02.

[264] *See, e.g.*, Mo. Ann. Stat. § 562.026; Tex. Penal Code Ann. § 6.02; Ala. Code § 13A-2-4; N.J. Stat. Ann. § 2C:2-2; Utah Code Ann. § 76-2-102.

more precise term "explicitly." This should help to limit litigation and inconsistent outcomes the former language has engendered.[265]

3. § 22E-205(c)—Determination of When Recklessness Is Implied

Relation to National Legal Trends. Subsection (c) generally reflects common law interpretive principles and legislative practice in reform jurisdictions.

The concept of a default culpable mental state requirement is a well-established part of the common law. Courts have "repeatedly held," for example, that "'mere omission from a criminal enactment of any mention of criminal intent' should not be read 'as dispensing with it.'"[266] This "rule of construction reflects the basic principle that 'wrongdoing must be conscious to be criminal.'"[267] The "central thought" animating this rule of construction—that a defendant must be "blameworthy in mind" before he can be found guilty—is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.""[268] As a result, courts have for a long time opted to "interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even where the statute by its terms does not contain them."[269] That being said, given the substantial confusion surrounding the common law approach to *mens rea*, the meaning of this default culpable mental state requirement has historically been less than clear.

In light of these considerations, the drafters of the Model Penal Code codified rule § 2.02(3), which establishes that a culpable mental state of recklessness applies in situations of interpretive uncertainty.[270] The drafters' selection of recklessness as the appropriate default culpability level was based, *inter alia*, on their view that this reflected "the common law position."[271] Whether or not this is this was true then is less than clear; however, it clearly seems true today given that "recklessness is generally accepted as the theoretical norm" for criminal liability,[272] and—as articulated in one recent Supreme Court concurrence—likely constitutes the contemporary basis for the common law presumption of *mens rea*.[273]

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[265] *See* Brown, *supra* note 17.
[266] *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morissette*, 342 U.S. at 250).
[267] *Id.* at 2009 (quoting *Morissette,* 342 U.S. at 252).
[268] *Morissette*, 342 U.S. at 250, 252.
[269] *X–Citement Video,* 513 U.S. at 70.
[270] The relevant provision reads:

> **Culpability Required Unless Otherwise Provided.** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

Model Penal Code § 2.02(3).
[271] Model Penal Code § 2.02(3) cmt. at 127.
[272] Robinson & Grall, *supra* note 12, at 701.
[273] As Justice Alito frames the argument for recklessness in the context of interpreting the federal threats statute:

> [W]e should presume that an offense like that [of threats] requires more than negligence with respect to a critical element like the one at issue here. [] As the Court states, "[w]hen

Codification of a rule of implication based on Model Penal Code § 2.02(3) is a standard part of modern code reform efforts. Numerous reform jurisdictions codify a general provision providing a comparable default rule.[274] And several courts in jurisdictions with criminal codes lacking general culpability provisions have recognized the virtues of this rule and similarly apply it through case law.[275] Consistent with the foregoing legal trends, § 22A-207(c) incorporates a comparable rule of implication into the Revised Criminal Code. It's important to note, however, that given the precision and comprehensiveness of §§ 22A-207(a) and (b), the applicability of the recklessness default reflected in § 22A-207(c) is likely to apply less frequently than in other reform codes.

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

§§ 22E-208(a) & (b)—Effect of Accident, Mistake and Ignorance on Liability & Correspondence Between Mistake and Culpable Mental State Requirements

Relation to National Legal Trends. Subsections (a) and (b) codify well-accepted common law principles and are generally in accordance with national legislative trends. Importantly, however, these provisions depart from standard legislative practice in three ways: (1) by addressing the relationship between mistake, ignorance, and culpable mental states without reference to "defenses"; (2) by clarifying that the same logical relevance

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> interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that *mens rea* which is necessary to separate wrongful conduct from "otherwise innocent conduct."' [] Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.
>
> Once we have passed negligence, however, no further presumptions are defensible. In the hierarchy of mental states that may be required as a condition for criminal liability, the *mens rea* just above negligence is recklessness. Negligence requires only that the defendant "should [have] be [en] aware of a substantial and unjustifiable risk," [] while recklessness exists "when a person disregards a risk of harm of which he is aware" [] And when Congress does not specify a mens rea in a criminal statute, we have no justification for inferring that anything more than recklessness is needed. It is quite unusual for us to interpret a statute to contain a requirement that is nowhere set out in the text. Once we have reached recklessness, we have gone as far as we can without stepping over the line that separates interpretation from amendment.
>
> There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct . . . .

Elonis, 135 S. Ct. at 2015 (internal citations omitted); *see* John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999).

[274] Del. Code Ann. tit. 11, § 251; Haw. Rev. Stat. Ann. § 702-204; Ind. Code Ann. § 35-41-2-2; Kan. Stat. Ann. § 21-5202; 18 Pa. Stat. and Cons. Stat. Ann. § 302; Ark. Code Ann. § 5-2-203; 720 Ill. Comp. Stat. Ann. 5/4-3; Mont. Code Ann. § 45-2-103; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.21; Tenn. Code Ann. § 39-11-301; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-102.

[275] *See, e.g., State v. Sivo*, 925 A.2d 901, 913 (R.I. 2007); *State v. Lima*, 546 A.2d 770, 772 (R.I. 1988); *United States v. Schelin*, 15 M.J. 218, 220 (C.M.A. 1983); *United States v. Nofziger*, 878 F.2d 442, 450 (D.C. Cir. 1989).

approach governing mistake and ignorance similarly applies to accidents; and (3) by further clarifying the nature of the correspondence between mistake and culpable mental state requirements under the traditional reasonable/unreasonable distinction.

Claims that a defendant did not satisfy the *mens rea* of the charged offense by virtue of some accident,[276] mistake[277] or ignorance[278] as to a matter of fact or law have long been recognized by the common law as a viable defense theory.[279] At the same time, however, courts have historically struggled to deal with these claims in a clear, consistent, and principled manner—indeed, "[n]o area of the substantive criminal law has traditionally been surrounded by more confusion."[280]

The most frequently referenced form of this type of claim is based on an erroneous factual belief—or generalized ignorance—concerning the ownership status of a particular piece of property.[281] In a paradigm mistake of fact scenario, a person takes a piece of property owned by someone else motivated by the mistaken belief that it was abandoned.[282] If later prosecuted for a theft offense, that person will argue that because of this mistaken belief as to the property's ownership statute, he or she lacked the *mens rea* necessary for a conviction.[283]

At common law, courts relied upon a three-part offense categorization scheme to address claims of this nature.[284] For specific intent crimes, the general rule was that an honestly held mistake could serve as a defense to the crime charged, regardless of whether the mistake was reasonable or unreasonable.[285] For general intent crimes, in contrast,

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[276] Generally speaking, "[a]n accident occurs when one brings about a result without desiring or foreseeing it." Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) [hereinafter, *Mistake and Impossibility*].

[277] In contrast to accidents, "[m]istakes occur in the realm of perception; they involve false beliefs." Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 73 (1996).

[278] "'Ignorance' implies a total want of knowledge—a blank mind—regarding the matter under consideration." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012). This is in contrast to mistakes, which "suggests a wrong belief about the matter." *Id.* As a result, the terms "[i]gnorance" and "mistake" are "not synonyms." *Id.* Nevertheless, "this distinction typically is not drawn" in the relevant cases. *Id.* What is important is that both terms "describe the absence of a particular state of mind as to a circumstance element, but not as to a conduct or result element." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). For purposes of this commentary, ignorance can be assimilated within mistake.

[279] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6 (Westlaw 2017); DRESSLER, *supra* note 19, at § 12.01. Note that mistakes or ignorance as to a matter of *penal* law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the *mens rea* of an offense. *Id.* This commentary does not discuss such issues except to the extent that proof of a culpable mental state as to a matter of penal law is an element of an offense. For discussion of offenses that incorporate proof of a culpable mental state as to a matter of penal law as an element of an offense, see Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1579-80 (2006).

[280] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

[281] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

[282] *See, e.g., Simms*, 612 A.2d at 219. For an example of an accident claim, in contrast, imagine that the person later realizes the property was not, in fact, abandoned and thereafter attempts to return it to its lawful owner. If, in the course of trying to return that property, he or she unintentionally drops it on the floor, thereby destroying it, the person could raise the accidental nature of the dropping as a defense in the context of a destruction of property prosecution.

[283] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[284] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[285] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

courts applied a reasonable mistake doctrine, under which an honestly held mistake could serve as a defense to the crime charged only if it was reasonable.[286] And for strict liability crimes, courts simply held that no mistake, no matter its reasonableness, could serve as a defense.[287]

Categorical rules of this nature were understood to address the level of culpability required by the class of offense at issue. The problem, however, is that there was little principled basis upon which to pin the distinction between "general intent" and "specific intent" in the first place.[288] After all, "[n]either common experience nor psychology knows of any such phenomenon as 'general intent' distinguishable from 'specific intent.'"[289] In the absence of legislative guidance on whether an offense was one of specific intent or general intent, that classification decision—as well as the ultimate policy judgment concerning whether any particular kind of mistake ought to provide the basis for exoneration—was left to the courts.

In making that policy determination, moreover, this binary categorization scheme failed to provide courts with a basis for accounting for the different kinds of mistakes that could potentially arise. For example, the distinction between reasonable and unreasonable mistakes at the heart of the common law approach overlooked the potential relevance of a reckless mistake—which "occurs when an actor is aware of a substantial risk that the circumstance exists"—to liability.[290]

Perhaps more problematic, however, was the fact that courts themselves often failed to accurately perceive the nature of what they were doing. Whether in the context of considering claims of mistake or accident, judicial reliance on the distinctions between general intent and specific intent crimes had a tendency to lead courts to view the relevant issues as distinct from the government's burden of proof, and, therefore, to treat them as "affirmative defenses"[291]—for which the defendant may ultimately bear the burden of proof—rather than "absent element defenses"[292]—for which the defendant may not.[293]

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[286] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[287] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[288] The main, and perhaps only, exception to this phenomenon were those offenses that expressly required proof of "an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the actus reus of the offense." DRESSLER, *supra* note 19, at § 10.06. These so-called partially inchoate offenses were quite consistently treated as specific intent offenses at common law. *See* Model Penal Code § 2.08 cmt. at 356.

[289] People v. Kelley, 176 N.W.2d 435, 443 (Mich. 1970).

[290] ROBINSON & CAHILL, *supra* note 10, at 195.

[291] An affirmative defense is contingent upon conditions or circumstances unrelated to the elements contained in the charged offense. When an affirmative defense—typically either a justification or excuse—is successfully raised it exonerates the accused *notwithstanding the fact that the government proved all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

[292] An absent element defense is contingent upon conditions or circumstances directly related to the elements of the charged offense. When an absent element defense is successfully raised it exonerates the accused *because the government cannot, by virtue of the defense's existence, prove all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

[293] The United States Supreme Court has held that the states and the federal government must be allocated the burden of persuasion with regard to the requisite culpable mental state for each objective element of the crime(s) charged. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979). For compilations of case law addressing mistake and accident claims which may conflict with this principle, see, for example, Robinson & Grall, *supra* note 19, at 758; Dannye Holley, *The Influence of the Model Penal Code's Culpability*

The source of most of the foregoing problems, as many jurisdictions have come to recognize, was the flawed method of analyzing culpability, offense analysis, upon which the common law approach to mistake and accident was premised. By "failing to distinguish between elements of the crime, to which different mental states may apply,"[294] offense analysis lacked the conceptual toolkit necessary to appreciate what the modern conception of culpability, element analysis, clarified: resolving claims of mistake, ignorance, and accident amount to little more than a "negative statement" of the culpable mental state governing the particular objective element to which it applies.[295]

To appreciate the reciprocal nature of this relationship consider the role that a mistaken belief as to abandonment, such as that discussed *supra*, plays in the context of a theft offense with the following *actus reus*: "No person shall unlawfully use the property of another." In this context, the nature of the mistaken belief as to abandonment that will exonerate is part and parcel with the culpable mental state requirement (if any) applicable to the circumstance "of another."[296]

For example, application of a knowledge mental state requirement to that circumstance means that any honest mistake as to the property's ownership status shall exonerate, since someone who wholeheartedly believed—whether reasonably or unreasonably—that property X was abandoned cannot, by definition, have been practically certain (i.e., knew) that property X was owned by someone else. But if, in contrast, the government need only prove the accused was negligent as to whether the property was "of another" to secure a conviction, only a reasonable mistake (or at least a mistake that is not grossly unreasonable) as to the property's ownership status can negate the existence of the culpable mental state requirement. Negligence, after all, does not require proof that the accused was aware of the substantial risk he or she disregarded, only that the reasonable person in the accused's situation *would have been aware of that risk*.[297]

This kind of element analysis offers similar insights for the adjudication of accident claims, which can primarily be distinguished from mistake claims by the objective element to which they relate: whereas mistakes implicate the culpable mental state governing circumstance elements, accidents typically involve the culpable mental state governing result elements.[298] For example, "[o]ne makes a 'mistake' as to another's age or property, the obscene nature of a publication, or other circumstance elements, but one 'accidentally'

Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine, 27 SW. U. L. REV. 229, 255 nos. 100 & 101 (1997); see also Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 356-57 (1986).

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

[295] Robinson & Grall, *supra* note 19, at 726–27. As Dressler similarly observes: "[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense." DRESSLER, *supra* note 19, at § 12.02.

[296] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

[297] Likewise, if a culpable mental state of recklessness governed the circumstance "of another," then an unreasonable mistake as to whether property X was abandoned can negate the existence of the requisite culpable mental state requirement, so long as the defendant was merely negligent, but not reckless, in making that mistake. *See* Robinson & Grall, *supra* note 19, at 726–27.

[298] *See, e.g.,* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1080 (1997); Simons, *Mistake and Impossibility*, *supra* note 17, at 504-07; Husak, *supra* note 18, at 65.

injures another, pollutes a stream, or interferes with a law enforcement officer."[299] "To say," therefore, "that a non-negligent accident that causes a prohibited result provides a defense is simply to say that all offenses containing result elements require at least negligence as to causing the prohibited result."[300]

The drafters of the Model Penal Code, themselves initially responsible for devising element analysis, understood the extent to which the common law confusion surrounding issues of mistake and ignorance could ultimately be traced back to judicial reliance on offense analysis. Addressing the varied problems this reliance produced was, therefore, at the forefront of the drafters' minds as they undertook their work of simplifying and rendering more coherent the American law of culpability.

Aided by the insights of element analysis, the drafters accurately perceived that "ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability."[301] These principles were understood by the drafters to be implicit in the requirement that the government prove every element of an offense—including culpable mental states—beyond a reasonable doubt.[302] Nevertheless, the drafters nevertheless chose to explicitly codify them for purposes of clarity.

The relevant provision, § 2.04(1) of the Model Penal Code, establishes that:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
>
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
>
> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

The explanatory note accompanying this provision communicates the drafters' stated intent of clarifying that "ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense," which in turn depends "upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02."[303]

Generally speaking, Model Penal Code § 2.04(1) has been quite influential. It is now commonly accepted, for example, that "ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged."[304] And

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[299] Robinson & Grall, *supra* note 19, at 732.

[300] *Id.* As the DCCA observed in *Carter v. United States*: "It is only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care notwithstanding that the accident occurred, that an unavoidable accident instruction is proper." 531 A.2d at 964 (quoting *Bickley v. Farmer*, 215 Va. 484, 488 (1975)).

[301] Model Penal Code § 2.04 cmt. at 269.

[302] Robinson & Grall, *supra* note 19, at 727.

[303] Model Penal Code § 2.04—Explanatory Note.

[304] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; *see, e.g, People v. Andrews,* 632 P.2d 1012, 1016 (Colo. 1981) *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). There is, however, one exception: "if

codification of a general provision modeled on § 2.04(1) is a well-established part of modern code reform efforts: a strong majority of reform jurisdictions—as well as well as all of the major model codes and recent comprehensive code reform projects—codify a comparable provision.[305] Likewise, courts in jurisdictions that never modernized their codes have endorsed Model Penal Code § 2.04(1) through case law.[306]

Notwithstanding the broad popularity of the Model Penal Code approach, however, many reform jurisdictions have opted to modify § 2.04(1) in one or more ways.[307] For example, a plurality of jurisdictions link the significance of mistakes to disproving the requisite culpable mental state without reference to "defenses" at all—as is the case in Model Penal Code § 2.04(1)(a)—and instead focus solely on when a given mistake "negatives" an element of the offense.[308] Another common variance is reflected in the plurality of jurisdictions that omit the second prong of Model Penal Code § 2.04(1)(b) altogether, opting against inclusion of an explicit statement that "[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense."[309]

Modifications aside, it is nevertheless clear that Model Penal Code § 2.04(1) broadly reflects the standard legislative approach for dealing with issues of mistake and ignorance. Consistent with national codification trends, §§ (a) and (b) incorporate a comparable standard into the Revised Code, which clarifies what is otherwise implicit in the requirement that a conviction rest upon proof of all offense elements beyond a reasonable doubt: that a person's mistake or ignorance will typically relieve that person of liability when (and only when) it precludes the person from acting with the culpable mental state requirement applicable to an objective element. That being said, there are three important ways in which the Revised Code departs from Model Penal Code § 2.04(1).

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the defendant would be guilty of another crime had the situation been as he believed, then he may be convicted of the offense of which he would be guilty had the situation been as he believed it to be." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. For further discussion of this issue, see *infra* note 69.

[305] For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Ark. Code Ann. § 5-2-206; Colo. Rev. Stat. Ann. § 18-1-504; Haw. Rev. Stat. Ann. § 702-218; 720 Ill. Comp. Stat. Ann. 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Ky. Rev. Stat. Ann. § 501.070; Me. Rev. Stat. tit. 17-A, § 36; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:3; N.J. Stat. Ann. § 2C:2-4; N.Y. Penal Law § 15.20; N.D. Cent. Code Ann. § 12.1-02-03; 18 Pa. Stat. and Cons. Stat. Ann. § 304; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For model codes, see Brown Commission § 304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207. Note also that "[e]ight other states that do not emulate the Model Penal Code's key culpability provisions have also codified the mistake of fact doctrine," most of which "also take the position that the doctrine primarily sanctions a challenge to the prosecution's ability to prove the requisite culpable mental state." Holley, *supra* note 34, at 247-48.

[306] *See, e.g. United States v. Aitken*, 755 F.2d 188, 193 (1st Cir. 1985); *Com. v. Lopez*, 745 N.E.2d 961, 964 (Mass. 2001).

[307] Holley, *supra* note 34, at 247-49 (collecting citations).

[308] For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Colo. Rev. Stat. Ann. § 18-1-504; Conn. Gen. Stat. Ann. § 53a-6; Ky. Rev. Stat. Ann. § 501.070; Mo. Ann. Stat. § 562.031; N.H. Rev. Stat. Ann. § 626:3; N.Y. Penal Law § 15.20. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

[309] For reform jurisdictions, see Ariz. Rev. Stat. Ann. § 13-204(a); Ill. Comp. Stat. 720 § 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Mo. Ann. Stat. § 562.031; Tenn. Code Ann. § 39-11-502; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

First, the logical relevance principle incorporated into the Revised Code does not reference "defenses" in any capacity. For example, § (a) reframes the rule of logical relevance stated in Model Penal Code § 2.04(1)(a) to solely focus on whether a given mistake or ignorance "negates" the existence of a culpable mental state requirement. Likewise, § (a) omits a provision like Model Penal Code § 2.04(1)(b), thereby avoiding any reference to specific laws providing for "[i]gnorance or mistake as to a matter of fact or law serv[ing] as a defense."

Both of these modifications—each of which is consistent with the plurality legislative trends noted above—are intended to avoid the significant judicial and legislative confusion that "characterizing the mistake of fact doctrine as a 'defense'" has produced in many jurisdictions.[310] In an attempt to avoid this kind of confusion, § (a) more clearly communicates that mistake "does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution's ability to prove the requisite culpable mental state beyond a reasonable doubt."[311]

A related area of confusion, addressed by § (b), is the nature of the correspondence between mistake and culpable mental state requirements. Although courts in reform jurisdictions generally seem to have recognized that "determining whether a reasonable or an unreasonable mistake as to a particular [] circumstance element will provide a defense requires nothing more than determining what culpable state of mind is required as to that element,"[312] judges have struggled to accurately translate this principle into specific rules that accurately translate the traditional distinctions between reasonable and unreasonable mistakes into rules that track the relevant culpable mental states.[313] This is particularly true, moreover, in the area where the translation is most difficult, determining the kind of mistake that negates the existence of recklessness.[314] With that in mind, and consistent

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[310] Holley, *supra* note 34, at 254; *see* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 205 (2003).

[311] Holley, *supra* note 34, at 247. As LaFave phrases it: "Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Consistent with that analysis, Model Penal Code § 2.04(1)(b), by providing that "[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense," is "doubly superfluous." ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62. For an application of this provision, see Model Penal Code § 223.1(3)(a), which provides a defense for an actor who took property when he "was unaware that the property or service was that of another . . . ." For recognition by the Model Penal Code drafters that this defense is redundant and that such an actor would be exculpated by the normal operation of the culpability requirements, see Model Penal Code § 223.1 cmt. at 153

[312] Robinson & Grall, *supra* note 19, at 729. As the New Jersey Supreme Court frames the inquiry: "[W]e relate the type of mistake involved to the essential elements of the offense, the conduct proscribed, and the state of mind required to establish liability for the offense." *State v. Sexton*, 733 A.2d 1125, 1130 (N.J. 1999).

[313] ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62 (collecting citations).

[314] As Robinson and Grall observe:

> [T]he translation is uncertain at its most critical point: in determining the kind of mistake that provides a defense when recklessness, the most common culpability level, as to a circumstance is required. [A] negligent or faultless mistake negates (necessarily precludes the existence of) recklessness. While a "negligent mistake" may be said to be an "unreasonable mistake," all "unreasonable mistakes" are not "negligent mistakes." A mistake may also be unreasonable because it is reckless. Reckless mistakes, although

with case law,[315] commentary,[316] and the general provisions incorporated into two recent comprehensive criminal code reform projects,[317] § (b) provides District courts with the basic rules of translation. Such guidance is intended to avoid the confusion which silence on such issues can create, and, therefore, increase the clarity and consistency of District law.

The third noteworthy aspect of the Revised Code is its application of the logical relevance principle incorporated into § (a) to accidents, alongside mistakes and ignorance. This dual application of the logical relevance principle constitutes a departure from modern legislative trends: few reform codes address the import of accidents and, to the extent they do, accidents are viewed through the lens of legal causation.[318]

More specifically, these few reform code provisions incorporate the "fresh approach"[319] to legal causation developed by the drafters of the Model Penal Code and

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> unreasonable, will not negate recklessness. Thus, when offense definitions require recklessness as to circumstance elements, as they commonly do, the reasonable-unreasonable mistake language inadequately describes the mistakes that will provide a defense because of the imprecision of the term "unreasonable mistake." Reckless-negligent-faultless mistake language is necessary for a full and accurate description.

Robinson & Grall, *supra* note 19, at 729; *see, e.g*, ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62; Holley, *supra* note34, at 233 n.12.

[315] For example, in *Laseter v. State*, an Alaska appellate court determined because the offense of sexual assault in the first degree requires recklessness as to lack of consent in Alaska, it was reversible error to instruct the jury to acquit if the jury found that defendant had a "reasonable belief" that the victim consented—the "reasonable belief" instruction permitted the jury to convict on the basis of negligence as to lack of consent. 684 P.2d 139, 142 (Alaska Ct. App. 1984). For a similar recognition in the context of negligence and unreasonable mistakes, see Doe v. Breedlove, 906 So. 2d 565, 573 (La. Ct. App. 2005).

[316] *See, e.g.*, sources cited *supra* note 55.

[317] For example, § 207(2)-(3) of the Illinois Reform Project reads:

> (2) *Correspondence Between Mistake Defenses and Culpability Requirements.* Any mistake as to an element of an offense, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A negligent mistake as to an element of an offense will negate the existence of intention, knowledge, or recklessness as to that element. A reasonable mistake as to an element of an offense will negate intention, knowledge, recklessness, or negligence as to that element.
>
> (3) *Definitions.*
> (a) A "reckless mistake" is an erroneous belief that the actor is reckless in forming or holding.
> (b) A "negligent mistake" is an erroneous belief that the actor is negligent in forming or holding.
> (c) A "reasonable mistake" is an erroneous belief that the actor is non-negligent in forming or holding.

Section 501.207 of the Kentucky Revision Project proposes a substantively identical general provision.

[318] *See* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303. For reform jurisdictions with similar provisions, see Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.

[319] Model Penal Code § 2.03 cmt. at 254.

implemented through Model Penal Code § 2.03(2).[320] For the reasons discussed in the commentary to Revised Code § 22A-204(c), however, this approach generally constitutes a problematic departure from the common law.[321] With respect to treatment of accidents in particular, though, what the Model Penal Code (and relevant state-based provisions) miss is that whether a claim of accident or mistake is raised, both effectively raise a culpable mental state issue, namely, whether the government can meet its affirmative burden of proof concerning the culpable mental state requirement governing an offense.[322]

This insight is reflected in District case law, which recognizes that "[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element."[323] And it is also reflected in case law from outside of the District, which similarly views accidents through the lens of *mens rea*.[324] In accordance with these authorities, and in furtherance of the interests of clarity and consistency, § (a) explicitly articulates that accidents are subject to the same general rule of logical relevance as mistakes.

Viewed collectively, the broadly applicable logical relevance principle set forth by §§ (a) and (b) should secure for the District one of the primary benefits of element analysis: "eliminating the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements."[325] There is, however, one additional benefit of codifying this logical relevance principle that bears notice: it should provide the basis for more clearly and consistently dealing with those exceptional situations where the

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[320] The relevant provisions addressing accidents in Model Penal Code § 2.03(2) read:

> (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
>
> (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused . . . .
>
> (3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused . . . .

[321] *See* Commentary to Revised Criminal Code § 204(c), Nationwide Legal Trends.

[322] *See, e.g.,* Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 No. 6 CRIM. LAW BULLETIN Art. 3 (Winter 2015).

[323] D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). Outside of the District, court decisions often similarly contrast accident with culpability requirements as to results. *See, e.g.,* People v. Eveland, 81 Ill. App. 3d 97 (1980); People v. Schwartz, 64 Ill. App. 3d 989 (1978); People v. Morrin, 31 Mich. App. 301 (1971).

[324] ROBINSON, *supra* note 14, 1 CRIM. L. DEF. § 63 n.4; *see, e.g., People v. Eveland*, 81 Ill. App. 3d 97 (1980); *People v. Schwartz*, 64 Ill. App. 3d 989 (1978); *People v. Morrin*, 31 Mich. App. 301 (1971); *City of Columbus v. Bee*, 425 N.E.2d 409 (Ohio Ct. App. 1979); *Hall v. State*, 431 A.2d 1258 (Del. 1981).

[325] Robinson & Grall, *supra* note 19, at 704.

distinctively culpable nature of a particular kind of mistake, ignorance, or accident justifies imputing the relevant culpable mental state—considerations of logical relevance aside.

An illustrative example is presented by an actor who suspects a prohibited circumstance exists but deliberately avoids the acquisition of guilty knowledge in order to preserve a defense.[326] Under these circumstances, it is clear that—pursuant to § (a)—the actor's ignorance would negate the existence of the culpable mental state of knowledge applicable to that circumstance. At the same time, however, it is also generally recognized that deliberate ignorance of this nature should not preclude a conviction for a crime that imposes a requirement of knowledge as to a prohibited circumstance given the comparable blameworthiness of the actor's conduct. Consistent with this recognition, Revised D.C. Code § 208(c) clearly delineates deliberate ignorance as an exception to the logical relevance principle stated in § (a) by authorizing courts to impute knowledge in the relevant circumstances. (Additional imputation provisions have not been incorporated into § 208 to deal with situations involving accident-based[327] or mistake-based[328] divergences.[329]

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[326] *See infra*, Commentary to Revised D.C. Code § 208(c), National Legal Trends, for a more detailed discussion of the topic of deliberate ignorance.

[327] Accident-based divergences most frequently arise where the victim or property actually harmed or affected by an actor's conduct is different than the particular victim or property the person intended or risked harming or affecting, as the case may be. Divergence of this nature is most commonly associated with bad-aim cases: "[W]hen one person (*A*) acts (or omits to act) with intent to harm another person (*B*), but because of a bad aim he instead harms a third person (*C*) whom he did not intend to harm." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4. Typically, these situations are dealt with by the judicially created doctrine of "transferred intent," which treats an actor such as *A* "just as guilty as if he had actually harmed the intended victim." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4; *see Ruffin v. United States*, 642 A.2d 1288 (D.C. 1994). Likewise, under a corollary doctrine of "transferred recklessness" courts allow for a "defendant's conscious awareness of the danger to one person [to suffice for liability] when another person is harmed *and* the defendant was negligent as to that person." *Id.*; *see also Flores v. United States*, 37 A.3d 866 (D.C. 2011). Under the Model Penal Code, in contrast, this kind of divergence is viewed through the lens of legal causation; Model Penal Code § 2.03(2) provides that the variance between the actual result and the result designed, contemplated, or risked is immaterial if the only difference is whether a "different person or different property" is injured.

[328] Mistake-based divergences arise where the character of the circumstance actually harmed or affected by the actor's conduct is distinct from the character of the circumstance the person intended or risked harming or affecting. Divergence of this nature is most commonly associated with the commission of property crimes that grade based upon the nature of the property violated: consider, for example, the prosecution of defendant who, "in a jurisdiction which by statute makes burglary of a dwelling a more serious offense than burglary of a store, reasonably believes that the building he has entered is a store when it is in fact a dwelling." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Historically, these issues were disposed of by the judicially-created "lesser legal wrong" or "moral wrong" doctrines, which dictated that "the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong." *Id.* The Model Penal Code, in contrast, denies a mistake defense under these circumstances if the "defendant would be guilty of another offense had the situation been as he supposed," but thereafter "reduce[s] the grade and degree of the offense of which [defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed." Model Penal Code § 2.04(2).

[329] Reform codes do not typically codify general provisions addressing accident-based or mistake-based divergences, see LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. §§ 5.6, 6.4, while both of the relevant Model Penal Code provisions addressing these issues, Model Penal Code §§ 2.03(2) and 2.04(2), have been the subject of significant criticism. *See, e.g.,* Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000); Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321 (2013); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984). It is also an open question whether a special doctrine is even necessary to deal with accident-

§§ 22E-208(a) & (b)—Effect of Accident, Mistake and Ignorance on Liability & Correspondence Between Mistake and Culpable Mental State Requirements

Relation to National Legal Trends. Subsections (a) and (b) codify well-accepted common law principles and are generally in accordance with national legislative trends. Importantly, however, these provisions depart from standard legislative practice in three ways: (1) by addressing the relationship between mistake, ignorance, and culpable mental states without reference to "defenses"; (2) by clarifying that the same logical relevance approach governing mistake and ignorance similarly applies to accidents; and (3) by further clarifying the nature of the correspondence between mistake and culpable mental state requirements under the traditional reasonable/unreasonable distinction.

Claims that a defendant did not satisfy the *mens rea* of the charged offense by virtue of some accident,[330] mistake[331] or ignorance[332] as to a matter of fact or law have long been recognized by the common law as a viable defense theory.[333] At the same time, however, courts have historically struggled to deal with these claims in a clear, consistent, and principled manner—indeed, "[n]o area of the substantive criminal law has traditionally been surrounded by more confusion."[334]

The most frequently referenced form of this type of claim is based on an erroneous factual belief—or generalized ignorance—concerning the ownership status of a particular piece of property.[335] In a paradigm mistake of fact scenario, a person takes a piece of property owned by someone else motivated by the mistaken belief that it was abandoned.[336]

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based divergences, see *Brooks v. United States*, 655 A.2d 844, 848 (D.C. 1995) (citing *Moore v. United States,* 508 A.2d 924 (D.C. 1986)), or whether the offenses in the Revised D.C. Code will be structured in a manner to necessitate a statement on mistake-based divergences, see *Carter v. United States*, 591 A.2d 233, 234 (D.C. 1991) (discussing D.C. Code § 48-904.01).

[330] Generally speaking, "[a]n accident occurs when one brings about a result without desiring or foreseeing it." Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) [hereinafter, *Mistake and Impossibility*].

[331] In contrast to accidents, "[m]istakes occur in the realm of perception; they involve false beliefs." Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 65, 73 (1996).

[332] "'Ignorance' implies a total want of knowledge—a blank mind—regarding the matter under consideration." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012). This is in contrast to mistakes, which "suggests a wrong belief about the matter." *Id.* As a result, the terms "[i]gnorance" and "mistake" are "not synonyms." *Id.* Nevertheless, "this distinction typically is not drawn" in the relevant cases. *Id.* What is important is that both terms "describe the absence of a particular state of mind as to a circumstance element, but not as to a conduct or result element." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). For purposes of this commentary, ignorance can be assimilated within mistake.

[333] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6 (Westlaw 2017); DRESSLER, *supra* note 19, at § 12.01. Note that mistakes or ignorance as to a matter of *penal* law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the *mens rea* of an offense. *Id.* This commentary does not discuss such issues except to the extent that proof of a culpable mental state as to a matter of penal law is an element of an offense. For discussion of offenses that incorporate proof of a culpable mental state as to a matter of penal law as an element of an offense, see Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1579-80 (2006).

[334] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

[335] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

[336] *See, e.g., Simms*, 612 A.2d at 219. For an example of an accident claim, in contrast, imagine that the person later realizes the property was not, in fact, abandoned and thereafter attempts to return it to its lawful

If later prosecuted for a theft offense, that person will argue that because of this mistaken belief as to the property's ownership statute, he or she lacked the *mens rea* necessary for a conviction.[337]

At common law, courts relied upon a three-part offense categorization scheme to address claims of this nature.[338] For specific intent crimes, the general rule was that an honestly held mistake could serve as a defense to the crime charged, regardless of whether the mistake was reasonable or unreasonable.[339] For general intent crimes, in contrast, courts applied a reasonable mistake doctrine, under which an honestly held mistake could serve as a defense to the crime charged only if it was reasonable.[340] And for strict liability crimes, courts simply held that no mistake, no matter its reasonableness, could serve as a defense.[341]

Categorical rules of this nature were understood to address the level of culpability required by the class of offense at issue. The problem, however, is that there was little principled basis upon which to pin the distinction between "general intent" and "specific intent" in the first place.[342] After all, "[n]either common experience nor psychology knows of any such phenomenon as 'general intent' distinguishable from 'specific intent.'"[343] In the absence of legislative guidance on whether an offense was one of specific intent or general intent, that classification decision—as well as the ultimate policy judgment concerning whether any particular kind of mistake ought to provide the basis for exoneration—was left to the courts.

In making that policy determination, moreover, this binary categorization scheme failed to provide courts with a basis for accounting for the different kinds of mistakes that could potentially arise. For example, the distinction between reasonable and unreasonable mistakes at the heart of the common law approach overlooked the potential relevance of a reckless mistake—which "occurs when an actor is aware of a substantial risk that the circumstance exists"—to liability.[344]

Perhaps more problematic, however, was the fact that courts themselves often failed to accurately perceive the nature of what they were doing. Whether in the context of considering claims of mistake or accident, judicial reliance on the distinctions between general intent and specific intent crimes had a tendency to lead courts to view the relevant issues as distinct from the government's burden of proof, and, therefore, to treat them as

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owner. If, in the course of trying to return that property, he or she unintentionally drops it on the floor, thereby destroying it, the person could raise the accidental nature of the dropping as a defense in the context of a destruction of property prosecution.

[337] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[338] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[339] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[340] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[341] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

[342] The main, and perhaps only, exception to this phenomenon were those offenses that expressly required proof of "an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the actus reus of the offense." DRESSLER, *supra* note 19, at § 10.06. These so-called partially inchoate offenses were quite consistently treated as specific intent offenses at common law. *See* Model Penal Code § 2.08 cmt. at 356.

[343] People v. Kelley, 176 N.W.2d 435, 443 (Mich. 1970).

[344] ROBINSON & CAHILL, *supra* note 10, at 195.

"affirmative defenses"[345]—for which the defendant may ultimately bear the burden of proof—rather than "absent element defenses"[346]—for which the defendant may not.[347]

The source of most of the foregoing problems, as many jurisdictions have come to recognize, was the flawed method of analyzing culpability, offense analysis, upon which the common law approach to mistake and accident was premised. By "failing to distinguish between elements of the crime, to which different mental states may apply,"[348] offense analysis lacked the conceptual toolkit necessary to appreciate what the modern conception of culpability, element analysis, clarified: resolving claims of mistake, ignorance, and accident amount to little more than a "negative statement" of the culpable mental state governing the particular objective element to which it applies.[349]

To appreciate the reciprocal nature of this relationship consider the role that a mistaken belief as to abandonment, such as that discussed *supra*, plays in the context of a theft offense with the following *actus reus*: "No person shall unlawfully use the property of another." In this context, the nature of the mistaken belief as to abandonment that will exonerate is part and parcel with the culpable mental state requirement (if any) applicable to the circumstance "of another."[350]

For example, application of a knowledge mental state requirement to that circumstance means that any honest mistake as to the property's ownership status shall exonerate, since someone who wholeheartedly believed—whether reasonably or unreasonably—that property X was abandoned cannot, by definition, have been practically certain (i.e., knew) that property X was owned by someone else. But if, in contrast, the government need only prove the accused was negligent as to whether the property was "of another" to secure a conviction, only a reasonable mistake (or at least a mistake that is not grossly unreasonable) as to the property's ownership status can negate the existence of the culpable mental state requirement. Negligence, after all, does not require proof that the

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[345] An affirmative defense is contingent upon conditions or circumstances unrelated to the elements contained in the charged offense. When an affirmative defense—typically either a justification or excuse—is successfully raised it exonerates the accused *notwithstanding the fact that the government proved all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

[346] An absent element defense is contingent upon conditions or circumstances directly related to the elements of the charged offense. When an absent element defense is successfully raised it exonerates the accused *because the government cannot, by virtue of the defense's existence, prove all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

[347] The United States Supreme Court has held that the states and the federal government must be allocated the burden of persuasion with regard to the requisite culpable mental state for each objective element of the crime(s) charged. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979). For compilations of case law addressing mistake and accident claims which may conflict with this principle, see, for example, Robinson & Grall, *supra* note 19, at 758; 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, 255 nos. 100 & 101 (1997); see also Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 356-57 (1986).

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

[349] Robinson & Grall, *supra* note 19, at 726–27. As Dressler similarly observes: "[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense." DRESSLER, *supra* note 19, at § 12.02.

[350] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

accused was aware of the substantial risk he or she disregarded, only that the reasonable person in the accused's situation *would have been aware of that risk*.[351]

This kind of element analysis offers similar insights for the adjudication of accident claims, which can primarily be distinguished from mistake claims by the objective element to which they relate: whereas mistakes implicate the culpable mental state governing circumstance elements, accidents typically involve the culpable mental state governing result elements.[352] For example, "[o]ne makes a 'mistake' as to another's age or property, the obscene nature of a publication, or other circumstance elements, but one 'accidentally' injures another, pollutes a stream, or interferes with a law enforcement officer."[353] "To say," therefore, "that a non-negligent accident that causes a prohibited result provides a defense is simply to say that all offenses containing result elements require at least negligence as to causing the prohibited result."[354]

The drafters of the Model Penal Code, themselves initially responsible for devising element analysis, understood the extent to which the common law confusion surrounding issues of mistake and ignorance could ultimately be traced back to judicial reliance on offense analysis. Addressing the varied problems this reliance produced was, therefore, at the forefront of the drafters' minds as they undertook their work of simplifying and rendering more coherent the American law of culpability.

Aided by the insights of element analysis, the drafters accurately perceived that "ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability."[355] These principles were understood by the drafters to be implicit in the requirement that the government prove every element of an offense—including culpable mental states—beyond a reasonable doubt.[356] Nevertheless, the drafters nevertheless chose to explicitly codify them for purposes of clarity.

The relevant provision, § 2.04(1) of the Model Penal Code, establishes that:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
>
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or

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[351] Likewise, if a culpable mental state of recklessness governed the circumstance "of another," then an unreasonable mistake as to whether property X was abandoned can negate the existence of the requisite culpable mental state requirement, so long as the defendant was merely negligent, but not reckless, in making that mistake. *See* Robinson & Grall, *supra* note 19, at 726–27.

[352] *See, e.g.,* Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1080 (1997); Simons, *Mistake and Impossibility*, *supra* note 17, at 504-07; Husak, *supra* note 18, at 65.

[353] Robinson & Grall, *supra* note 19, at 732.

[354] *Id.* As the DCCA observed in *Carter v. United States*: "It is only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care notwithstanding that the accident occurred, that an unavoidable accident instruction is proper." 531 A.2d at 964 (quoting *Bickley v. Farmer*, 215 Va. 484, 488 (1975)).

[355] Model Penal Code § 2.04 cmt. at 269.

[356] Robinson & Grall, *supra* note 19, at 727.

> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.

The explanatory note accompanying this provision communicates the drafters' stated intent of clarifying that "ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense," which in turn depends "upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02."[357]

Generally speaking, Model Penal Code § 2.04(1) has been quite influential. It is now commonly accepted, for example, that "ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged."[358] And codification of a general provision modeled on § 2.04(1) is a well-established part of modern code reform efforts: a strong majority of reform jurisdictions—as well as well as all of the major model codes and recent comprehensive code reform projects—codify a comparable provision.[359] Likewise, courts in jurisdictions that never modernized their codes have endorsed Model Penal Code § 2.04(1) through case law.[360]

Notwithstanding the broad popularity of the Model Penal Code approach, however, many reform jurisdictions have opted to modify § 2.04(1) in one or more ways.[361] For example, a plurality of jurisdictions link the significance of mistakes to disproving the requisite culpable mental state without reference to "defenses" at all—as is the case in Model Penal Code § 2.04(1)(a)—and instead focus solely on when a given mistake "negatives" an element of the offense.[362] Another common variance is reflected in the plurality of jurisdictions that omit the second prong of Model Penal Code § 2.04(1)(b) altogether, opting against inclusion of an explicit statement that "[i]gnorance or mistake as

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[357] Model Penal Code § 2.04—Explanatory Note.

[358] LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; *see, e.g, People v. Andrews,* 632 P.2d 1012, 1016 (Colo. 1981) *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). There is, however, one exception: "if the defendant would be guilty of another crime had the situation been as he believed, then he may be convicted of the offense of which he would be guilty had the situation been as he believed it to be." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. For further discussion of this issue, see *infra* note 69.

[359] For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Ark. Code Ann. § 5-2-206; Colo. Rev. Stat. Ann. § 18-1-504; Haw. Rev. Stat. Ann. § 702-218; 720 Ill. Comp. Stat. Ann. 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Ky. Rev. Stat. Ann. § 501.070; Me. Rev. Stat. tit. 17-A, § 36; Mont. Code Ann. § 45-2-103; N.H. Rev. Stat. Ann. § 626:3; N.J. Stat. Ann. § 2C:2-4; N.Y. Penal Law § 15.20; N.D. Cent. Code Ann. § 12.1-02-03; 18 Pa. Stat. and Cons. Stat. Ann. § 304; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For model codes, see Brown Commission § 304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207. Note also that "[e]ight other states that do not emulate the Model Penal Code's key culpability provisions have also codified the mistake of fact doctrine," most of which "also take the position that the doctrine primarily sanctions a challenge to the prosecution's ability to prove the requisite culpable mental state." Holley, *supra* note 34, at 247-48.

[360] *See, e.g. United States v. Aitken*, 755 F.2d 188, 193 (1st Cir. 1985); *Com. v. Lopez*, 745 N.E.2d 961, 964 (Mass. 2001).

[361] Holley, *supra* note 34, at 247-49 (collecting citations).

[362] For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Colo. Rev. Stat. Ann. § 18-1-504; Conn. Gen. Stat. Ann. § 53a-6; Ky. Rev. Stat. Ann. § 501.070; Mo. Ann. Stat. § 562.031; N.H. Rev. Stat. Ann. § 626:3; N.Y. Penal Law § 15.20. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense."[363]

Modifications aside, it is nevertheless clear that Model Penal Code § 2.04(1) broadly reflects the standard legislative approach for dealing with issues of mistake and ignorance. Consistent with national codification trends, §§ (a) and (b) incorporate a comparable standard into the Revised Code, which clarifies what is otherwise implicit in the requirement that a conviction rest upon proof of all offense elements beyond a reasonable doubt: that a person's mistake or ignorance will typically relieve that person of liability when (and only when) it precludes the person from acting with the culpable mental state requirement applicable to an objective element. That being said, there are three important ways in which the Revised Code departs from Model Penal Code § 2.04(1).

First, the logical relevance principle incorporated into the Revised Code does not reference "defenses" in any capacity. For example, § (a) reframes the rule of logical relevance stated in Model Penal Code § 2.04(1)(a) to solely focus on whether a given mistake or ignorance "negates" the existence of a culpable mental state requirement. Likewise, § (a) omits a provision like Model Penal Code § 2.04(1)(b), thereby avoiding any reference to specific laws providing for "[i]gnorance or mistake as to a matter of fact or law serv[ing] as a defense."

Both of these modifications—each of which is consistent with the plurality legislative trends noted above—are intended to avoid the significant judicial and legislative confusion that "characterizing the mistake of fact doctrine as a 'defense'" has produced in many jurisdictions.[364] In an attempt to avoid this kind of confusion, § (a) more clearly communicates that mistake "does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution's ability to prove the requisite culpable mental state beyond a reasonable doubt."[365]

A related area of confusion, addressed by § (b), is the nature of the correspondence between mistake and culpable mental state requirements. Although courts in reform jurisdictions generally seem to have recognized that "determining whether a reasonable or an unreasonable mistake as to a particular [] circumstance element will provide a defense requires nothing more than determining what culpable state of mind is required as to that

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[363] For reform jurisdictions, see Ariz. Rev. Stat. Ann. § 13-204(a); Ill. Comp. Stat. 720 § 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Mo. Ann. Stat. § 562.031; Tenn. Code Ann. § 39-11-502; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

[364] Holley, *supra* note 34, at 254; *see* Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 205 (2003).

[365] Holley, *supra* note 34, at 247. As LaFave phrases it: "Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Consistent with that analysis, Model Penal Code § 2.04(1)(b), by providing that "[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense," is "doubly superfluous." ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62. For an application of this provision, see Model Penal Code § 223.1(3)(a), which provides a defense for an actor who took property when he "was unaware that the property or service was that of another . . . ." For recognition by the Model Penal Code drafters that this defense is redundant and that such an actor would be exculpated by the normal operation of the culpability requirements, see Model Penal Code § 223.1 cmt. at 153

element,"[366] judges have struggled to accurately translate this principle into specific rules that accurately translate the traditional distinctions between reasonable and unreasonable mistakes into rules that track the relevant culpable mental states.[367] This is particularly true, moreover, in the area where the translation is most difficult, determining the kind of mistake that negates the existence of recklessness.[368] With that in mind, and consistent with case law,[369] commentary,[370] and the general provisions incorporated into two recent comprehensive criminal code reform projects,[371] § (b) provides District courts with the basic rules of translation. Such guidance is intended to avoid the confusion which silence

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[366] Robinson & Grall, *supra* note 19, at 729. As the New Jersey Supreme Court frames the inquiry: "[W]e relate the type of mistake involved to the essential elements of the offense, the conduct proscribed, and the state of mind required to establish liability for the offense." *State v. Sexton*, 733 A.2d 1125, 1130 (N.J. 1999).
[367] ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62 (collecting citations).
[368] As Robinson and Grall observe:

> [T]he translation is uncertain at its most critical point: in determining the kind of mistake that provides a defense when recklessness, the most common culpability level, as to a circumstance is required. [A] negligent or faultless mistake negates (necessarily precludes the existence of) recklessness. While a "negligent mistake" may be said to be an "unreasonable mistake," all "unreasonable mistakes" are not "negligent mistakes." A mistake may also be unreasonable because it is reckless. Reckless mistakes, although unreasonable, will not negate recklessness. Thus, when offense definitions require recklessness as to circumstance elements, as they commonly do, the reasonable-unreasonable mistake language inadequately describes the mistakes that will provide a defense because of the imprecision of the term "unreasonable mistake." Reckless-negligent-faultless mistake language is necessary for a full and accurate description.

Robinson & Grall, *supra* note 19, at 729; *see, e.g*, ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62; Holley, *supra* note34, at 233 n.12.
[369] For example, in *Laseter v. State*, an Alaska appellate court determined because the offense of sexual assault in the first degree requires recklessness as to lack of consent in Alaska, it was reversible error to instruct the jury to acquit if the jury found that defendant had a "reasonable belief" that the victim consented—the "reasonable belief" instruction permitted the jury to convict on the basis of negligence as to lack of consent. 684 P.2d 139, 142 (Alaska Ct. App. 1984). For a similar recognition in the context of negligence and unreasonable mistakes, see Doe v. Breedlove, 906 So. 2d 565, 573 (La. Ct. App. 2005).
[370] *See, e.g.*, sources cited *supra* note 55.
[371] For example, § 207(2)-(3) of the Illinois Reform Project reads:

> (2) *Correspondence Between Mistake Defenses and Culpability Requirements.* Any mistake as to an element of an offense, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A negligent mistake as to an element of an offense will negate the existence of intention, knowledge, or recklessness as to that element. A reasonable mistake as to an element of an offense will negate intention, knowledge, recklessness, or negligence as to that element.
>
> (3) *Definitions.*
> (a) A "reckless mistake" is an erroneous belief that the actor is reckless in forming or holding.
> (b) A "negligent mistake" is an erroneous belief that the actor is negligent in forming or holding.
> (c) A "reasonable mistake" is an erroneous belief that the actor is non-negligent in forming or holding.

Section 501.207 of the Kentucky Revision Project proposes a substantively identical general provision.

on such issues can create, and, therefore, increase the clarity and consistency of District law.

The third noteworthy aspect of the Revised Code is its application of the logical relevance principle incorporated into § (a) to accidents, alongside mistakes and ignorance. This dual application of the logical relevance principle constitutes a departure from modern legislative trends: few reform codes address the import of accidents and, to the extent they do, accidents are viewed through the lens of legal causation.[372]

More specifically, these few reform code provisions incorporate the "fresh approach"[373] to legal causation developed by the drafters of the Model Penal Code and implemented through Model Penal Code § 2.03(2).[374] For the reasons discussed in the commentary to Revised Code § 22A-204(c), however, this approach generally constitutes a problematic departure from the common law.[375] With respect to treatment of accidents in particular, though, what the Model Penal Code (and relevant state-based provisions) miss is that whether a claim of accident or mistake is raised, both effectively raise a culpable mental state issue, namely, whether the government can meet its affirmative burden of proof concerning the culpable mental state requirement governing an offense.[376]

This insight is reflected in District case law, which recognizes that "[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element."[377] And it is also reflected in case law from outside of the District, which similarly views accidents through the lens of

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[372] *See* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303. For reform jurisdictions with similar provisions, see Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.

[373] Model Penal Code § 2.03 cmt. at 254.

[374] The relevant provisions addressing accidents in Model Penal Code § 2.03(2) read:

> (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
>
> (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused . . . .
>
> (3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:
>
> (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused . . . .

[375] *See* Commentary to Revised Criminal Code § 204(c), Nationwide Legal Trends.

[376] *See, e.g.,* Paul H. Robinson, *The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 No. 6 CRIM. LAW BULLETIN Art. 3 (Winter 2015).

[377] D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). Outside of the District, court decisions often similarly contrast accident with culpability requirements as to results. *See, e.g.,* People v. Eveland, 81 Ill. App. 3d 97 (1980); People v. Schwartz, 64 Ill. App. 3d 989 (1978); People v. Morrin, 31 Mich. App. 301 (1971).

mens rea.[378] In accordance with these authorities, and in furtherance of the interests of clarity and consistency, § (a) explicitly articulates that accidents are subject to the same general rule of logical relevance as mistakes.

Viewed collectively, the broadly applicable logical relevance principle set forth by §§ (a) and (b) should secure for the District one of the primary benefits of element analysis: "eliminating the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements."[379] There is, however, one additional benefit of codifying this logical relevance principle that bears notice: it should provide the basis for more clearly and consistently dealing with those exceptional situations where the distinctively culpable nature of a particular kind of mistake, ignorance, or accident justifies imputing the relevant culpable mental state—considerations of logical relevance aside.

An illustrative example is presented by an actor who suspects a prohibited circumstance exists but deliberately avoids the acquisition of guilty knowledge in order to preserve a defense.[380] Under these circumstances, it is clear that—pursuant to § (a)—the actor's ignorance would negate the existence of the culpable mental state of knowledge applicable to that circumstance. At the same time, however, it is also generally recognized that deliberate ignorance of this nature should not preclude a conviction for a crime that imposes a requirement of knowledge as to a prohibited circumstance given the comparable blameworthiness of the actor's conduct. Consistent with this recognition, Revised D.C. Code § 208(c) clearly delineates deliberate ignorance as an exception to the logical relevance principle stated in § (a) by authorizing courts to impute knowledge in the relevant

[378] ROBINSON, *supra* note 14, 1 CRIM. L. DEF. § 63 n.4; *see, e.g., People v. Eveland*, 81 Ill. App. 3d 97 (1980); *People v. Schwartz*, 64 Ill. App. 3d 989 (1978); *People v. Morrin*, 31 Mich. App. 301 (1971); *City of Columbus v. Bee*, 425 N.E.2d 409 (Ohio Ct. App. 1979); *Hall v. State*, 431 A.2d 1258 (Del. 1981).
[379] Robinson & Grall, *supra* note 19, at 704.
[380] *See infra*, Commentary to Revised D.C. Code § 208(c), National Legal Trends, for a more detailed discussion of the topic of deliberate ignorance.

circumstances. Additional imputation provisions have not been incorporated into § 208 to deal with situations involving accident-based[381] or mistake-based[382] divergences.[383]

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

Relation to National Legal Trends. Section 209 reflects common law principles and legislative practice in many reform jurisdictions. However, the precise manner in which § 209 addresses the issue of intoxication simplifies and renders more transparent the approach in reform codes.

In "early American law," there was a "stern rejection of inebriation as a defense" by the courts, which did not "permit the defendant to show that intoxication prevented the

[381] Accident-based divergences most frequently arise where the victim or property actually harmed or affected by an actor's conduct is different than the particular victim or property the person intended or risked harming or affecting, as the case may be. Divergence of this nature is most commonly associated with bad-aim cases: "[W]hen one person (*A*) acts (or omits to act) with intent to harm another person (*B*), but because of a bad aim he instead harms a third person (*C*) whom he did not intend to harm." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4. Typically, these situations are dealt with by the judicially created doctrine of "transferred intent," which treats an actor such as *A* "just as guilty as if he had actually harmed the intended victim." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4; *see Ruffin v. United States*, 642 A.2d 1288 (D.C. 1994). Likewise, under a corollary doctrine of "transferred recklessness" courts allow for a "defendant's conscious awareness of the danger to one person [to suffice for liability] when another person is harmed *and* the defendant was negligent as to that person." *Id.*; *see also Flores v. United States*, 37 A.3d 866 (D.C. 2011). Under the Model Penal Code, in contrast, this kind of divergence is viewed through the lens of legal causation; Model Penal Code § 2.03(2) provides that the variance between the actual result and the result designed, contemplated, or risked is immaterial if the only difference is whether a "different person or different property" is injured.

[382] Mistake-based divergences arise where the character of the circumstance actually harmed or affected by the actor's conduct is distinct from the character of the circumstance the person intended or risked harming or affecting. Divergence of this nature is most commonly associated with the commission of property crimes that grade based upon the nature of the property violated: consider, for example, the prosecution of defendant who, "in a jurisdiction which by statute makes burglary of a dwelling a more serious offense than burglary of a store, reasonably believes that the building he has entered is a store when it is in fact a dwelling." LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Historically, these issues were disposed of by the judicially-created "lesser legal wrong" or "moral wrong" doctrines, which dictated that "the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong." *Id.* The Model Penal Code, in contrast, denies a mistake defense under these circumstances if the "defendant would be guilty of another offense had the situation been as he supposed," but thereafter "reduce[s] the grade and degree of the offense of which [defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed." Model Penal Code § 2.04(2).

[383] Reform codes do not typically codify general provisions addressing accident-based or mistake-based divergences, see LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. §§ 5.6, 6.4, while both of the relevant Model Penal Code provisions addressing these issues, Model Penal Code §§ 2.03(2) and 2.04(2), have been the subject of significant criticism. *See, e.g.,* Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000); Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321 (2013); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984). It is also an open question whether a special doctrine is even necessary to deal with accident-based divergences, see *Brooks v. United States*, 655 A.2d 844, 848 (D.C. 1995) (citing *Moore v. United States,* 508 A.2d 924 (D.C. 1986)), or whether the offenses in the Revised D.C. Code will be structured in a manner to necessitate a statement on mistake-based divergences, see *Carter v. United States*, 591 A.2d 233, 234 (D.C. 1991) (discussing D.C. Code § 48-904.01).

requisite *mens rea*."[384] However, "by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant possessed the *mens rea*" in some circumstances.[385] At the same time, the courts perennially struggled to identify those circumstances in a principled or clear way.[386] The cause for the confusion, like that surrounding the common law's treatment of accident, mistake, and ignorance, was judicial reliance on offense analysis.[387]

By conceiving of offenses as being comprised of a singular "umbrella culpability requirement that applie[s] in a general way to the offense as a whole"[388] courts lacked the tools necessary to recognize when intoxication could plausibly negate the existence of the culpable mental state governing one or more objective elements in an offense—let alone devise a principled policy exception to deal with those situations where intoxication should be precluded from providing the basis for exoneration. [389] Instead, courts chose, on an offense-by-offense basis, those crimes for which an intoxication defense seemed appropriate.[390] The labels of "general intent" and "specific intent" were utilized by courts to describe the *conclusion* of that process, namely, a "specific intent crime" was one for which evidence of voluntary intoxication may be relevant, while a "general intent" crime was one for which an intoxication defense could not be raised."[391]

This distinction between general intent and specific intent crimes was generally understood to represent a pragmatic "compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."[392] Though some courts (including the DCCA[393]) have at times spoken as through there exists some "intrinsic meaning to the terms,"[394] 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."[395] Lacking a clear or consistent framework to describe the relationship between *mens rea* and intoxication, however, judicial determinations typically lacked "even the pretense of a theoretical justification" or a "logical explanation."[396]

With acceptance of element analysis in reform jurisdictions came a clearer and more nuanced understanding of the issues presented by an intoxicated actor. Most importantly, element analysis highlights that—as with issues of accident, mistake, and ignorance—intoxication is only plausibly relevant when it negates the existence of one or

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[384] *Montana v. Egelhoff*, 518 U.S. 37, 44 (1996); *see, e.g.*, Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 484-91 (1997).
[385] *Egelhoff*, 518 U.S. at 44; *see, e.g.,* Keiter, *supra* note 29, at 484-91.
[386] *See, e.g.,* PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2017); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.03 (6th ed. 2012).
[387] *See, e.g.,* ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.
[388] PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).
[389] *See, e.g.,* ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.
[390] *See, e.g.,* ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.
[391] *See, e.g.,* ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.
[392] *People v. Hood*, 1 Cal. 3d 444, 455 (1969).
[393] *See, e.g., Kyle*, 759 A.2d at 199; *Washington*, 689 A.2d at 573.
[394] Keiter, *supra* note 29, at 497.
[395] *People v. Whitfield*, 7 Cal. 4th 437, 463 (1994) (Mosk, J., concurring in part and dissenting in part). Which is to say that "[t]he distinction between general intent and specific intent evolved as a judicial response to the problem of the intoxicated offender." *Hood*, 1 Cal. 3d at 455.
[396] ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

more of the culpable mental states incorporated into the crime charged, which, as a practical matter, is possible for any subjective culpable mental state[397]—for example, purpose,[398] knowledge,[399] or recklessness.[400] By clarifying that intoxication can plausibly negate the existence of any subjective culpable mental state, however, element analysis also reveals a fundamental tension presented by an intoxicated actor: whereas that actor may not have been aware of a risk to a protected societal interest *because of* his or her intoxicated state, getting intoxicated is itself a risky activity and thus intuitively seems like an inappropriate basis for exonerating an actor in some cases.[401]

Illustrative is the situation of a person who knowingly drinks a significant amount of alcohol at a house party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which—unbeknownst to the person given his intoxicated state—repeatedly shatter the windows of nearby homes, causing thousands of dollars in damage. If this person is later charged with a property destruction offense that prohibits "recklessly damaging the property of another," the person may argue that, due to the person's intoxicated state, he or she lacked the awareness of a substantial risk of harm necessary to establish recklessness under the statute. At the same time, however, given the known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his own defense, it may be inappropriate to allow self-induced intoxication of this nature to constitute a means of exoneration.[402]

The drafters of the Model Penal Code, informed by the insights of element analysis, appreciated both the general nature of the relationship between intoxication and culpable mental states, as well as the specific tension that relationship could create under particular circumstances.[403] And they also appreciated the range of problems that judicial reliance on offense analysis had created for the common law of intoxication.[404]

The drafters' solution was the creation of a legislative framework comprised of an imputation approach to intoxication, which generally accepted that evidence of intoxication could be presented whenever relevant to negating the existence of a culpable mental state. However, the framework also provided that where self-induced intoxication

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[397] *See, e.g.,* Miguel Angel Mendez, *A Sisyphean Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 433 (1995); *State v. Coates*, 735 P.2d 64, 72 (Wash. 1987) (Goodloe, J. concurring); *Egelhoff*, 518 U.S. at 62-70 (O'Conner, J. dissenting).

[398] Intoxication has the capacity to negate the culpable mental state of purpose when, due to the person's intoxicated state, that person was unable or otherwise failed to consciously desire to cause a prohibited result or to consciously desire that a prohibited circumstance have existed.

[399] Intoxication has the capacity to negate the culpable mental state of knowledge when, due to the person's intoxicated state, that person was unable to or otherwise failed to be practically certain that a prohibited result would follow from his or her conduct or to be practically certain that a prohibited circumstance existed.

[400] Intoxication has the capacity to negate the culpable mental state of recklessness when, due to the person's intoxicated state, that person was unable to or otherwise failed to be aware of a substantial risk that a prohibited result would follow from his or her conduct or to be aware of a substantial risk that a prohibited circumstance existed.

[401] *See, e.g.,* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 537 (2d ed. 1960).

[402] *See, e.g.,* WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017).

[403] *See* Model Penal Code § 2.08 cmt. at 354-59.

[404] *See id.*

was at issue, proof that the actor would have been aware of a risk had he or she been sober could provide an alternative basis for establishing recklessness.[405]

This approach is implemented through Model Penal Code § 2.08. Model Penal Code § 2.08(1) establishes that intoxication "is not a defense unless it negatives an element of the offense." Though framed in the negative, this provision essentially recognizes that intoxication, whether self-induced or involuntary, may always serve as an absent element defense whenever it logically precludes the government from meeting its burden. However, Model Penal Code § 2.08(2) then creates an exception to this rule as it pertains to crimes defined in terms of recklessness. That rule reads as follows:

> When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.[406]

In practical effect, this provision "boosts the negligence of voluntarily intoxicated persons" at the time of their conduct "to the culpability of recklessness," subject to a causation limitation, i.e., the accused's intoxicated state must have been the *cause of her unawareness* in order to activate the rule.[407]

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[405] The Model Penal Code justified this resolution of the "[t]wo major problems" present by intoxication claims as follows:

> The first . . . is the question whether intoxication ought to be accorded a significance that is entirely co-extensive with its relevance to disprove purpose or knowledge . . . . We submit that the answer clearly ought to be affirmative . . . . [W]hen purpose or knowledge, as distinguished from recklessness, is made essential for conviction, the reason very surely is that in the absence of such states of mind the conduct involved does not present a comparable danger . . . ; or that the actor is not deemed to present as significant a threat . . . ; or, finally, that the ends of legal policy are served by bringing to book or subjecting to graver sanctions those who consciously defy the legal norm . . . .
>
> The second and more difficult question relates to recklessness, where awareness of the risk created by the actor's conduct ordinarily is a requisite for liability. . . . [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes . . . .

Model Penal Code § 2.08 cmt. at 358-59.

[406] Model Penal Code § 2.08(2).

[407] Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1220-21 (1999). Under the Model Penal Code approach, "if negligence is the mens rea required for the crime, and the question is whether defendant failed to advert to a risk to which the reasonable person would have adverted . . . defendant's voluntary intoxication as the explanation for his not recognizing the risk would establish his inadvertence as unreasonable." Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 217 (1996). As a result, the Model Penal Code approach also embodies an "Intoxication Negligence Principle:

The Model Penal Code drafters believed that the foregoing approach would provide the basis for a clearer and more principled treatment of intoxication claims than was otherwise evident in the common law. At the same time, however, the approach they devised was explicitly intended to approximate the prevailing common law trends. As the drafters observed:

> To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant. When, on the other hand, recklessness or negligence . . . suffices to establish the offense, an exculpation based on intoxication is precluded by the law.[408]

Viewed through the lens of the common law, then, the logical relevance test in Model Penal Code § 2.08(1) roughly approximates the specific intent rule governing intoxication claims, while the rule of reckless imputation in Model Penal Code § 2.08(2) roughly approximates the general intent rule—an approximation that has been recognized by a range of legal authorities.[409]

The imputation approach to intoxication developed by the Model Penal Code has been quite influential. A substantial number of reform jurisdictions—as well as all major model codes and recent comprehensive code reform projects—codify comparable provisions.[410] Likewise, "the majority of cases in America support the creation of a special

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If a defendant is unaware of a condition and intoxicated, and he became intoxicated voluntarily, then in assessing negligence with respect to that condition, he is to be compared to a sober reasonable person." Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 547 (2012). Note, however, that the Code's recklessness imputation provision in no way alters the ordinary requirements regarding mental states of purpose or knowledge. Rather, the Model Penal Code framework grants to voluntarily intoxicated persons the same defenses of absence of purpose or absence of knowledge that other persons possess, despite the fact that the intoxication may be responsible for their lack of purpose or knowledge. *See* Westen, *supra* note 52, at 1220-21.

[408] Model Penal Code § 2.08 cmt. at 354.

[409] For example, the Brown Commission observes that "[t]he [common law] decisions in which intoxication evidence has been considered" with respect to specific intent crimes can fruitfully be understood "in terms of whether . . . . purpose or knowledge is required." NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970) (hereinafter "Working Papers"). Likewise, Wharton's treatise observes that "[a] 'specific intent' is usually interpreted to mean [purposely] or knowingly." CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014). And both state and federal courts have observed that "a general intent crime" is one "for which recklessness is the required mens rea, and as to which voluntary intoxication may not provide a defense." *People v. Carr*, 81 Cal. App. 4th 837, 843 (2000); *see, e.g., United States v. Zunie*, 444 F.3d 1230, 1234-35 (10th Cir. 2006) (citing *United States v. Loera*, 923 F.2d 725 (9th Cir.1991) and *United States v. Ashley*, 255 F.3d 907 (8th Cir. 2001)); *see also Parker*, 359 F.2d at 1012 n.4.

[410] *See* Ala. Code § 13A-3-2; Ariz. Rev. Stat. Ann. § 13-105; Conn. Gen. Stat. Ann. § 53a-7; Ky. Rev. Stat. Ann. § 501.020(3); Me. Rev. Stat. Ann. tit. 17-A, § 37; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-8; N.Y. Penal Law § 15.05; N.D. Cent. Code § 12.1-04-02; Or. Rev. Stat. § 161.125; Tenn. Code Ann. § 39-11-503; Utah Code Ann. § 76-2-306. Alaska appears to adopt an imputation approach, but applies it to knowledge as well. *See* Alaska Stat. Ann. § 11.81.900. In contrast, Washington appears to apply a logical relevance test to all culpable mental states in the absence of a rule of imputation. *See* Wash. Rev. Code Ann.

rule relating to intoxication, so that, if the only reason why the defendant does not realize the riskiness of his conduct is that he is too intoxicated to realize it, he is guilty of the recklessness which the crime requires."[411]

Nevertheless, adherence to the imputation approach is by no means universal among reform jurisdictions. For example, a significant plurality followed a different legislative path to addressing intoxication—what might be referred to as the "evidentiary approach."[412] At the heart of the evidentiary approach is an evidentiary exclusion, which broadly limits the presentation of evidence regarding the voluntary intoxication of an accused as it pertains to a required culpable mental state.[413]

Illustrative is § 45-2-203 of the Montana Criminal Code, which establishes that "an intoxicated condition . . . may not be taken into consideration in determining the existence of a mental state that is an element of the offense."[414] Or, similarly, consider § 702-230 of the Hawaii Criminal Code, which establishes that "[e]vidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense."[415]

Generally speaking, these statutes dictate that a defendant may not present, and the jury may not consider, intoxication evidence for the purpose of disproving any kind of culpable mental state[416]—though it should be noted that some reform jurisdictions which otherwise subscribe to the evidentiary approach make exceptions for particular culpable mental states or particular crimes.[417] Whatever the scope of these general provisions, however, the evidentiary limitations they apply share three similar implications.

First, whereas the limitation *does* preclude the defense from rebutting the government's burden by relying upon evidence that she was intoxicated, it *does not* prevent the government from using evidence of intoxication to show that a defendant possessed a required culpable mental state for an offense.[418]

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§ 9A.16.090. For the imputation approach developed by the drafters of the federal criminal code, see Brown Commission § 502. For the imputation approach applied in recent code reform projects, see Kentucky Revision Project § 503.302 and Illinois Reform Project § 302.

[411] LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For federal cases citing to the Model Penal Code approach, see, for example, *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984); *Leal v. Holder*, No. 12-73381, 2014 WL 5742137, at *5 (9th Cir. Nov. 6, 2014); *United States v. Johnson*, 879 F.2d 331, 334 n.1 (8th Cir. 1989); *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984).

[412] *See, e.g.,* Haw. Rev. Stat. § 702-230; Mont. Code Ann. § 45-2-203; Ohio Rev. Code Ann. § 2901.21; Ind. Code Ann. § 35-41-2-5. For compilations and analysis of the evidentiary approach, see Westen, *supra* note 52, at 1225-26; ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65 n.11.

[413] The practice of excluding certain kinds of evidence, even if probative, for policy reasons is generally well established. *See, e.g.,* F.R.E. 403; F.R.E 802; *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

[414] Mont. Code Ann. § 45-2-203.

[415] Haw. Rev. Stat. § 702-230.

[416] *But see* infra note 80 for a discussion of ambiguity surrounding the relationship between the evidentiary approach and intoxication-induced accidents or mistakes.

[417] For example, Colorado appears to allow the presentation of intoxication evidence for "specific intent" crimes. Colo. Rev. Stat. Ann. § 18-1-804. And Pennsylvania appears to allow the presentation of intoxication evidence "whenever it is relevant to reduce murder from a higher degree to a lower degree of murder." 18 Pa. Stat. and Cons. Stat. Ann. § 308.

[418] For example, the government may find it useful to introduce evidence of voluntary intoxication to show that a bartender who tends to get into fights when intoxicated intended to strike a patron whom he struck.

Second, the limitation *does not* preclude the government or defense from presenting proof of self-induced intoxication to show that the accused either did, or did not, commit the *actus reus* of the offense.[419]

Third, and perhaps most importantly, such an approach *does not* enable prosecutors to substitute proof of self-induced intoxication for proof of a statutorily required culpable mental state—indeed, even if the accused was intoxicated at the time of the charged crime, the government nevertheless retains the burden under this approach to prove an offense's culpability requirement beyond a reasonable doubt. [420]

These implications are quite different than those that follow from the imputation approach (separate and apart from the culpable mental states to which they apply). For example, the imputation approach generally renders intoxication evidence immaterial to disproving recklessness by eliminating recklessness as a culpable mental state that the prosecution is required to prove in cases of voluntary intoxication—negligence plus the absence of recklessness caused by voluntary intoxication will suffice.[421] In contrast, the evidentiary approach explicitly precludes defendants from introducing evidence of voluntary intoxication to negate the existence of any culpable mental state that the prosecution invariably retains an obligation to prove—even in cases of voluntary intoxication.[422]

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[419] This is of course obvious where intoxication is actually an element of an offense (e.g., "driving while intoxicated" offenses) that must be proven beyond a reasonable doubt. But it is also true where an accused seeks to raise her intoxication as part of an *alibi defense*, i.e., a claim that the accused, because of her intoxication, could not have actually engaged in the physical activity required for commission of the offense.

[420] For example, as the Hawaii Supreme Court observed in *State v. Souza*, an evidentiary approach statute "does not deprive a defendant of the opportunity to present evidence to rebut the *mens rea* element of the crime," but "merely prohibits the jury from considering self-induced intoxication to negate the defendant's state of mind." 813 P.2d 1384, 1386 (Haw. 1991).

[421] Under an imputation approach, a jury may therefore be charged in a case involving the culpable mental state of recklessness to which a voluntary intoxication defense has been raised as follows:

> The defendant has been charged with an offense which ordinarily requires a mental state of recklessness on a defendant's part. However, the offense does not require recklessness of a defendant whose voluntary intoxication causes her to lack recklessness that she would otherwise possess. Accordingly, you may find the defendant guilty if you find either that she possessed a mental state of recklessness with respect to the conduct with which she is charged or that, while being negligent, and due to voluntary intoxication, she lacked a mental state of recklessness that she would otherwise have possessed.

Westen, *supra* note 52, at 1226.

[422] Under an evidentiary approach, a jury could therefore receive the following charge in a case implicating voluntary intoxication:

> The defendant has been charged with an offense that requires that she have acted with the culpable mental state of __. However, in considering whether the defendant possessed such mental states, you shall disregard any evidence of the defendant's voluntary intoxication in so far as it negates findings of culpability that you would otherwise make. Accordingly, you shall find the defendant guilty if, and only if, you find that the evidence shows that the defendant acted with the culpable mental state of ___—evidence of her voluntary intoxication to the contrary notwithstanding.

Westen, *supra* note 52, at 1226.

The foregoing practical differences, in turn, bring with them distinct constitutional implications: whereas the imputation approach does not appear to raise any meaningful constitutional issues,[423] the evidentiary approach has produced a large amount of constitutional litigation, some of which may still be unfolding.[424]

At the heart of this litigation is the U.S. Supreme Court's splintered decision in *Montana v. Egelhoff*, where the justices struggled to address the constitutionality of Montana's intoxication statute, which provides that voluntary intoxication "may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense."[425] A 5-4 majority ultimately held that the evidentiary limitation inherent in the Montana statute did not violate a defendant's constitutional right to present relevant evidence in criminal cases; however, the Court did so in a severely fractured opinion in which a narrow concurrence, penned by Justice Ginsburg, appears to govern.[426]

According to Justice Ginsburg, the Montana statute, although framed as an evidentiary limitation, was actually "a measure redefining mens rea."[427] That is, she interpreted Montana's statute to mean that any Montana offense may alternatively be established by proving the defendant, even if lacking one or more of the statutorily required culpable mental states, acted "under circumstances that would otherwise establish [that culpable mental state] 'but for' [the defendant's] voluntary intoxication."[428] Practically speaking, therefore, Justice Ginsburg deemed the evidentiary approach constitutional by more or less interpreting it as a rule of imputation.[429]

With the foregoing distinctions and complications in mind, legal commentary has been particularly critical of the evidentiary approach.[430] For example, Sanford Kadish has described the evidentiary approach as having a deeply problematic "Alice-in-Wonderland quality," given that it "retain[s] a *mens rea* requirement in the definition of the crime, but keep[s] the defendant from introducing evidence to rebut its presence."[431] Others believe

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[423] Generally speaking, the practice of imputing *mens rea* based on prior culpable conduct is a basic feature of American criminal law, see Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984)—and to the extent constitutional challenges have been raised with respect to the imputation approach to intoxication, they have been summarily rejected. *See, e.g., State v. Shine*, 479 A.2d 218 (Conn. 1984); *State v. Glidden*, 441 A.2d 728, 730 (N.H. 1982).

[424] *See, e.g., Souza*, 813 P.2d at 1386; *Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (Pa. 1983); *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001); *Rothwell v. Hense*, SACV 11-01046 SS, 2011 WL 5295286 (C.D. Cal. Nov. 3, 2011); *Leal v. Long*, No. SACV 12-0934-MWF JPR, 2013 WL 831038 (C.D. Cal. Jan. 15, 2013).

[425] Mont. Code Ann. § 45-2-203. For general critiques of *Egelhoff*, see, for example, Alexander, *supra* note 52, at 211; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

[426] As the U.S. Supreme Court has observed: "The holding of the Court [in a fractured opinion] may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

[427] *Egelhoff*, 518 U.S. at 58.

[428] *Id.*

[429] *See* LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

[430] *See, e.g.,* Westen, *supra* note 52; at 1228-47; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For an argument that the evidentiary approach creates a "permissive but irrebuttable inference" of *mens rea* in intoxication cases, see Alexander, *supra* note 52, at 199-200.

[431] Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 955 (1999); *see* DRESSLER, *supra* note 31, at § 24.03.

the evidentiary approach to be "draconian,"[432] "arbitrary,"[433] and "clearly wrong."[434] Finally, content aside, legal commentary highlights the extent to which it is unclear—both as a matter of policy and constitutional law—whether the evidentiary approach impermissibly "exclude[s] evidence of intoxication-induced accidents or mistakes" (as distinguished from the "intoxication-induced blackout" at issue in *Egelhoff*).[435]

In light of the above considerations, the Revised Criminal Code adopts a legal framework to address issues of intoxication that broadly accords with the imputation approach—namely it incorporates a rule of logical relevance, § 209(a), alongside a rule of recklessness imputation, § 209(c).

Overall, the imputation approach is a laudable attempt at translating the confusing and haphazard common law approach to intoxication—currently applicable in the District—into clear rules.[436] Although this framework is, as the Model Penal Code drafters themselves recognized, imperfect, it does a better job of collectively balancing the competing policy considerations implicated by the intoxicated actor than does the evidentiary approach.[437] It also finds strong support in legislative practice among reform jurisdictions and in case law.[438] Finally, this framework should avoid the potential constitutional issues implicated by *Egelhoff*.[439]

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[432] Alexander, *supra* note 52, at 215.

[433] *Commonwealth v. Henson*, 476 N.E.2d 947, 954 (Mass. 1985).

[434] LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

[435] Westen, *supra* note 52, at 1246. As Westen explains, *Egelhoff* involved an intentional killing which, the defendant argued, occurred "while in an automaton-like state of 'blackout' of which he had no memory." *Id.* at 1247. When the defendant "sought to buttress his testimony of blackout with evidence of heavy intoxication at the time, the Montana courts invoked Montana Code section 45-2-203 to bar the evidence." *Id.* This was directly in accordance with the Montana legislature's intent, as well as the legislative intent underlying similar statutes, which were "clearly designed to exclude evidence of intoxication-induced blackouts." *Id.* at 1248. Less clear, however, is how these statutes are intended to deal with the situation of a defendant who seeks to buttress his testimony of mistake or accident with intoxication evidence, as would be the case where "[a] radio thief asserts that he thought the radio belonged to himself" and thereafter attempts to "support his claim, which otherwise might be unbelievable, with evidence that he was drunk." *Id.* (quoting Arthur A. Murphy, *Has Pennsylvania Found A Satisfactory Intoxication Defense?*, 81 DICK. L. REV. 199, 202 (1977)). As Westen highlights, considerable authority—including an amicus brief submitted by eighteen jurisdictions that apply some form of an evidentiary approach, see Brief of the States of Hawaii, et al., as Amicus Curiae, Egelhoff (No. 95-966), at *17-18—suggests that the Montana statute "would not operate to exclude evidence of voluntary intoxication to prove accident or mistake" as a policy matter. Westen, *supra* note 52, at 1248-50 nos. 137-144; *see also id.* at 1250 (noting policy reasons for making this distinction). In any event, *Egelhoff* did not resolve this issue as a constitutional matter. *Id.* at 1250.

[436] *See* sources cited *supra* notes 53-54 and accompanying test.

[437] *See* Model Penal Code § 2.08 cmt. at 358-59; Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 436 (1998). Insofar as scholarly views are concerned, support for the imputation approach is less pronounced than the overwhelming disdain for the evidentiary approach. *See, e.g.,* Alexander, *supra* note 52, at 215. For criticism of the Model Penal Code approach, see ROBINSON, 1 CRIM. L. DEF. § 65; Alexander, *supra* note 52, at 214-15: Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 15-17 (1985); Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 609-10 (2001).

[438] *See* sources cited *supra* notes 55-56 and accompanying text.

[439] Note also that, *Egelhoff* aside, other U.S. Supreme Court case law suggests that jury instructions in jurisdictions that apply the evidentiary approach must be "carefully fashioned." LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. That is, an instruction which "creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible regardless of his state of mind . . .

It's important to note that while the intoxication framework reflected in § 209 is broadly consistent with Model Penal Code § 2.08 and the general intoxication provisions in reform codes that were modeled on it, § 209 departs from the standard imputation approach in a few notable ways.

First, the logical relevance principle incorporated into § 209(a) does not reference "defenses" in any capacity; instead, it mirrors the logical relevance principle governing accidents, mistake, and ignorance under § 208(a) by establishing that: "A person is not liable for an offense when that person's intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense." This is in contrast to the standard logical relevance principle, reflected in MPC § 2.08(1) and incorporated into numerous state criminal codes, which establishes that the "intoxication of the actor is not a defense unless it negatives an element of the offense."[440] To improve the clarity and consistency of the Revised Criminal Code, this departure is intended to better communicate that intoxication, like mistake, "does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution's ability to prove the requisite culpable mental state beyond a reasonable doubt."[441]

Second, § 209(b) departs from legislative practice by clarifying the nature of the correspondence between intoxication and culpable mental state requirements. Neither the Model Penal Code, nor reform codes, explicitly state when intoxication has the tendency to negate the existence of a given culpable mental state requirement. Subsection 209(b), in contrast, provides a set of general rules, which broadly establish that intoxication has the tendency to negate the existence of any subjective culpable mental state—namely, purpose, knowledge, and recklessness—when, due to the person's intoxicated state, that person did not act with the desire or level of awareness applicable to a result or circumstance under a given offense definition.[442] These rules explicitly articulate what is otherwise inherent in the requirement that the government prove the elements of an offense beyond a reasonable doubt. (In this sense, they run parallel with § 208(b), which serves a similar function in the context of mistake.) By providing District judges with these basic rules of translation, § 208(b) should enhance the clarity and consistency of District law.

Third, § 209(c) states a rule of recklessness imputation through a two-prong approach, which affirmatively and explicitly enunciates the government's burden of proof in cases of self-induced intoxication. This is intended to address two related flaws in Model Penal Code § 2.08(2) and the similar provisions incorporated into numerous state criminal codes.

The first flaw is one of drafting: typically, the rule of recklessness imputation is framed in the negative, establishing those situations where "unawareness is immaterial"

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violates due process under" the U.S. Supreme Court's decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Id.* (quoting *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993).

[440] *See* sources cited *supra* note 55.

[441] Dannye Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 247-49 (1997). Which is to say that the intoxication "defense" most closely resembles a mistake of fact "defense": "[n]either affirmatively exculpates; rather, they represent a failure of proof of an essential element (the requisite mens rea) of the crime, as evaluated in the act-oriented framework." Keiter, *supra* note 29, at 497; *see* DRESSLER, *supra* note 31, at § 24.07.

[442] Note, however, that the rule of imputation governing self-induced intoxication in § 209(c) severely limits the situations in which intoxication will actually negate recklessness.

for purposes of dealing with self-induced intoxication when it ought to be framed in the positive, establishing the government's affirmative burden of proof with respect to recklessness in cases involving self-induced intoxication. A few reform jurisdictions appear to have recognized this problem, opting to reframe Model Penal Code § 2.08(2) as an alternative definition of "recklessly" contained in their general parts.[443]

Even these jurisdictions, however, fail to address a second flaw in Model Penal Code § 2.08(2): its failure to explicitly clarify what the government's burden of proof actually is. To generally state, for example, "that defendants are guilty of crimes of recklessness if they 'would have been aware' of the risks if sober, can be interpreted in [a variety of] ways."[444] That being said, it is reasonably clear from the Model Penal Code commentary that the drafters "intended to hold voluntarily intoxicated persons responsible for conduct that would constitute negligence if they were sober."[445] If true, however, then they should have more clearly articulated this "Intoxication Recklessness Principle" [446] through the text of the Model Penal Code itself.

In the interests of clarity and consistency in the Revised Criminal Code, § (c) resolves both of these flaws by affirmatively articulating when and how proof of self-induced intoxication can provide an alternative means for proving recklessness. It authorizes courts to impute the culpable mental state of recklessness in the context of self-induced intoxication based upon proof that: (1) but for the person's intoxicated state the person would have been aware of a substantial risk that the person's conduct would cause a result or that a circumstance existed; and (2) the person otherwise acted negligently as to the requisite result or circumstance.

One final group of variances relate to intoxication-related issues that the Revised Criminal Code does not address. For example, § 209 is generally silent on the meaning of self-induced intoxication, the difference between self-induced and involuntary intoxication, and on the appropriate treatment of involuntary intoxication that is not logically relevant to negating proof of a required culpable mental state.[447] This is in contrast to Model Penal Code § 2.08, which codifies an affirmative defense applicable to

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[443] *See, e.g.*, N.Y. Penal Law § 15.05; N.H. Rev. Stat. Ann. § 626:2; Ala. Code § 13A-2-2.

[444] Westen, *supra* note 52, at 1220 n.72. For example, Model Penal Code § 2.08(2) *could* be interpreted to "mean that voluntarily intoxicated defendants are responsible for crimes of recklessness at Time2 if they are negligent in being unaware of substantial and unjustified risks at that time, regardless of whether their intoxication causes them to be unaware of risks of which they would otherwise be conscious." *Id.* However, there does not appear to be any support for this approach in legal authority, see *Glidden*, 441 A.2d at 731, while such an approach would "punish[] [actors] in excess of the risks and harms which their intoxicated creates," Westen, *supra* note 52, at 1220 n.72.

[445] Westen, *supra* note 52, at 1222 (discussing Model Penal Code § 2.08 cmt. at 358-59); *see* DRESSLER, *supra* note 31, at § 24.07.

[446] Yaffe, *supra* note 52, at 546. As Yaffe explains, this principle dictates that "[i]f a defendant is negligent and intoxicated, and he became intoxicated voluntarily, then, for legal purposes, he is to be treated as though he were reckless." *Id.*

[447] The explanatory note to § 209(c) generally establishes that self-induced intoxication "occurs when a person culpably introduces a substance into his or her body with the tendency to cause a disturbance of mental or physical capacities." However, this general language leaves undefined the key term "culpably."

instances of involuntary intoxication of this nature,[448] alongside definitions of "self-induced intoxication"[449] and "pathological intoxication."[450]

Section 209 does not incorporate a comparable Model Penal Code-based general provision addressing involuntary intoxication that is not logically relevant to negating proof of a required culpable mental state for pragmatic reasons. These issues are typically—and most appropriately—addressed through affirmative defenses;[451] however, affirmative defenses are not within the scope of the CCRC's planned review.[452]

In contrast, § 209 does not codify additional general definitions—beyond that of "intoxication"[453]—for two main policy reasons. First, only "[a] few of the modern recodifications" have codified additional general definitions of this nature.[454] And second, these definitions are—both as initially developed by the drafters of the Model Penal Code and as thereafter adopted by a handful of state legislatures—comprised of a wide range of flaws, which are not easily remedied.[455]

The Revised Criminal Code, by remaining silent on the foregoing issues, intends to leave them to the courts—which is where they currently exist under current District law and where they still exist in most reform jurisdictions.[456]

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[448] Model Penal Code § 2.08 establishes, in relevant part, that:

> (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.
>
> (4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

[449] Model Penal Code § 2.08 (5)(b) defines "self-induced intoxication" as "intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime."

[450] Model Penal Code § 2.08 (5)(c) defines "pathological intoxication" to mean "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible."

[451] *See* ROBINSON, *supra* note 31, at 2 CRIM. L. DEF. § 176.

[452] *See* Commentary to Revised Criminal Code §§ 201(a) and (b).

[453] Section 209(a) of the Revised Criminal Code codifies a definition of "intoxication" which is identical to the definition of "intoxication" proposed by the drafters of the Model Penal Code, see Model Penal Code § 2.08(5)(a), and comparable to that codified by many reform jurisdictions, see Ala. Code § 13A-3-2; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Conn. Gen. Stat. Ann. § 53a-7; Ga. Code Ann. § 16-3-4; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; N.J. Stat. Ann. § 2C:2-8; Ohio Rev. Code Ann. § 2901.21; Tenn. Code Ann. § 39-11-503; Tex. Penal Code Ann. § 8.04.

[454] LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5 n.60; *see* Ala. Code § 13A-3-2; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; Tenn. Code Ann. § 39-11-503; Wyo. Stat. Ann. § 6-1-202.

[455] For discussion of these flaws, see ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

[456] For a collection of relevant case law, see LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5; and ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

RCC § 22E-210. Accomplice Liability.

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

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

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

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

RCC § 210(a): Relation to National Legal Trends on Conduct Requirement. The conduct requirement of accomplice liability is comprised of two main kinds of actions: (1) assisting a party with commission of a crime; and (2) encouraging a party to commit a crime.[457] In practice, the categories of assistance and encouragement frequently overlap since knowledge that aid will be given can influence the principal's decision to go forward.[458] Nevertheless, there remains an important analytic difference between the two: whereas assistance is subject to criminal liability because of the accomplice's *material contribution* to the principal's *execution* of a crime, encouragement is subject to criminal liability because of the accomplice's *psychological contribution* to the principal's *decision* to commit a crime.[459]

Contemporary American legal authorities—as reflected in case law, legislation, and commentary—express these two alternative means of satisfying the conduct requirement of accomplice liability in a variety of different ways.[460] Phrasing aside, though, modern common law trends, as summarized below, converge on most (though not all) aspects of their meaning and practical import.

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

[458] Kadish, *supra* note 79, at 342.

[459] *Id.* at 342-43.

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

The most common and well-established basis for satisfying the conduct requirement of accomplice liability is *assistance by affirmative conduct*.[461] Often, an accomplice will assist the principal actor by furnishing the means of committing a crime—for example, by providing guns,[462] money,[463] supplies[464] or other instrumentalities.[465] Also typical is the situation of an accomplice who assists the principal actor by providing opportunities or lending a hand in preparation or execution of the offense—for example, by serving as a lookout,[466] driving the getaway car,[467] signaling the approach of the victim,[468] sending the victim to the actor,[469] preventing a warning from reaching the victim,[470] or preventing escape by the victim.[471] Importantly, in any of these situations, it need not be proven that the accomplice directly assisted the principal's conduct; rather, working through an intermediary will suffice.[472]

Although less common, *assistance by omission* may also, under appropriate circumstances, provide the basis for satisfying the conduct requirement of accomplice liability.[473] Generally speaking, those circumstances are understood to exist when an

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

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

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

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

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

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

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

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

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

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

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

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

[473] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. This common law principle is "often not explicitly stated in accomplice liability statutes." *Id.* at n. 51. Those statutes that do so, however, are based upon Model Penal Code § 2.06(3), which establishes that one may be deemed an accomplice if, "having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort to do so." For reform codes that adopt a similar approach, see Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. § 702-222; Ky. Rev. Stat. Ann. § 502.020; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann.

accomplice, with the intent to aid the commission of an offense: (1) fails to fulfill a legal duty to act; and (2) the failure to do so assists the principal actor.[474] So, for example, a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators may be deemed an accomplice to that crime.[475] Likewise, a conductor on a train may be held criminally liable for failing to take steps to prevent the transportation of illegal substances on his or her train.[476] And a parent may be convicted as an accomplice in the perpetration of an assault, battery, or criminal homicide upon his or her child by another person if the parent fails to make efforts to prevent commission of the offense.[477]

Encouragement provides an alternative and broad means of satisfying the conduct requirement of accomplice liability.[478] Generally speaking, encouragement entails

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§ 30-1-13; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tenn. Code Ann. § 39-11-402; Tex. Penal Code Ann. § 7.02. *Cf. State v. Jackson*, 137 Wash.2d 712 (1999) (where state's accomplice liability statute "was modeled, in part, on the accomplice liability provision in the Model Penal Code," but did not include the subsection specifically dealing with liability based on omission, this manifests legislative "intent to reject the concept of extending accessory liability for omissions to act").

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

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

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

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

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

Others accomplice liability statutes specify certain kinds or degrees of encouragement. For example, some use "procures" or "hires." *See* Ala. Code § 13A-2-23; Fla. Stat. Ann. § 777.011; Ga. Code Ann. § 16-2-20; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; La. Rev. Stat. Ann. § 14:24; Minn. Stat. Ann. § 609.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201. Some use "induces" or "coerces." *See* Ala. Code § 13A-2-23; Ark. Code Ann. § 5-2-403; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.020; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.D. Cent. Code § 12.1-03-01. Some use "commands" or "directs." *See* Ariz. Rev. Stat. Ann. § 13-301; Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; Ky. Rev. Stat. Ann. § 502.020; N.Y. Penal Law § 20.00; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.155; Tex. Penal Code Ann. § 7.02; Utah

providing another person with either reasons or incentives to engage in a particular course of conduct.[479] In practice, there are a variety of ways in which this kind of psychological influence manifests itself.[480] For example, one may become an accomplice by advising or counseling[481] another to commit a crime; by commanding, directing, or requesting[482] another to commit a crime; or by procuring, inducing, or coercing[483] another person to commit a crime.[484] These pathways of influence may, in turn, be communicated directly or by an intermediary,[485] through words or gestures,[486] via threats or promises,[487] and occur either before or at the actual time the crime is being committed.[488]

The breadth of accomplice liability for encouragement is borne out in case law. It is well established, for example, that while mere presence at the scene of the crime cannot,

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Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201. And some use "requests" or "importunes." *See* Conn. Gen. Stat. Ann. § 53a-8; Del. Code Ann. tit. 11, § 271; N.Y. Penal Law § 20.00; Utah Code Ann. § 76-2-202; Wash. Rev. Code § 9A.08.020.

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

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

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

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

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

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

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

Kadish, *supra* note 101, at 343.

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

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

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

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

by itself, provide a sufficient basis for satisfying the encouragement prong,[489] presence coupled with minimal other conduct can justify such a finding. This includes proof that the defendant was standing at the scene of the crime ready to give some aid, if needed, where the principal was aware of the defendant's intentions,[490] where a prior agreement to assist existed,[491] or where the defendant uttered the words "[l]et's get out of here."[492] It also includes proof of the defendant's presence during the planning stages of a burglary coupled with a general exhortation that the principal parties take some minor item from the site of the planned intrusion.[493]

One noteworthy point of disagreement among contemporary common law authorities relevant to the conduct requirement of accomplice liability is whether an accomplice's conduct must *actually* facilitate or promote the commission of the offense by the principal actor. At stake in the dispute is the treatment of an unsuccessful accomplice, who has attempted, but ultimately failed, to assist or encourage the principal's conduct. For example, where A attempts to assist P by opening a window to allow P to enter a dwelling unlawfully, but P (unaware of the open window) enters through a door, is A an accomplice to P's trespass?[494] Alternatively, if A utters words of encouragement to P who fails to hear them, but nevertheless proceeds to enter the dwelling unlawfully anyways, is A an accomplice to P's trespass?[495]

There are two main approaches to dealing with these kinds of questions: that of the common law and that of the Model Penal Code. Under the common law approach, one cannot be an accomplice if he or she performs an act of assistance or encouragement, but

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

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

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

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

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

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

[495] *Id.*

that assistance or encouragement is wholly ineffectual.[496] On this accounting, the "words used to define the scope of accomplice liability"—namely, assistance and encouragement—are understood to "contain an implicit requirement that the defendant's words or actions contribute somehow to the criminal venture."[497] Importantly, this contribution need not, in the eyes of the common law, be substantial[498] or even causally necessary.[499] Nevertheless, absent proof that the defendant's conduct *in some way* assisted or influenced the commission of the offense, he or she cannot, under the common law approach, be deemed an accomplice.

Under the Model Penal Code approach, in contrast, there is no requirement that an accomplice have actually aided or encouraged the principal's conduct in any way. Instead, as Model Penal Code § 2.06(3) phrases it, any person who "*agrees* or *attempts* to aid [an]other person in planning or committing of an offense" may—assuming the requisite

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

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

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

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

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

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

culpable mental state—be held criminally liable for the conduct of another.[500] Practically speaking, this language "removes the need for the accomplice to make any contribution to the commission of the offense or to an attempt."[501]

Since completion of the Model Penal Code, "[a] substantial minority of states" have adopted the drafters' recommended approach to dealing with unsuccessful accomplices.[502] Policies of this nature are common among reform jurisdictions; however, quite a few of those jurisdictions most influenced by the Model Penal Code in general nevertheless opted to drop the "agrees or attempts to aid" clause recommended by the Code's drafters.[503] Such variance is not surprising, though, once one considers the potential consequences at stake.

Although pitched as a matter of criminal law doctrine, the issue of failed accomplices is primarily a matter of grading. For example, under the common law approach, a failed accomplice would likely be guilty of an attempt to commit the target of

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

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

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

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

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

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

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

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

the complicity based upon an individual assessment of his or her conduct.[504] In those jurisdictions (a strong majority) that grade attempts less severely, this would ultimately subject the failed accomplice to a lower level of potential punishment than the successful principal.[505] Under the Model Penal Code approach, in contrast, "an unfulfilled agreement or unsuccessful attempt to assist or encourage is graded the same as the substantive offense that does not materialize."[506] In practical effect, this means that the failed accomplice is subject to the same level of potential punishment as the successful principal.[507]

So, then, which outcome is preferable? At its core, the choice is between objectivist and subjectivist policies. The common law approach to dealing with failed accomplices reflects a more objectivist view of the criminal law, under which causing harm or evil is the gravamen of a criminal offense. Where the defendant's conduct is ineffectual, therefore, his or her punishment ought to be reduced accordingly.[508] The Model Penal Code approach, in contrast, "is consistent with the subjectivist view that an actor's liability ought to be based on the actor's own conduct and attendant state of mind, rather than on subsequent events over which the actor has no control, such as whether the attempt to aid is successful."[509]

Both objectivist and subjectivist policies stand on firm theoretical ground.[510] However, community sentiment favors objectivist grading policies—both generally[511] and as it relates to the treatment of accomplices in particular.[512] And, insofar as legislative practice is concerned, the sentencing policies employed in most jurisdictions reflect the more objectivist approach to grading.[513] Where, as in the District, this is the case, it can be argued that acceptance of the Model Penal Code approach to dealing with failed accomplices produces a "particularly troublesome result," namely, it affords unsuccessful accomplices and successful perpetrators the same punishment, notwithstanding the fact that attempts and completed offenses are typically punished differentially. [514] "To be consistent," therefore, more objectivist states ought to "reject that portion of the Model Penal Code complicity provision that rests accomplice liability—i.e., liability for the full substantive offense—on an ineffective attempt or agreement to aid."[515]

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

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

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

[507] *Id.*

[508] *Id.*

[509] *Id.* at 304–05.

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

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

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

[513] *See id.*

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

[515] *Id.*

One other issue relevant to the conduct requirement of accomplice liability relates to the nature of the communication implicated by the would-be accomplice's conduct where it is based solely on encouragement, namely, just how detailed must the communication be? The question is significant given the free speech interests implicated by solicitations to engage in criminal conduct.[516]

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of speech has historically been murky.[517] Most recently, in *United States v. Williams*, the U.S. Supreme Court clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[518] But it also reaffirmed the crucial yet nevertheless ambiguous distinction "between a proposal to engage in illegal activity and the abstract advocacy of illegality," the latter being entitled to constitutional protection.[519]

Constitutional considerations aside, there "remains a legislative question" concerning whether and to what extent criminal liability based upon encouragement "should be curtailed to avoid chilling speech."[520] "The main problem," as the drafters of the Model Penal Code phrase it, is how to prevent

> [L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.[521]

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

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

[518] *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)).

[519] *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)).

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

[521] *Id.*

In light of these constitutional and policy considerations, the modern approach to criminalizing encouragement, reflected in both contemporary solicitation and complicity statutes, is to require the solicitation of "specific conduct that would constitute" the target crime.[522] Practically speaking, this requires proof of the utterance of a communication that, when viewed "in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor's object to incite."[523]

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

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

[523] Model Penal Code § 5.02 cmt. at 375-76.; *see, e.g., State v. Johnson*, 202 Or. App. 478, 483 (2005). This standard is relatively broad. For example, it does not require specificity as to "the details (time, place, manner) of the conduct that is the subject of the solicitation." *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 ("It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed."). Nor does it require that "the act of solicitation be a personal communication to a particular individual." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient). But it does bring with it a few limitations. For example, "general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation." Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor does criminal liability extend to "a situation where the defendant makes a general solicitation (however reprehensible) to a large indefinable group to commit a crime." *People v. Quentin*, 296 N.Y.S.2d 443, 448 (Dist. Ct. 1968); *see Johnson*, 202 Or. App. at 484 (observing that a "general exhortation to 'go out and revolt' does not constitute solicitation).

RCC § 210(a), (b), & (c): Relation to National Legal Trends on Culpable Mental State Requirement. It has been observed that the culpable mental state requirement of accomplice liability is a "very difficult" topic,[524] which has been the subject of "a long history of disagreement"[525] as well as "[c]onsiderable confusion."[526] Legal authorities generally agree that "a person is an accomplice in the commission of an offense if he intentionally aids the primary party to commit the offense charged."[527] Upon closer analysis, however, this broad statement obscures a range of complexities surrounding the culpable mental state requirement of accomplice liability.[528] The relevant complexities follow the same pattern as those surrounding the general inchoate offenses of solicitation and conspiracy.[529]

Ordinarily, a clear element analysis of a consummated crime entails a consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[530] The same is also true of the culpable mental state requirement applicable to accomplice liability, which—like that of solicitation and conspiracy liability—must be analyzed with respect to the culpable mental state requirement applicable to the target offense.[531] At the same time, the multi-participant nature of this theory of liability raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (committed by someone else), which culminates in commission of the target

[524] Weisberg, *supra* note 79, at 232.
[525] Alexander F. Sarch, *Condoning the Crime: The Elusive Mens Rea for Complicity*, 47 LOY. U. CHI. L.J. 131, 131 (2015).
[526] LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2.
[527] DRESSLER, *supra* note 79, at § 30.05.
[528] Here, for example, is how one commentator has summarized some of the relevant questions:

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

Michael S. Moore, *Causing, Aiding, and the Superfluity of Accomplice Liability*, 156 U. PA. L. REV. 395, 396 (2007).
[529] *See generally* RCC § 302: Relation to National Legal Trends on Culpable Mental State Requirement; RCC § 303: Relation to National Legal Trends on Culpable Mental State Requirement.
[530] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).
[531] *Id.*

offense.[532] For this reason, it is often said that accomplice liability—like solicitation[533] and conspiracy liability[534]—is comprised of "dual intent" requirements.[535]

More specifically, the first intent requirement relates to the accomplice's culpable mental state with respect to the future conduct of the principal: generally speaking, the accomplice must "intend," by his or her assistance, to promote or facilitate conduct planned to culminate in an offense.[536] The second intent requirement, in contrast, relates to the accomplice's culpable mental state with respect to the results and/or circumstance elements that comprise the target offense: generally speaking, the accomplice must "intend," by his or her assistance, to bring them about.[537]

To illustrate how these dual intent requirements fit together, consider the following scenario.[538] Police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P's plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the building, only to observe an individual, A, with a large collection of packages blocking the front entrance to the building. The officers' entry into the building is delayed due to A's blockage, which in turn enables P to successfully carry out the assassination. If A later finds herself in D.C. Superior Court charged with aiding the murder of a police officer committed by P, can she be convicted as an accomplice?

The answer to this question depends upon whether A's state of mind fulfills both of the dual intent requirements governing accomplice liability. For example, if A was blocking the entrance to the building because she accidentally dropped her packages, then neither requirement is met: A did not intentionally assist the conduct of P which, in fact, resulted in the death of a police officer; nor did she act with the intent that, by her conduct, a police officer be killed.[539]

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

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

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

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

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

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

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

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

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

Lastly, if A was blocking the entrance to the building because P had approached her with an opportunity to seek retribution against the same officer responsible for disrupting a drug conspiracy A was involved with years ago, then A fulfills both requirements: A acted with both the intent to facilitate D's conduct and the intent that, through such conduct, a police officer be killed.[540]

Unpacking these dual intent requirements provides the basis for more clearly analyzing the culpability-related policy issues at the heart of accomplice liability. With respect to the first intent requirement, for example, the central question is this: may an accomplice be held criminally liable if he or she is *merely aware* (i.e., knows) that, by providing assistance, he or she is promoting or facilitating conduct planned to culminate in an offense. Or, alternatively, must it proven that the accomplice *desires* (i.e., has the purpose) to promote or facilitate such conduct?[541]

Resolution of this issue is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business that end up facilitating criminal acts may be subjected to criminal liability.[542] For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to rent a room to a man who is with a woman below the age of consent, knowing that it'll be used for sex.[543] In

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circumstances, A plausibly possessed the intent to kill a police officer, though she nevertheless lacked the intent to assist P's conduct of which she was unaware.

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

[541] Conceptually, this issue is a product of the fact that the concept of intent is, and "has always been, an ambiguous one." Wechsler et al., *supra* note 152, at 577. "[T]raditionally," for example, intent was "viewed as a bifurcated concept embracing either the specific requirement of purpose," which entails proof of a conscious desire, "or the more general one of knowledge," which entails proof of a belief as to a practical certainty." *United States v. U.S. Gypsum Co*., 438 U.S. 422, 445 (1978); *see Tison v. Arizona*, 481 U.S. 137, 150 (1987). In specific contexts, however—such as, for example, in the context of inchoate crimes such as conspiracy and solicitation, "where a heightened mental state separates criminality itself from otherwise innocuous behavior"[541]—the common law employed the term intent as a synonym for purpose, thereby excluding knowledge as a viable basis for liability. *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, "that purpose is rarely the required mens rea for the commission of a crime." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code drafters recognized, "th[e] distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt., at 234.

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

[543] Other illustrative situations include:

> A lessor rents with knowledge that the premises will be used to establish a bordello. A vendor sells with knowledge that the subject of the sale will be used in commission of a crime. A doctor counsels against an abortion during the third trimester but, at the patient's

these kinds of cases, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[544] What remains to be determined is whether this culpable mental state of knowing indifference provides a sufficient basis for imposing accomplice liability.

There are two different approaches American legal authorities apply to resolving the issue: the "true purpose view" and the "knowledge view." Under a true purpose view, nothing short of a *conscious desire* to promote or facilitate criminal conduct by another will suffice for accomplice liability. As the "canonical formulation"[545] of this approach—originally articulated by Judge Learned Hand in *United States v. Peoni*,[546] but thereafter endorsed by the U.S. Supreme Court in *Nye & Nissen v. United States*[547]—phrases it: "To aid and abet a crime, a defendant must not just 'in some sort associate himself with the venture,' but also 'participate in it as in something that he wishes to bring about' and 'seek by his action to make it succeed.'"[548]

The knowledge view, in contrast, accepts *mere awareness* that one is promoting or facilitating the commission of a crime by another as a sufficient basis for accomplice liability. Under this approach—as Judge Richard Parker famously reasoned in *Backun v. United States*—"[g]uilt as an accessory depends, not on 'having a stake' in the outcome of crime," but rather, on consciously "aiding and assisting the perpetrators" of a criminal scheme in a more conventional sense.[549]

The choice between these two approaches implicates conflicting policy considerations, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing

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> 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.

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

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

[546] 100 F.2d 401, 402 (2d Cir. 1938).

[547] 336 U.S. 613, 619 (1949) (quoting *Peoni,* 100 F.2d at 402).

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

[549] 112 F.2d 635, 637 (4th Cir. 1940). The defendant in *Backun* knowingly sold stolen silverware to a third person, Zucker, in New York. *Id.* Zucker then transported the silverware to North Carolina to sell it. *Id.* The defendant wanted Zucker to sell the silverware and knew Zucker would go out of state to do so, but the defendant did not specifically desire that Zucker leave the state. *Id.* Judge Parker upheld his conviction of interstate transportation of stolen merchandise, finding that conviction of a defendant for knowingly facilitating the interstate transportation of stolen merchandise was appropriate under the circumstances. *Id.*

behavior that facilitates the commission of crimes."[550] More specifically, underlying the true purpose view is the idea that:

> [T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. [I]n extending liability to merchants who know harm will occur from their activities, there is a risk that merchants who only suspect their customers' criminal intentions (thus, are merely reckless in regard to their customers' plans) will also be prosecuted, thereby seriously undermining lawful commerce.[551]

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

> [S]ociety has a compelling interest in deterring people from furnishing their wares and skills to those whom they know are practically certain to use them unlawfully. Free enterprise should not immunize an actor from criminal responsibility in such circumstances; unmitigated desire for profits or simple moral indifference should not be rewarded at the expense of crime prevention.[552]

Historically, the choice between these two positions has been the subject of much legal debate and disagreement.[553] Today, however, a "majority of jurisdictions have adopted the Hand approach over Parker's analysis in *Backun* and require a showing of purpose."[554] The true purpose view has prevailed, in large part, due to the recommendations of the Model Penal Code.

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes, the Model Penal Code drafters ultimately opted against it, siding "in the complicity provisions of the Code[] in favor of requiring a purpose to advance the criminal end."[555] This is reflected in the Model Penal Code's general complicity provision, § 2.06(3), which codifies a broad purpose requirement—similarly employed in the Code's general definitions of conspiracy[556] and

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[550] Model Penal Code § 5.03 cmt. at 403.
[551] *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), aff'd, 311 U.S. 205 (1940) (Hand, J.).
[552] DRESSLER, *supra* note 79, at § 27.07; *see* Model Penal Code § 2.06 cmt. at 318 n.58 ("Conduct that knowingly facilitates the commission of crimes is by hypothesis a proper object of preventive effort by the penal law, unless, of course, it is affirmatively justifiable. It is important in that effort to safeguard the innocent, but the requirement of guilty knowledge adequately serves this end—knowledge both that there is a purpose to commit a crime and that one's own behavior renders aid.").
[553] Weisberg, *supra* note 79, at 236.
[554] *Id.* Note that the analysis of national legal trends here, as well as below with respect to the relationship between the accomplice's state of mind and the results/circumstances of the target offense, excludes the natural and probable consequence rule, under which "accomplice liability extends to acts of the principal in the first degree which were a 'natural and probable consequence' of the criminal scheme the accomplice encouraged or aided." LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.3. For analysis of the rule, as well as the policy considerations that support rejecting it, see *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*) (rejecting application of the natural and probable consequence rule).
[555] Model Penal Code § 5.03 cmt. at 406.
[556] Model Penal Code § 5.03(1)

solicitation[557]—under which the requisite aid or encouragement must be accompanied by "the purpose of promoting or facilitating the commission of the crime."[558]

Textually speaking, the scope of this broadly phrased purpose requirement is ambiguous.[559] Nevertheless, it's clear from the Model Penal Code commentary that the drafter's intended for it to apply, at minimum, to the conduct culminating in an offense.[560] Explicitly endorsing Judge Hand's decision in *Peoni*, the Model Penal Code commentary states that § 2.06(3) was intended to import a requirement that the accomplice have "as his conscious objective the bringing about of conduct that the Code has declared to be criminal."[561] Absent this "purpose to promote or facilitate the particular conduct that forms the basis for the charge," the Model Penal Code would preclude liability as an accomplice.[562]

Since publication in 1962, "most states have followed the Model Penal Code's lead" by requiring proof that an accomplice acted with the "purpose" to facilitate the principal's conduct.[563] Legislative adoption of this true purpose approach is a particularly

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[557] Model Penal Code § 5.02(1).

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

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

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

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

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

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

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

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

One survey finds that "only four states codify facilitation." Ira P. Robbins, *Double Inchoate Crimes,* 26 HARV. J. ON LEGIS. 1, 116 (1989); *see* Ky. Rev. Stat. Ann. § 506.080 ("A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he

pervasive feature of modern criminal codes, which frequently incorporate general complicity provisions modeled on § 2.06(3) that—in substance if not form—seem to codify the true purpose view.[564] But even in those jurisdictions that have not undertaken comprehensive code reform efforts, the relevant legal authorities—namely, case law and jury instructions—have strongly "rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite [criminal] purpose."[565] The true purpose view is also "particularly popular in the academic community,"[566] where there is significant concern that drawing "the circle of criminal liability any wider" would cast a "pall on ordinary activity."[567]

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engages in conduct which knowingly provides such a person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime."); Ariz. Rev. Stat. Ann. § 13-1004 ("A person commits facilitation if, acting with knowledge that another person is committing or intends to commit an offense, the person knowingly provides the other person with means or opportunity for the commission of the offense.").

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

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

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

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

[566] Decker, *supra* note 186, at 239. *See, e.g.,* DRESSLER, *supra* note 79, at §§ 29.05, 30.05; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2; Robinson & Grall, *supra* note 118, at 758; Note, *Falcone Revisited: The Criminality of Sales to an Illegal Enterprise*, 53 COLUM. L. REV. 228, 239 (1953); Allen R. Friedman, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under Rico Section 1962(a)*, 82 COLUM. L. REV. 574, 585 (1982). *See also* Alexander & Kessler, *supra* note 164, at 1192 (advocating for application of a general recklessness requirement but nevertheless endorsing a carve out, which establishes that "an actor who sells goods or services in the regular course of his trade shall not be deemed to have rendered aid or encouragement that is sufficient for solicitation liability"). *Cf.* Tyler B. Robinson, *A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under S 924(c)*, 96 MICH. L. REV. 783, 788 (1997) (analyzing ambiguity concerning the purpose requirement where multi-element crimes are at issue). For discussion of the ways in which the traditional purpose vs. knowledge debate misses important aspects of the culpability of accomplice liability, see Gideon Yaffe, *Intending to Aid*, 33 L. & PHIL. 1 (2014); Sarch, *supra* note 147, at 131; Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460 (2013).

[567] Kadish, *supra* note 101, at 353. More specifically, the commonly expressed concern is that if the criminal law prohibited conduct that knowingly facilitates the commission of crime, that would give us reason to "fear

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

Generally speaking, there is broad agreement that an accomplice "must not only have the purpose that someone else engage in the conduct which constitutes the particular crime charged, but the accomplice must also share in the *same intent* which is required for commission of the substantive offense."[568] Less clear, and more controversial, however, is what to do about a substantive offense that does not require "intent" at all, but rather, is comprised of one or more objective elements subject to recklessness, negligence, or strict liability? In this situation, one must ask: should proof that an accomplice acted with the requisite non-intentional mental state (or none at all in the case of strict liability) be sufficient—or, alternatively, must a higher level of culpability be proven?

Generally speaking, there are two alternative approaches jurisdictions apply to resolving this question.[569] The first is a principle of *culpable mental state elevation*, under which any non-intentional mental state applicable to the target offense—for example, recklessness or negligence—must be elevated to a higher culpable mental state—for example, purpose or knowledge—when the government proceeds upon an accomplice theory of liability. The second, and alternative, principle is one of *culpable mental state equivalency*, under which proof of the culpable mental state requirement (if any) applicable to the target offense will suffice for purposes of accomplice liability.

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

Assuming both A and P were aware that P's speeding created a substantial risk of death to V, P is clearly guilty of reckless homicide for his own conduct. But can A be convicted of the same under an accomplice theory of liability? Under a principle of culpable mental state elevation, the answer is no: A is not liable for reckless homicide

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criminal liability for what others might do simply because our actions made their acts more probable." *Id.* Such a phenomenon, it is argued, is particularly problematic in the commercial context, wherein "people otherwise lawfully conducting their affairs should not be constrained by fear of liability for what their customers will do." *Id.*

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

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

because—although A purposely encouraged the requisite criminal conduct—he lacked the intent to kill. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A is liable because he purposely encouraged P's criminal conduct with the culpable mental state applicable to reckless homicide, consciously disregarding a substantial risk of death.

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

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

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

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

Contemporary American legal authorities have resolved the above culpability issues relevant to result elements in a relatively uniform fashion, which is characterized by two basic principles. The first is a principle of culpable mental state equivocation, under which "[c]onviction of an accomplice in the commission of a crime of recklessness or negligence is permitted" based upon proof that he or she purposely assisted the principal party to engage in the conduct that forms the basis of the offense with "the mental state—intent, recklessness, or negligence, as the case may be—required for commission of the substantive offense."[570] The second is a principle of individualized culpability, under which an accomplice prosecuted for an offense graded by distinctions in mental state as to result elements is subject to any grade for which he or she—rather than the principal—possesses the requisite form of culpability.[571]

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

[570] DRESSLER, *supra* note 79, at § 30.05.
[571] *Id.*

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

This provision, as the accompanying explanatory note explains, was intended to serve two functions. The first was to establish that "complicity in conduct causing a particular criminal result entails accountability for that result so long as the accomplice is personally culpable with respect to the result to the extent demanded by the definition of the crime."[572] Beyond adopting a principle of culpable mental state equivalency, however, the drafters of the Model Penal Code also intended for § 2.06(4) to establish that, in those situations where two or more criminal actors jointly commit a crime that is divided into degrees based upon distinctions in culpability as to result elements, the liability of each participant in the criminal scheme should be "measured by his own degree of culpability toward the result."[573]

Since completion of the Model Penal Code, the drafters recommended approach to dealing with the culpability of accomplice liability in the context of result elements has gone on to become "the overwhelming majority rule."[574] Legislatively speaking, only a handful of modern criminal codes explicitly adopt statutory language based on Model Penal Code § 2.06(4).[575] Nevertheless, a few other reform jurisdictions communicate the same policies through other legislative means.[576] And case law from both inside[577] and

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[572] Model Penal Code § 2.06(4): Explanatory Note.

[573] *Id.* So, for example, "if the accomplice recklessly endangers life by rendering assistance to another, he can be convicted of manslaughter if a death results, even though the principal actor's liability is at a different level." Model Penal Code § 2.06 cmt. at 311.

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

[575] *See* Ariz. Rev. Stat. Ann. §13-303(B); Ark. Code Ann. §5-2-403(b); Haw. Rev. Stat. Ann. § 702-223; Ky. Rev. Stat. Ann. §502.020(2); N.H. Rev. Stat. Ann. §626:8(IV); 18 Pa. Cons. Stat. Ann. § 306(d).

[576] For example, a few reform jurisdictions incorporate prefatory language—"acting with the mental state required for commission of an offense"—into their accomplice liability statutes that appears to be indicative of a principal of culpable mental state equivalency applicable to results. *See* Conn. Gen. Stat. Ann. § 53a-8; N.Y. Penal Law § 20.00; Kan. Stat. Ann. § 21-5210(a). And a few other reform jurisdictions incorporate a grading provision indicative of the same. *See, e.g.,* Del. Code Ann. tit. 11, § 274; N.Y. Penal Law § 20.15; Mo. Rev. Stat. § 562.051; Ark. Code Ann. § 5-2-406.

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

For case law applying an individualized approach to grading based upon culpability, see *State v. Ervin*, 835 S.W.2d 905, 923 (Mo. 1992) ("[T]wo murderous actors may have differing mental states, although they act together. A defendant, in a state of cool blood, may promote a murder by aiding a person who kills in the heat of passion. Such a defendant would be guilty of murder in the first degree though the other person is guilty of a lesser offense."); *Bosnick v. State,* 248 Ark. 846, 454 S.W.2d 311 (1970); *People v. Castro,* 55

outside[578] reform jurisdictions appears to be consistent with the relevant culpability principles.[579] Contemporary legal commentary is also in accordance, supporting both the general application of a principal of culpable mental state equivalency for results[580]; and, where a result element crime is graded by distinctions in culpability, assessing each actor's liability "according to his own *mens rea*," without regard to whether the principal's culpability "is greater or less than that of the primary party."[581]

The relatively uniform and well-developed state of national legal trends relevant to result elements is to be contrasted with national legal trends on the culpable mental state requirement applicable to circumstances, which are both less robust and more ambiguous.

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

Assuming the interaction occurs in a jurisdiction with a statutory rape offense that applies to a fourteen year-old, P can clearly be convicted for his conduct—notwithstanding his mistake of fact—since age is a matter of strict liability. But can A similarly be convicted as an accomplice? Under a principle of culpable mental state elevation, the answer is no: A is not liable for statutory rape because A—although purposely assisting P's criminal conduct—lacked the intent to facilitate sex *with a minor*. Under a principle of culpable mental state equivalency, in contrast, the answer is yes: A

N.Y.2d 972, 449 N.Y.S.2d 184, 434 N.E.2d 253 (1982); *Chance v. State*, 685 A.2d 351, 360 (Del. 1996); *see also Maiorino v. Scully*, 746 F. Supp. 331 (S.D.N.Y. 1990).

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

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

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

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

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

is liable for statutory rape because A purposely facilitated P's criminal conduct with the culpable mental state applicable to the circumstance of age—none at all.

Notwithstanding these conceptual symmetries, "[v]ery little attention has been paid in the courts and legislatures to the question of complicity's *mens rea* for circumstance elements."[582] On a legislative level, much of the problem stems from the fact that the Model Penal Code is intentionally silent on the issue,[583] with the hopes of delegating its "resolution [to] the courts."[584] Since completion of the Model Penal Code, most American legislatures have followed suit in that they, too, do not explicitly address the relationship between the accomplice's state of mind and the circumstance elements of the target offense.[585]

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

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

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

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

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

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

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

And yet, notwithstanding this explicit delegation of policy discretion to the judiciary, "[t]he issue here—whether the intent requirement of accomplice liability applies as well to attendant circumstances—is one that the courts have rarely considered," at least historically speaking.[586] More recently, though, a handful of state and federal courts have confronted the issue, and the resulting case law indicates that a principle of culpable mental state elevation reflects the majority approach.

Illustrative is a body of case law requiring proof of intent as to the aggravating circumstance of whether a crime has been committed while armed when prosecuted under an accomplice theory of liability.[587] Most noteworthy is the U.S. Supreme Court's decision in *Rosemond v. United States*, which deemed it well-established that accomplice liability requires proof that a "person actively participates in a criminal venture with *full knowledge* of the *circumstances* constituting the charged offense."[588] Applying this principle to a complicity-based conviction for the federal crime of using a firearm during a crime of violence, 18 U.S.C.A. § 924(c),[589] the *Rosemond* court determined that: "An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when"—but only when—"he *knows* that one of his confederates will carry a gun."[590]

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

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

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

[588] 134 S. Ct. 1240, 1248–49, 188 L. Ed. 2d 248 (2014) (collecting cases); *see id.* at 1249 ("So for purposes of aiding and abetting law, a person who actively participates in a criminal scheme knowing its extent and character intends that scheme's commission.").

[589] 18 U.S.C.A. § 924(c) ("[A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . .").

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

Post-*Rosemond*, state courts have hued to this line of reasoning.[591] For example, in *Robinson v. United States*, the DCCA held that "[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved."[592] The basis for such a determination is, as the *Robinson* court explains, the more general idea articulated in *Rosemond*, namely, in order for an accomplice to be deemed "guilty of a crime"—for example, "an offense committed while armed"—the defendant "must, *inter alia,* intend to facilitate the *entire offense*."[593]

There also exists a complementary body of state and federal cases applying a principle of culpable mental state elevation to the circumstance of age in strict liability sex crimes. For example, in *State v. Bowman*, the Court of Appeals of North Carolina—relying on an older precedent from the California Supreme Court—determined that "[a]lthough statutory rape is a strict liability crime, aiding and abetting statutory rape is not."[594] More specifically, the *Bowman* court concluded that the government, when bringing a statutory

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in that respect"); *see also United States v. Ford*, 821 F.3d 63 (1st Cir. 2016) (defendant's conviction for aiding and abetting another's unlawful possession of a firearm because she had "reason to know" facts making such possession criminal, i.e., that person's prior felony conviction, overturned because defendant must be shown to have actually known such facts).

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

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

[592] *Robinson*, 100 A.3d at 105–06.

[593] *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson–Bey*, 903 A.2d at 831). For other state cases, see, for example, *State v. Silva-Baltazar,* 886 P.2d 138, 144 (Wash. 1994)("[A]lthough in most crimes involving deadly weapons, the coparticipants are aware that one or more of them is armed, that is no reason to impose strict liability on all coparticipants regardless of each participant's knowledge that another is armed."); *State v. Hammock*, 214 N.J. Super. 320, 322–24, 519 A.2d 364, 365–66 (App. Div. 1986) ("If the jury determines that the defendant shared his partner's purpose to commit the robbery but not his purpose to use a deadly weapon, then the jury may find the defendant guilty of a second-degree robbery, but not a first-degree armed robbery."); *State v. Rodriguez*, 164 N.H. 800, 812 (2013) ("[T]o affirm the defendant's convictions for . . . accomplice to first degree assault, we must be able to conclude that the properly-admitted evidence overwhelmingly established that he had at least a tacit understanding that deadly weapons would be used in the commission of the assault."); *State v. Doucet*, 638 So. 2d 246, 249 (La. Ct. App. 1994) (collecting Louisiana cases that support application of culpable mental state elevation to while armed element of robbery); *see also People v. Childress*, 2015 CO 65M, ¶ 29, 363 P.3d 155, 164, *as modified on denial of reh'g* (Jan. 11, 2016) (complicitor must have "an awareness of those circumstances attending the act or conduct he seeks to further that are necessary for commission of the offense in question."); *compare Silva-Baltazar*, 886 P.2d at 144 (on charge of drug activity within a drug-free zone, awareness activity occurring in such place not required for "any of the participants," including accomplices); *State v. McCalpine*, 190 Conn. 822, 832–33, 463 A.2d 545, 551 (1983) (determining that there is "no requirement that the accessory possess the intent to commit the specific degree of the robbery charged or the intent to possess a deadly weapon"); *State v. Gonzalez*, 15 A.3d 1049, 1053 (Conn. 2011) (government need not prove culpable mental state as to whether principal, in committing homicide, used, carried or threatened to use a firearm; however, court notes available affirmative defense to effectively preclude strict liability).

[594] 188 N.C. App. 635, 650 (N.C. 2008) (citing *People v. Wood,* 56 Cal.App. 431, 205 P. 698 (1922)).

rape charge against an accomplice, must "present evidence tending to show that the defendant acted with *knowledge* that the [victims] were under the age of sixteen."[595]

Similarly in accordance is the U.S. Court of Appeals for the First Circuit's decision in *United States v. Encarnacion-Ruiz* interpreting the federal statute prohibiting the production of child pornography.[596] More specifically, the *Encarnacion-Ruiz* court held that, although the circumstance of age for the production of child pornography is typically a matter of strict liability, when a charge is brought against an accomplice the government must nevertheless prove that the defendant *knew* the victim was a minor.[597] The First Circuit supported this outcome, in part, because of the *Rosemond* decision, under which, "to establish the *mens rea* required to aid and abet a crime, the government must prove that the defendant participated with advance knowledge of the elements that constitute the charged offense."[598] But the *Encarnacion-Ruiz* court also looked towards broader policy considerations, underscoring the fact that "the special circumstances which justify the imposition of liability without fault on certain persons who themselves engage in the proscribed conduct are not likely to exist as to those rendering aid."[599]

Legal commentary on the culpable mental state requirement governing accomplice liability "is particularly sparse and conflicting for crimes requiring proof of some attendant

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

[596] 787 F.3d 581, 589 (1st Cir. 2015).

[597] *Id.*

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

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

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

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

circumstance."[600] Nevertheless, it appears that the majority approach reflected in the scholarly literature supports a principle of culpable mental state elevation.[601]

In accordance with the above analysis of national legal trends, RCC § 210(a) incorporates the following culpability policies applicable to accomplice liability. First, the prefatory clause of RCC § 210(a) establishes that the culpability required for accomplice liability is, at minimum, that required by the target offense. Second, RCC §§ 210(a)(1) and (2) endorse the purpose view of accomplice liability, under which proof that the secondary party consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of accomplice liability. Third, RCC § 210(b) applies a principle of culpable mental state elevation to circumstance elements, under which the accomplice must intend to bring about any circumstance required by the target offense.[602] Fourth, and finally, RCC § 210(c) establishes that where an offense is graded based upon distinctions in culpability as to results, an accomplice may be held liable for any grade for which he or she possesses the required culpability.

RCC § 210(d): Relation to National Legal Trends on Derivative Liability. Accomplice liability provides a basis for holding one person liable for the crimes committed by another.[603] As such, it does not constitute a freestanding form of criminal liability; rather, accomplice liability is derivative in nature.[604] Practically speaking, this means that holding someone liable as an accomplice actually requires proof that a crime was, in fact, committed by someone.[605] Determining what this derivative aspect of complicity specifically entails with respect to an accomplice can be difficult, however, given the various ways in which the principal's legal situation might be resolved.[606]

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

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

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

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

[603] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. *See, e.g., McKnight v. State*, 658 N.E.2d 559, 561 (Ind. 1995).

[604] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2

[605] DRESSLER, *supra* note 79, at § 30.06; LAFAVE, *supra* note 23, at 2 SUBST. CRIM. L. § 13.2. *See, e.g., People v. Vaughn*, 465 N.W.2d 365, 369 (Mich. Ct. App. 1990).

[606] The next two paragraphs draw on issues raised in DRESSLER, *supra* note 79, at § 30.06.

immunity from prosecution. Alternatively, the government may have attempted to prosecute the principal, but ultimately lost at trial—by an acquittal in either the same proceeding in which the accomplice was being prosecuted or in a separate proceeding.

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

The early common law approach to the above issues was relatively restrictive: "[A]n accessory could not be convicted of the crime in which he assisted until the principal was convicted and, with the limited exception of criminal homicide, could not be convicted of a more serious offense or degree of offense than that of which the principal was convicted."[607] More recently, though, "[n]early all states have abrogated these rigid common law rules."[608] For example, it is now generally accepted that "[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted,"[609] or even where the principal has been acquitted.[610] Likewise, it is also

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[607] *Id.*

[608] *Id.* For case law addressing whether the availability of a justification defense on behalf of the principal extends to an accomplice, see *United States v. Lopez*, 662 F.Supp. 1083 (N.D. Cal. 1987) (liability as an aider and abettor requires proof of a "criminal act," for that reason a justification defense of a principal, because it is available where there is no wrongful act under the circumstances, precludes accomplice liability on the part of one who aids the justified conduct); *State v. Montanez*, 894 A.2d 928 (Conn. 2006) (alleged accomplice entitled to a jury instruction on the principal's use of self-defense because when an act is justified by self-defense, a third party has the right to assist the principal in his lawful conduct); *U.S. v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (where principal charged in murder case was improperly deprived of evidence corroborating his claim of self-defense through actions of the government and his conviction therefore was reversed, conviction of second defendant as aider and abettor also reversed because if principal has been acquitted on grounds of self-defense, no crime to aid and abet would have been committed).

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

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

generally accepted that an "aider and abettor may be convicted of a lesser or greater offense than the principal."[611]

Abrogation of the early common law approach to implementing the derivative nature of accomplice liability is not a new phenomenon; many jurisdictions adopted these kinds of more expansive policies prior to completion of the Model Penal Code.[612] Nevertheless, it is the Model Penal Code approach to codifying them that provides the contemporary basis for their expression in modern criminal codes.[613] The relevant provision, Model Penal Code § 2.06(7), establishes that:

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

The above language encapsulates a cluster of policies. Most fundamentally, it establishes the basic principle of derivative liability, namely, that accomplice liability requires proof that the offense for which the defendant is being held liable was, in fact, committed.[614] Beyond that, this provision also establishes four specific policies concerning the "relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense."[615] First, it is immaterial that the "person claimed to have committed the offense has not been prosecuted or convicted."[616] Second, it is immaterial that the "person claimed to have committed the offense . . . has been convicted of a different offense or degree of offense."[617] Third, it is immaterial that the "person claimed to have committed the offense . . . has an immunity to prosecution."[618] And fourth, it is immaterial that the "person claimed to have committed the offense . . . has been acquitted."[619]

The above policies, as the accompanying Model Penal Code commentary explains, were understood by the drafters to accord with what were then "modern developments,"[620]

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

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

[613] *Id.*

[614] Model Penal Code § 2.06(7) ("An accomplice may be convicted on proof of the commission of the offense and of his complicity therein . . . .").

[615] Model Penal Code § 2.06(7): Explanatory Note.

[616] Model Penal Code § 2.06(7).

[617] *Id.*

[618] *Id.*

[619] *Id.*

[620] Model Penal Code § 2.06(7): Explanatory Note.

i.e., previously existing "legislation that deprives the distinction between principals and accessories of its common law procedural significance."[621] And they were also believed to "follow the consistent principle" reflected throughout Mode Penal Code § 2.06, namely, "that it is only the conduct of the main actor that is attributed to the accomplice, with the degree of liability turning on the accomplice's own culpability."[622]

Since completion of the Model Penal Code, legislative adoption of a general provision based on § 2.06(7) has become a standard feature of comprehensive code reform efforts.[623] This is reflected in the following trends. First, nearly all reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has not been prosecuted[624] or convicted.[625] Second, a strong majority of reform codes incorporate a provision declaring that an accomplice may be convicted even if the principal has been acquitted,[626] or has been convicted of a different offense or degree of offense.[627] And third, a simple majority of reform codes incorporate a provision declaring that an

[621] Model Penal Code § 2.06(7) cmt. at 327-28.
[622] *Id.*
[623] *Id.* (noting that a "great majority of recently enacted codes and proposals" incorporate "a provision comparable to subsection (7)").
[624] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wyo. Stat. § 6-1-201.
[625] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; N.D. Cent. Code § 12.1-03-01; Ohio Rev. Code Ann. § 2923.03; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Va. Code Ann. § 18.2-21; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05; Wyo. Stat. § 6-1-201.
[626] Ala. Code § 13A-2-25; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Conn. Gen. Stat. Ann. § 53a-9; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Ill. Comp. Stat. Ann. ch. 720, § 5/5-3; Ind. Code Ann. § 35-41-2-4; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.Y. Penal Law § 20.05; Pa. Cons. Stat.Ann. tit. 18, § 306; S.D. Cod. Laws § 22-3-5.1; Tenn. Code Ann. § 39-11-407; Wash. Rev. Code § 9A.08.020.
[627] Ala. Code § 13A-2-25; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-304; Ark. Code Ann. § 5-2-405; Colo. Rev. Stat. Ann. § 18-1-605; Del. Code Ann. tit. 11, § 272; Ga. Code Ann. § 16-2-21; Haw. Rev. Stat. § 702-225; Iowa Code Ann. § 703.1; Kan. Stat. Ann. § 21-5210; Ky. Rev. Stat. Ann. § 502.030; Me. Rev. Stat. Ann. tit. 17-A, § 57; Md. Code Ann. Crim. Proc. § 4-204; Mo. Ann. Stat. § 562.046; Mont. Code Ann. § 45-2-303; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; N.M. Stat. Ann. § 30-1-3; N.D. Cent. Code § 12.1-03-01; Or. Rev. Stat. § 161.160; Pa. Cons. Stat.Ann. tit. 18, § 306; Tenn. Code Ann. § 39-11-407; Tex. Penal Code Ann. § 7.03; Utah Code Ann. § 76-2-203; Wash. Rev. Code § 9A.08.020; Wis. Stat. Ann. § 939.05.

accomplice may be convicted even if the principal has immunity to prosecution or conviction.[628]

Consistent with national legal trends, the RCC incorporates a general provision that is broadly consistent with the Model Penal Code approach to addressing the derivative nature of accomplice liability. The relevant provision, RCC § 210(d), does so by codifying two basic principles. The first is that accomplice liability entails "proof of the commission of the offense" that was, in fact, committed by another person.[629] The second is that, assuming the government can meet this standard of proof, the legal disposition of the principal actor's situation—for example, non-prosecution, the absence of a conviction, or an acquittal—is generally immaterial to that of the accomplice.[630]

RCC § 210(a), (b), (c), & (d): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of accomplice liability is concerned.[631] Generally speaking, though, the Model Penal Code's general provision, § 2.06,[632] provides the basis for most contemporary reform efforts. The

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

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

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

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

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

> (3) A person is an accomplice of another person in the commission of an offense if:
>
> (a) with the purpose of promoting or facilitating the commission of the offense, he
>
> (i) solicits such other person to commit it, or
>
> (ii) aids or agrees or attempts to aid such other person in planning or committing it, or
>
> (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or
>
> (b) his conduct is expressly declared by law to establish his complicity . . . .
>
> (4) When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense . . . .
>
> (7) An accomplice may be convicted on proof of the commission of the offense and of his complicity therein, though the person claimed to have committed the offense has not been prosecuted or convicted or has been convicted of a different offense or degree of offense or has an immunity to prosecution or conviction or has been acquitted.

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

The most noteworthy drafting decision reflected in the Model Penal Code's general definition of accomplice liability is the manner in which the culpable mental state requirement is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 2.06(3) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to accomplice liability ambiguous.[633]

Illustrative is the prefatory clause of Model Penal Code § 2.06(3), which entails proof that the defendant act "with the purpose of promoting or facilitating" the commission of the offense that is the object of the defendant's assistance or encouragement. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances).[634] Based solely on consideration of Model Penal Code § 2.06(3), then, it is unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[635]

It is only through commentary that the drafters of the Model Penal Code clarify their intent for the general purpose requirement set forth in § 2.06(3) to apply, at minimum, to the "bringing about of conduct that the Code has declared to be criminal.[636] This implicit adoption of the true purpose approach to conduct is thereafter accompanied by a further textual clarification that the purpose requirement *does not* apply to results. More specifically, Model Penal Code § 2.06(4) establishes that result elements are subject to a principle of culpable mental state equivalency, under which:

> When causing a particular result is an element of an offense, an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense.[637]

Importantly, Model Penal Code § 2.06 does not incorporate an analogous provision addressing the culpability required for circumstances.[638] Instead, the drafters of the Model Penal Code opted for "deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense or whether . . . the policy of the substantive offense on this point should control." [639] Through such silence the drafters

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[633] *See* Robinson & Grall, *supra* note 118, at 733-34.
[634] *See also id.* at 758 ("One could be even more precise by distinguishing the accomplice's culpability as to his conduct, generally not an issue, from his culpability as to whether his conduct will assist the perpetrator in committing the offense, the primary issue here.").
[635] *See id.*
[636] Model Penal Code § 2.06 cmt. at 310.
[637] Model Penal Code § 2.06(4).
[638] Robinson & Grall, *supra* note 118, at 739.
[639] Model Penal Code § 2.06 cmt. at 311 n.37.

intended to delegate the issue "to resolution by the courts."[640] This is the same approach reflecting in the Model Penal Code's general solicitation[641] and conspiracy provisions,[642] both of which also "deliberately le[ave] open" the "matter" of whether the circumstances of the target offense are subject to a principle of culpable mental state elevation or equivalency,[643] with the goal of "affording courts sufficient flexibility for satisfactory decision as such cases may arise."[644]

While consistent with the Model Penal Code's solicitation and conspiracy provisions, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement accomplice liability,[645] "rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues through] continued reliance on common law."[646] Comprehensive legislation of this nature also serves the interests of due process: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[647]

With this in mind, the RCC approach to codifying the culpable mental state of accomplice liability strives to provide the clarity lacking from the Model Penal Code, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 210(a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern accomplice liability statutes.[648] It effectively communicates that accomplice liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[649]

Next, RCC § 210(a)(1) and (2) clearly and directly articulate that accomplice liability's distinctive purpose requirement governs the conduct which constitutes the object of the assistance or encouragement. More specifically, RCC § 210(a)(1) states that the

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[640] *Id.*

[641] Model Penal Code § 5.02(1).

[642] Model Penal Code § 5.03(1).

[643] Model Penal Code § 5.02(1) cmt. at 371 n.23.

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

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

[646] *Com. v. Barsell*, 424 Mass. 737, 741 (1997); *see also* Robinson & Grall, *supra* note 118, at 754 ("The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."). For discussion of the problems this delegation has created, see Mueller, *supra* note 202, at 2179.

[647] Wesson, *supra* note 207, at 209.

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

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

defendant must "[p]urposely assist[] another person with the planning or commission of conduct constituting that offense." Likewise, RCC § 210(a)(2) states that the defendant must "[p]urposely encourage[] another person to engage in conduct constituting that offense." This language is modeled on the approach in a few modern accomplice liability provisions, which clarify that proof of a conscious desire as to the conduct constituting the target offense is necessary where the government's theory of liability is based on *assistance*.[650] Notably, however, these statutes are silent on the relationship between the actor's state of mind and the conduct elements of the target where the government's theory of liability is based on *encouragement*.[651] The latter approach is unnecessarily ambiguous—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing accomplice liability.

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

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

The Model Penal Code approach to addressing this issue is *apparently* reflected § 2.06(4), under which "an accomplice in the conduct causing such result is an accomplice in the commission of that offense if he acts with the kind of culpability, if any, with respect to that result that is sufficient for the commission of the offense."[652] The drafters intended for this language to be read as attributing the relevant criminal conduct "to both participants, with the liability of each measured by his own degree of culpability toward the result."[653] However, the envisioned legal proposition (i.e., that an accomplice may be convicted of a different grade of an offense than that which is committed by the principal

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

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

[652] Model Penal Code § 2.06(4).

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

where there are variations in culpable mental state[654]) is far from clear based upon the text of § 2.06(4).[655]

With that in mind, and in the interests and clarity and consistency, the RCC incorporates a clearer and more direct approach to communicating this principle of individualized liability. More specifically, RCC § 210(c) states that: "An accomplice in the commission of an offense that is divided into degrees based upon distinctions in culpability as to results is liable for any grade for which he or she possesses the required culpability." This language is premised upon the modern accomplice liability statutes employed in a handful of reform jurisdictions.[656] It explicitly addresses by statute an important culpability issue upon which the Model Penal Code is ambiguous (and ultimately relies upon commentary to clarify).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing accomplice liability, which avoids the flaws and ambiguities reflected in Model Penal Code § 2.06(3)-(4).[657]

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

Relation to National Legal Trends. There are two primary means by which one person can be held accountable for the conduct of another. The first, and most common, is that of accomplice liability; it applies where one party intentionally assists or encourages the commission of an offense committed by another party.[658] There is, however, one important limitation confronting accomplice liability, namely, the requirement that the other party *actually commit an offense*.[659]

Consider the following illustration: a drug dealer asks his sister—who is unaware of her brother's means of employment—to pick up a package for him at the post office. He credibly tells his sister that the package is filled with cooking spices; however, it is actually filled with heroin. If the sister is subsequently arrested by the police in transit from the post office, the drug dealer cannot be deemed an accomplice to the possession of narcotics by the sister since the sister cannot herself be convicted of that offense.[660] Although she has engaged in conduct that satisfies the *objective elements* of an offense, the

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

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

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

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

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

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

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

sister nevertheless does not act with the required *culpable mental state*, i.e., knowledge (or even negligence) as to the nature of the substance in her possession.[661] Under these circumstances, the drug dealer can, however, be held criminally responsible for possession as a principal under a different theory of liability: the "innocent instrumentality rule."[662] This rule posits that, where the defendant manipulates an innocent person to commit what would be a crime if the innocent person were not legally excused or justified, the innocent person's conduct may be imputed to the defendant.[663]

The innocent instrumentality rule is based on, but also departs from, normal principles of causation. The rule treats an actor who uses an innocent person as the means of committing a crime as having caused that person's act in the same way he would be seen to cause a physical event (e.g., firing a gun to injure another person).[664] This kind of treatment constitutes a departure from the standard approach to causation doctrine, under which other people's conduct are not typically viewed "as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action."[665] Where, however, one party, P, induces another party, X, to engage in generally prohibited conduct that is either excusable or justifiable, the analysis materially changes. This is because, "[f]or

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

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

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

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

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

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

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

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

purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen."[666] Under such circumstances, the law regards P as a principal and X as a tool—an innocent agent—that P uses to commit the crime.[667]

The innocent instrumentality rule is a well-established common law doctrine.[668] Historically, American legal authorities have long viewed the act of an innocent agent induced by another to commit a crime to be "as much the act of the procurer as if he were present and did the act himself."[669] And this is still true today: the idea that "one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent" remains a "universally acknowledged principle" reflected across an array of contemporary common law authorities.[670]

The innocent instrumentality rule, as construed by these authorities, is generally comprised of three main requirements.[671] The first, and most fundamental, is that a human intermediary, in order to be deemed an instrumentality, must have *non-culpably* engaged in criminal conduct.[672] There are a variety of circumstances that will support this essential finding of blamelessness.[673]

The most common fact patterns involve an intermediary who has been induced by the principal to engage in criminal conduct by misleading or incomplete information. Where the principal's deceptive practices preclude the intermediary from acting with the culpable mental state requirement applicable to an offense, the intermediary is treated as an instrumentality whose conduct may be imputed to the principal.[674]

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

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

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

[669] J. Turner, 1 RUSSELL ON CRIME 129 (12th ed. 1964); *see United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) *cert. denied* 385 U.S. 1002, 87 S.Ct. 705, 17 L.Ed.2d 542 (1967) ("This doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as Regina v. Saunders, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century") (citing *United States v. Gooding*, 25 U.S. (12 Wheat.) 460, 6 L.Ed. 693 (1827)); *see also* F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

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

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

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

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

[674] *See, e.g., United States v. Bryan*, 483 F.2d 88 (3d Cir. 1973) (innocent party induced to ship whiskey); *Boushea v. United States*, 173 F.2d 131 (8th Cir. 1949) (innocent party induced to submit false claim); *People*

Even where an intermediary acts with the culpable mental state requirement applicable to an offense (e.g., intentionally commits an offense's objective elements), the innocent instrumentality rule may still apply if the conditions for an excuse defense are met. For example, where P induces X, a child, to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if X possesses an immaturity defense.[675] Similarly, where P coerces X by threat of physical violence to intentionally engage in criminal conduct, P is nevertheless accountable for such conduct if P possesses a duress defense.[676] And where P induces X, a mentally ill individual, to intentionally engage in in criminal conduct, P is nevertheless accountable for such conduct if X possesses an insanity defense.[677]

One other important situation in which the innocent instrumentality rule applies is where the intermediary makes a reasonable mistake as to a justification, i.e., mistakenly causes harm in a situation where the justifying conditions were culpably created by the principal. Illustrative situations include: (1) where P orchestrates the fatal shooting of his enemy, V, by a police officer, X, based on a fraudulent 911 call indicating that V is standing outside his home armed, dangerous, and prepared to shoot any member of law enforcement upon arrival[678]; and (2) where P, a robber, provokes his victim, X, to mistakenly kill an innocent bystander, V, in reasonable self-defense. [679] Under these circumstances, the innocent instrumentality rule provides the basis for imputing X's lethal yet mistakenly justified conduct to P based upon his or her having culpably created the conditions that

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v. Mutchler, 140 N.E. 820 (Ill. 1923) (fraudulent check cashed by innocent agent); *State v. Bourgeois*, 148 So.3d 561 (La. 2013); State v. Runkles, 605 A.2d 111 (Md. 1992); *McAlevy v. Commonwealth,* 620 S.E.2d 758 (Va. 2005); *Jones v. State*, 256 P.3d 527 (Wyo. 2011).

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

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

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

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

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

gave rise to it.[680]

Once it has been determined that an intermediary who engages in statutorily prohibited conduct qualifies as an instrumentality, the next issue to be addressed is whether a sufficient causal nexus between the defendant's conduct and that of the intermediary exists.[681] The innocent instrumentality rule is subject to a causation requirement comprised of the same basic principles of factual causation and legal causation applicable throughout the criminal law. In this context, factual causation entails an empirical evaluation of whether the P was the logical, but-for cause of X's conduct, i.e., the question is whether "P did something to manipulate or otherwise use X, so that it may be said that, but for P's conduct, X would not have engaged in the conduct for which P is being held accountable."[682] Legal causation, in contrast, imports a normative evaluation of whether the chain of events following P's attempt at inducing X to engage in criminal conduct were "reasonably foreseeable,"[683] or not too "attenuated," [684] to justify holding the defendant liable under the circumstances.[685]

The third, and final, requirement is that the defendant must have committed the *actus reus* of the innocent instrumentality rule "with whatever *mens rea* or mental state is needed for the crime."[686] More specifically, the government must prove that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense

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

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

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

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

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

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

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

with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense. So, for example, in a jurisdiction where rape requires proof of *intentionally* engaging in sexual intercourse, with *negligence* as to the absence of consent, P may be held liable for coercing X to rape V if (but only if) it can be proven that: (1) P *intentionally* caused X to engage in sexual intercourse with V; and (2) P did so *failing to perceive a substantial risk* that V was not consenting to the episode.[687]

This general principle of culpable mental state equivalency has three main implications. First, the innocent instrumentality rule does not require proof of intent; rather, "a defendant may be held liable for causing the acts of an innocent agent even if he does so recklessly or negligently, so long as no greater *mens rea* is required for the underlying offense."[688] For example, P may be held liable for reckless manslaughter if he *recklessly* leaves his car keys with X, an irresponsible agent known to have a penchant for mad driving, if X subsequently kills V on the road, provided that P *consciously disregarded a substantial risk* that such a fatal outcome could transpire, and such disregard was a gross deviation from a reasonable standard of care.[689]

Second, and conversely, the innocent instrumentality rule precludes holding an actor criminally liable for causing an innocent or irresponsible person to engage in statutorily prohibited conduct absent proof of a culpable mental state that is *at least as demanding* as that governing the target offense. For example, if "obtaining property by false pretenses is a crime only if the false pretenses are made purposely, one does not commit it by negligently causing an innocent agent to make statements that are false; one must do so purposely."[690]

Third, and relatedly, where an offense is divided into degrees based upon distinctions in culpability as to results, the principal's "liability shall extend only as far as his mental state will permit."[691] For example, where a defendant recklessly "cause[s] a child to kill intentionally, the child's intent to kill is not imputed to him; he may be guilty of manslaughter for his recklessness but he is accountable for nothing more."[692]

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

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

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

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

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

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

The contemporary basis for codifying the innocent instrumentality rule is the Model Penal Code's general complicity provision, § 2.06.[693] At "the time of the drafting of the Model Penal Code," criminal codes rarely incorporated a "legislative formulation" of the rule, and even those that did were ambiguous about its basic contours.[694] The drafters of the Model Penal Code sought to fill this gap by offering a clear statutory approach. What they ultimately produced states that: "A person is legally accountable for 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."[695]

This formulation is composed of two main components. With respect to considerations of *actus reus*, the language utilized by the drafters clarifies that the innocent instrumentality rule "applies only if P causes X"—an innocent or irresponsible person—"to engage in the conduct in question."[696] And, with respect to considerations of *mens rea*, such language delineates that an actor may only be held "accountable for the behavior of an innocent or irresponsible person when he has caused it with the purpose, knowledge, recklessness, or negligence that the law requires for commission of the crime with which he has been charged."[697]

Since completion of the Model Penal Code, the drafters' recommended approach to codifying the innocent instrumentality rule has gone on to become quite influential. For example, the commentary accompanying the Code highlights that, as of 1980, "most of the recent revisions" had either incorporated or proposed a comparable provision.[698] And this remains true today: nineteen of the twenty-nine jurisdictions that have undertaken

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

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

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

[695] Model Penal Code § 2.06(2)(a).

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

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

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

comprehensive criminal code reform efforts codify the innocent instrumentality rule in a manner that corresponds with Model Penal Code § 2.06(2)(a).[699]

While the Model Penal Code approach to codification has had a broad influence on modern criminal codes, legislatures in reform jurisdictions also routinely modify it. Many of these revisions are minor or organizational; however, some are substantive.[700] Most significant are those reform jurisdictions that incorporate a definition of an "innocent or irresponsible person" (the importance of which is discussed below).[701] Revisions aside, there is little question that Model Penal Code § 2.06(2)(a) broadly reflects the modern legislative approach to the issue, which has also generally been embraced by the scholarly commentary.[702]

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

First, RCC § 211 remedies a key ambiguity in Model Penal Code § 2.06(2)(a), which vaguely states that the defendant must cause an innocent or irresponsible person to

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

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

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

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

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

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

"engage in *such* conduct."[703] As a textual matter, this language does not expressly require that the conduct that the defendant causes the intermediary to engage in actually be the conduct constituting the offense, "that is, the conduct under the circumstances and causing the results proscribed by the offense definition."[704] That being said, there is little doubt "that the drafters intended to require this" construction.[705] With that in mind, and in furtherance of the interests of clarity and consistency, RCC § 211 explicitly states that the defendant must cause "an innocent or irresponsible person to *engage in conduct constituting an offense*."[706]

Second, RCC § 211(b) fills an important gap in Model Penal Code § 2.06(2)(a), which fails to define an "innocent or irresponsible person." Absent a statutory definition of this phrase, the text of Model Penal Code § 2.06(2)(a) "gives no hint as to what kinds of defenses offered by the perpetrator will render him 'innocent or irresponsible.'"[707]

To be sure, the commentary accompanying the Model Penal Code offers illustrative examples, such as those who lack the necessary intent, the mentally ill, children, and one who mistakenly kills an innocent bystander while responding to a defendant's attack.[708] Viewed collectively, these illustrations indicate that the absence of an offense's culpable mental state requirement or the presence of an excuse defense provide the basis for viewing someone as innocent or irresponsible.[709] Commentary aside, the failure to expressly communicate this point through the Code's text remains a significant oversight given its importance to application of the rule.[710]

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

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

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.
[Previously § 22E-212. Exceptions to Legal Accountability.]

Relation to National Legal Trends. Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense

[703] 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 . . . .").
[704] *See* Robinson and Grall, *supra* note 65, at 733.
[705] *See id.* (discussing those aspects of the Model Penal Code commentary that support this view).
[706] *See, e.g.,* Alaska Stat. Ann. § 11.16.110 (3) ("[A]cting with the culpable mental state that is sufficient for the commission of the offense, the person causes an innocent person or a person who lacks criminal responsibility to engage in the proscribed conduct").
[707] ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.
[708] Model Penal Code § 2.06 cmt. at 301-04.
[709] ROBINSON, *supra* note 49, at 1 CRIM. L. DEF. § 82.
[710] *See id.*

definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense."[711] Two such situations arise in the context of accomplice liability where: (1) the would-be accomplice is also a victim of the offense; and (2) the conduct of the would-be accomplice is inevitably incident to commission of the offense.[712]

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—"the victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime."[713] This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves.[714]

The paradigm case is presented by a minor who willingly participates in a sexual relationship with an adult that is considered by law to constitute statutory rape.[715] Under these circumstances, the minor may technically satisfy the requirements of accomplice liability as to the statutory rape in the sense of having purposefully assisted and encouraged its perpetration.[716] Nevertheless, "in the absence of express legislative authority to the contrary, [the minor] may not be convicted as an accomplice in her own victimization."[717] The same has also been said about the "[t]he businessman who yields to the extortion of a racketeer, [or] the parent who pays ransom to the kidnapper."[718] Although those "who pay extortion, blackmail, or ransom monies" can be understood to have "significantly assisted

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[711] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

[712] *See, e.g.,* WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) ("One may be an accomplice in a crime which, by its definition, he could not commit personally. However, one is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . ."); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these "exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 (6th ed. 2012).

[713] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Southard*, 700 F.2d at 19.

[714] *See* Ky. Rev. Stat. § 502.040 cmt. (noting victim "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime"); ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (same).

[715] *See, e.g.,* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

[716] *See generally, e.g.,* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[717] DRESSLER, *supra* note 36, at § 29.09[D]; *see, e.g., In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape," and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse"); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) ("A girl under sixteen years of age, the victim of []sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony."); *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016) ("[A] fourteen-year old who consents to sex with a forty-year old cannot be charged with aiding or abetting statutory rape[.]"); *see also, e.g., Whitaker v. Commonwealth*, 95 Ky. 632, 27 S.W. 83, 84 (1894) (consenting victim of incestuous conduct of her father could not be convicted as an accomplice to his offense); *Ex parte Cooper*, 162 Cal. 81, 85, 121 P. 318 (1912) (rejecting argument that an unmarried woman, although not guilty herself of adultery, was nevertheless a principal in that crime by her participation in the illicit intercourse when she willfully and knowingly aided and abetted her married codefendant in the commission of the offense); *State v. Hayes*, 351 N.W.2d 654 (Minn. App. 1984) (minor who was furnished liquor not an accomplice to crime of furnishing liquor to minor).

[718] DRESSLER, *supra* note 36, at § 29.09[D]; LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

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."[719]

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—accomplice liability does not apply "where the crime is so defined that participation by another is inevitably incident to its commission."[720] This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of law.[721]

The paradigm case is a two-party transaction involving the purchase of controlled substances acquired by the buyer for individual use.[722] Under these circumstances, the buyer may technically satisfy the requirements of accomplice liability as to the distribution of controlled substances in the sense of having purposefully assisted and encouraged it.[723] Nevertheless, it is well-established that "a purchaser of a controlled substance is not an aider and abettor in the controlled substance's delivery or distribution."[724] The reason? The buyer's "conduct is necessarily incident to the other crime."[725] Which is to say: because the distribution of narcotics necessarily requires two parties, a seller and a

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[719] *Southard*, 700 F.2d at 19; Haw. Rev. Stat. § 702-224 cmt. ("For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be unwise to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.")

[720] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *see, e.g*,, *Wegg*, 919 F. Supp. at 907 ("[O]ne cannot be an accomplice if one's conduct is 'inevitably incident' to the commission of the offense."); *United States v. Jefferson*, 13 M.J. 779, 781 (A.C.M.R. 1982) ("[A] person is not an aider and abettor of an offense committed by another if his conduct is 'inevitably incident to its commission,' unless there is a criminal statute which provides otherwise."); *United States v. Carney*, 387 F.3d 436, 455 (6th Cir. 2004) (Guy, J., dissenting) (noting the well-established common law exception to accomplice liability for crimes in which "it takes two to tango"); *Southard*, 700 F.2d at 20.

[721] *See, e.g.,* Ky. Rev. Stat. Ann. § 502.040 cmt. (stating that conduct inevitably incident rule is an "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime," applicable to "a person who joins another in a two-party transaction that constitutes a crime for which criminal sanctions are imposed only on the other party").

[722] *See, e.g.,* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

[723] *See generally, e.g.,* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[724] *State v. Utterback,* 240 Neb. 981, 485 N.W.2d 760, 770 (1992); *see, e.g., State v. Berg,* 613 P.2d 1125, 1126 (Utah 1980) ("A purchaser of a controlled substance commits the offense of 'possession.' One guilty of that offense . . . is not an accomplice to the crime committed by the seller."); *Wheeler v. State,* 691 P.2d 599, 602 (Wyo. 1984) ("The purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution."); *United States v. Harold,* 531 F.2d 704, 705 (5th Cir.1976) ("It is not necessary to 'sell' contraband to aid and abet its distribution . . . but to participate actively in the distribution [of a controlled substance] to others one must do more than receive it as a user."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("The general rule in Alabama is that the purchaser of an illicit substance is not an accomplice of the seller because the purchaser is guilty of an offense independent from the sale."); *Leigh v. State*, 34 Okla. Crim. 338, 246 P. 667 (1926) ("The purchaser of intoxicating liquor at an illegal sale is not an accomplice of the seller."); *State v. Celestine*, 671 So. 2d 896, 897–98 (La. 1996) (same); *Robinson v. State*, 815 S.W.2d 361, 363–64 (Tex. App. 1991) (collecting legal commentary and citations).

[725] *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.").

purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception.

For similar reasons, American legal authorities frequently bar both "prosecution of the bribe giver for the crime of bribe receiving" (and vice versa).[726] Here again, general principles of accomplice liability would seem to support criminal responsibility given the likelihood that a bribe giver will have purposely assisted and encouraged the bribe receiver's conduct (and vice versa).[727] Nevertheless, courts preclude this kind of reciprocal liability premised on the "the mutual participation" inherent in bribery.[728] That is, because bribery necessarily requires two parties, the bribe-giver and the bribe-receiver, one of those parties may not be held criminally responsible for the other's conduct as an accomplice under the conduct inevitably incident exception.[729]

It's important to point out that, in applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime."[730] To take just one example, consider "the role of a doorman for a [drug]house, which is to prevent 'ripoffs' or robberies by individuals entering the premises."[731] That role may in a general sense be "incidental to the main business of the house—the sale and purchase of [controlled substances]."[732] Nevertheless, because it is entirely possible (as a matter of law) to distribute drugs without the assistance of a doorman, the doorman's conduct, unlike that of the purchaser, is not "inevitably incidental to the commission of the crime" of drug distribution.[733]

Both of these exceptions to the general rules of accomplice liability are typically justified on the basis of legislative intent. With respect to the victim exception, for example, it has been observed that "[w]here the statute in question was enacted for the

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[726] *People v. Manini*, 79 N.Y.2d 561, 571 (1992). (citing N.Y. Penal Law § 20.00 cmt.) ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.")); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with "sports bribery as an accomplice of the briber").

[727] *See generally, e.g.,* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[728] *Jennings*, 490 S.W.3d at 344.

[729] *See, e.g., People v. Manini*, 79 N.Y.2d 561, 571 (1992) (code precludes "prosecution of the bribe giver for the crime of bribe receiving") (citing Commentary to N.Y. Penal Law § 20.00 ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.")); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with "sports bribery as an accomplice of the briber"); *but see May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

[730] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999).

[731] *Wagers v. State*, 810 P.2d 172, 175 (Alaska Ct. App. 1991).

[732] *Id.*

[733] *Id.*; *see, e.g., Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's conduct was not "inevitably incident" to the crime of assault" because that offense "does not as defined require one person to identify the victim and another to strike the blow").

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."[734] And, with respect to the conduct inevitably incident exception, the standard "justification is that 'the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime."[735]

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to criminalize the relevant conduct.[736] For example, it has been argued that where the legislature excludes customers from the definition of prostitution, criminal liability premised on an aiding and abetting theory should be barred by the conduct inevitably incident exception.[737] With that in mind, however, many legislatures "have specifically provided for the liability of [customers] by either redefining the offense of prostitution or by enacting a 'patronizing a prostitute' offense."[738] And where the legislature has made an offense-specific determination of this nature, it is generally agreed that the courts should implement it.[739] In this way, these exceptions from general principles of legal accountability constitute default rules of construction, to be applied in the absence of an explicit, offense-by-offense specification of liability.[740]

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[734] *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016); (quoting LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3); *see* Ky. Rev. Stat. § 502.04 cmt. (noting that this exception "is for individuals whose protection is the very purpose of a criminal prohibition"). As for the rationale behind the legislative purpose, it seems to rest upon basic intuitions. Consider, for example, the commentary to the Hawaii criminal code:

> Even though a victim of an offense in a limited sense assists its commission, it *seems clear* that the victim ought not to be regarded as an accomplice. For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be *unwise* to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.

Haw. Rev. Stat. § 702-224 cmt.

[735] *Blankenship*, 2016 WL 4030943, at *6–7 (quoting *Southard*, 700 F.2d at 19); *Ex parte Cooper*, 162 Cal. 81, 86, 121 P. 318 (1912); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently,"; therefore, "adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); Commentary on Haw. Rev. Stat. Ann. § 702-224 ("In those cases where the commission of an offense necessarily involves the conduct of two persons, it is questionable wisdom to push the concept of complicity to its outer limits."); *see also* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 ("A secondary consideration, equally applicable to the victim exception, is that if the law were otherwise convictions would be more difficult to obtain in those jurisdictions requiring corroboration of an accomplice's testimony."); *compare United States v. Hogan*, 886 F.2d 1497, 1504 (7th Cir. 1989) ("Where the statute covers the incidental conduct, the "inevitably incident" defense does not apply.")

[736] *See, e.g.,* ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

[737] *See, e.g., People v. Anonymous*, 161 Misc. 379, 292 N.Y.S. 282 (N.Y. Crim. Ct. 1936).

[738] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (collecting statutory citations).

[739] *See, e.g.,* Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.

[740] *See, e.g.,* Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.[741] The relevant code language is contained in Model Penal Code § 2.06(6)(a) and (b), which provide:

> (6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

This language, as the explanatory note highlights, was intended to codify two different "special defenses to a charge that one is an accomplice."[742] The first is applicable "when the actor is himself a victim of the offense"[743]; it reflects the drafters belief that—as the accompanying commentary phrases it—"the victim of a crime should not be held as an accomplice in its perpetration, even though his conduct in a sense may have assisted in the commission of the crime and the elements of complicity previously defined may technically exist."[744] The drafters viewed this first exemption in terms of legislative intent:

> The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or may even be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime.[745]

Apart from the issue of victims addressed by Model Penal Code § 2.06(6)(a) is that of conduct inevitably incident, which is governed by Model Penal Code § 2.06(6)(b).[746] The latter provision creates a second (and distinct) exception applicable "when the offense is so defined that the actor's conduct is inevitably incident to the commission of the offense."[747]

The Model Penal Code drafters intended this provision to speak to difficult questions, such as whether someone who "has intercourse with a prostitute [should] be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist,

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[741] *See generally* Model Penal Code § 2.06(6) cmt. at 323-24.
[742] Model Penal Code § 2.06(6): Explanatory Note.
[743] Model Penal Code § 2.06(6): Explanatory Note.
[744] Model Penal Code § 2.06(6) cmt. at 323-24.
[745] Model Penal Code § 2.06(6) cmt. at 323-24.
[746] *See* Model Penal Code § 2.06(6) cmt. at 323-24 ("Exclusion of the victim does not wholly meet the problems that arise.").
[747] Model Penal Code § 2.06(6): Explanatory Note.

the bribe giver an accomplice of the taker?"[748] The drafters believed that "a systematic legislative resolution of these issues" to be a "hopeless effort," and that instead, "the problem must be faced and weighed as it arises in each situation."[749] That said, the drafters also believed that a default rule *against* accomplice liability best accounted for the commonality between them, namely, "that the question is before the legislature when it defines the individual offense involved."[750] "The provision, therefore, is that the general section on complicity is inapplicable, leaving to the definition of the crime itself the selective judgment that must be made."[751]

Since completion of the Model Penal Code, the drafters' recommendations concerning codification of broadly applicable exceptions to accomplice liability have been quite influential. A substantial majority of modern criminal codes incorporate a general provision based on Model Penal Code § 2.06(6)(a), which excludes victims from the scope of accomplice liability.[752] Likewise, a substantial majority of modern criminal codes also incorporate a general provision based on Model Penal Code § 2.06(6)(b), which excludes

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[748] Model Penal Code § 2.06(6) cmt. at 323-24. The commentary goes on to observe that:

> These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirements that testimony of accomplices be corroborated; the consequence may therefore be to diminish rather than enhance the law's effectiveness by making prosecutions unduly difficult. More than this, however, is involved. In situations like prostitution, prohibition, and even late abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity and elicits sympathy for those against whom prosecution may be launched.

Id. Note that the Model Penal Code has codified several of the crimes noted above in a way that makes conduct that was previously only "inevitably incident" to an offense, now liable for a separate offense. *See* Model Penal Code §§ 230.3(4) (prohibiting a woman from aborting after the 26th week of pregnancy), 251.2(5) (prohibiting patronizing a prostitute), 230.1(3) (prohibiting contracting or proporting to contract marriage with another knowing the other would thereby commit bigamy), 223.6(1) (prohibiting receipt of stolen property knowing it to be stolen).

[749] Model Penal Code § 2.06(6) cmt. at 323-24.

[750] *Id.*

[751] Model Penal Code § 2.06(6) cmt. at 323-24 ("If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct "inevitably incident to" the commission of the crime, the problem inescapably presents itself in defining the crime.""); *compare id.* ("This method of treatment might be unacceptable in legislating on accomplices for an established system, where the legislature may or may not have dealt with the issue in particular definitions and will not have been consistent in its practice. But in a model code or general revision, former legislative practice appears immaterial; the problem may be faced as each branch of the work proceeds.").

[752] Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev.Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev.Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Mont. Code Ann. § 45-2-302 (victim only); N.D. Cent. Code § 12.1-03-01 (victim only); Wash. Rev. Code § 9A.08.020 (victim only).

inevitably incident conduct from accomplice liability.[753]

While the exceptions reflected in the Model Penal Code § 2.06(6)(a) and (b) have had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions frequently modify them. Many of these revisions are stylistic and/or organizational; however, at least one is potentially substantive. This modification is reflected in those reform jurisdictions that address a noted textual "inconsistency" in the Model Penal Code's treatment of accomplices and those who cause crime to occur.[754]

The relevant inconsistency is a product of the fact that the Model Penal Code exceptions for victims and conduct inevitably incident are framed in terms of when "a person is not an accomplice in an offense committed by another person."[755] However, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.[756] The other basis, often referred to as the innocent instrumentality doctrine, attaches legal accountability where one person, "acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct."[757] Textually speaking, therefore, the Model Penal Code would appear to *preclude* applying the victim and conduct inevitably incident exceptions to those held criminally liable for causing crime to occur.[758]

Various state criminal codes, in contrast, clearly establish that the relevant exceptions apply equally to their general accomplice and causing crime by an innocent provisions. Illustrative is Section 20.10 of the New York criminal code, which establishes that "a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto."[759] Similarly, Section 13A-2-24 of Alabama's criminal code provides that, "[u]nless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting a criminal offense if: (1) He is a victim of that offense; or (2) The offense is so defined that his conduct is inevitably incidental to its commission."[760]

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[753] Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev.Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev.Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Ky. Rev. Stat .Ann. § 502.040 (only conduct inevitably incident); N.Y. Penal Law § 20.10 (only conduct inevitably incident).

[754] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

[755] Model Penal Code § 2.06(6).

[756] *Compare* Model Penal Code § 2.06(2)(c) ("A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense") *with* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . 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").

[757] Model Penal Code § 2.06(2)(a).

[758] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

[759] N.Y. Penal Law § 20.10.

[760] Ala. 13A-2-24; Ky. Rev. Stat. Ann. § 502.040 ("A person is not guilty under [statutory provisions governing accomplice liability and causing crime by an innocent] for an offense committed by another person when . . . The offense is so defined that his conduct is inevitably incident to its commission.").

This revision, it's worth noting, also finds support in legal commentary.[761] It has been observed, for example, that the disparate treatment of accomplices and those who cause crime by an innocent may simply have been "the result of careless drafting" given the different time periods in which the relevant Model Penal Code provisions were compiled.[762] Drafting concerns aside, moreover, it has been argued that there exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other."[763] For example, barring such defenses in the context of the innocent instrumentality doctrine would make it possible to hold X, an underage minor willingly engaged in a sexual relationship with adult Y, criminally responsible for statutory rape provided that Y possesses a mental illness sufficient to constitute an insanity defense.[764] Likewise, it would also authorize holding X, the purchaser in a drug sale by Y, criminally responsible for distribution merely because Y possesses a mental illness sufficient to constitute an insanity defense.[765]

Consistent with the above considerations, the RCC creates two generally applicable exceptions to legal accountability for another person's conduct. The first exception, RCC § 212(a), excludes the "victim of [the] offense" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. The second exception, RCC § 212(a)(2), excludes actors whose "conduct is inevitably incident to commission of the offense as defined by statute" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 212 *is not* intended to constitute a universal bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 2.06(6). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it clarifies that these exceptions apply equally across forms of legal accountability. This departure finds support in state legislative practice[766] and scholarly commentary.[767]

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[761] For legal commentary more generally in support of the Model Penal Code's approach to dealing with the intersection between accomplice liability, victims and conduct inevitably incident, see, for example, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; DRESSLER, *supra* note 36, at § 29.09.

[762] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

[763] *Id* ("For example, if the victim of an assault has purposely aided another in beating him by providing a whip, the victim nonetheless would receive a specially exempted person defense to complicity under § 2.06(6)(a). The result would be different, however, if the assisted assaulter has an insanity defense and the victim is charged with causing crime by an innocent; § 2.06(6)(a) provides the "victim" defense only to complicity liability.").

[764] *See id.*

[765] *See id.*

[766] *See supra* notes 83-84 and accompanying text.

[767] *See supra* notes 85-87 and accompanying text.

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

Relation to National Legal Trends. Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense."[768] There is, however, an important exception applicable to both the general inchoate crimes of attempt, solicitation, and conspiracy, as well as criminal liability based on complicity. In these contexts, the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise."[769] As it arises in the complicity context, the relevant defense is typically referred to as "withdrawal."[770]

The withdrawal defense to complicity both "originated and has persisted as a judicially-developed concept."[771] This concept embodies the idea that "a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party."[772] Importantly, though, not just any abandonment will provide the basis for a withdrawal defense. For example, it is well established among common law authorities that a "spontaneous and unannounced withdrawal will not do."[773] Nor will proof that the defendant merely regretted his or her

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[768] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

[769] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

[770] *Id.*

[771] Buscemi, *supra* note 8, at 1178; *see, e.g.,* CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 37 (15th ed. 2018) ("At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime."); *State v. Allen*, 47 Conn. 121 (1879); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *Galan v. State*, 44 Ohio App. 192, 184 N.E. 40 (1932).

[772] DRESSLER, *supra* note__, at § 30.07; *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal is traditionally a defense to crimes of complicity: conspiracy and aiding and abetting."); *see also* ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 ("A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability."); *cf.* Buscemi, *supra* note 8, at 1178 ("Withdrawal originated and has persisted as a judicially-developed concept. No evidence has been uncovered to indicate that its application will be discontinued under the new Federal Criminal Code, whichever form is ultimately adopted.").

On the federal level, "it is unsettled if a defendant can withdraw from aiding and abetting a crime," for "[u]nlike a conspiracy, which by its very nature involves an agreement that can be refuted, accomplice liability can arise from merely encouraging the principal." *United States v. Burks*, 678 F.3d 1190 (10th Cir. 2012) ("declin[ing] the government's suggestion to categorically hold that withdrawal can never be a valid defense to aiding and abetting a federal crime."). Note, however, that the U.S. Supreme Court's recent decision in *Rosemond v. United States*, 572 U.S. 65, 78 (2014) "explained that an accomplice must know of the substantive offense beforehand in order to be shown to have embraced its commission . . . in a manner suggesting an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime's ultimate success." Charles Doyle, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, CONGRESSIONAL RESEARCH SERVICE REPORT, at 10-11 (Oct. 24, 2014).

[773] DRESSLER, *supra* note 7, at § 30.07 (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev'd on other grounds*, 387 A.2d 1187 (N.J. 1978)); *see, e.g., Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959); *State v. Guptill*, 481 A.2d 772 (Me. 1984).

participation,[774] fled from the scene of a crime,[775] or was apprehended by the police before the crime aided or abetted was committed.[776] Rather, the contemporary common law rule is that the defendant must terminate his or her participation in a criminal scheme and: "(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable."[777]

This is generally understood to be a flexible standard, the satisfaction of which is contingent upon the nature of the conduct that establishes the defendant's complicity in the first place.[778] Which is to say: the greater the defendant's contribution to a criminal scheme, the stronger the evidence needed to prove that the defendant withdrew from it.[779] For example, a defendant who contributes a weapon to a criminal scheme to be used by the principal actor in the commission of an offense cannot avoid legal accountability by merely asking for the gun to be returned.[780] Rather, conduct such as actual retrieval is needed.[781]

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[774] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *In re D.N.*, 65 A.3d 88 (D.C. 2013); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959)).

[775] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Plater v. United States*, 745 A.2d 953 (D.C. 2000); *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905)); *see People v. Lacey,* 49 Ill.App.2d 301, 200 N.E.2d 11, 14 (1964) ("A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene.").

[776] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Sheppard v. State*, 312 Md. 118, 538 A.2d 773 (1988)); *see State v. Amaro,* 436 So.2d 1056 (Fla. Dist. Ct. App. 1983); *Commonwealth v. Doris,* 287 Pa. 547, 135 A. 313 (1926)).

[777] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g., Smith v. State*, 424 So. 2d 726, 732 (Fla. 1982) ("To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan."); DRESSLER, *supra* note 7, at § 30.07 ("[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance."); Ky. Rev. Stat. § 502.040 cmt. (observing the "prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly").

The common law rule has similarly been described as follows:

> Where the perpetration of a felony has been entered on, one who had aided and encouraged its commission may nevertheless, before its completion, withdraw all his aid and encouragement and escape criminal liability for the completed felony; but his withdrawal must be evidenced by acts or words showing to his confederates that he disapproves or opposes the contemplated crime. Moreover, it is essential that he withdraw in due time, that the one seeking to avoid liability do everything practicable to detach himself from the criminal enterprise and to prevent the consummation of the crime, and that, if committed, it be imputable to some independent cause.

Blevins v. Com., 209 Va. 622, 626, 166 S.E.2d 325, 328–29 (1969) (quoting 22 C.J.S. CRIMINAL LAW § 89).

[778] Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

[779] Haw. Rev. Stat. Ann. § 702-224 cmt ("More will be required of one who distributes arms than one who offers verbal encouragement.").

[780] Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[781] Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g., State v. Adams*, 225 Conn. 270, 623 A.2d 42 (1993) ("Depriving this act of its effectiveness would have required a further step, such as taking back the weapon"); *State v. Miller*, 204

This is to be contrasted with the situation of a defendant whose contribution to a criminal scheme merely involved verbal encouragement.[782] In that case, an oral communication indicating one's intentions to withdraw may be sufficient.[783] And it is also well established that, as an alternative in either of the above situations, a defendant can avoid legal accountability by providing the police with reasonable notice or by engaging in some other "proper effort" directed toward prevention of the target offense.[784]

While the nature of the conduct that will provide the basis for a withdrawal defense is varied, one limiting principle is uniform: the withdrawal must be timely.[785] For example, where the withdrawal is based on oral repudiation by the defendant, that repudiation must "be communicated far enough in advance to allow the others involved in the crime to follow suit."[786] Similarly, in the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme.[787] In practice, then, it must "be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise *before* the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed."[788]

None of which is to say that the defendant's conduct "must *actually prevent* the crime from occurring."[789] Indeed, just the opposite is true: the common law rule is that "[i]t is *not necessary* that the crime actually have been prevented" in order to successfully raise a withdrawal defense.[790] What matters is that the defendant's conduct was reasonably calculated towards negating—whether directly or indirectly—his or her initial contribution to a criminal scheme, thereby ameliorating the justification for imposing legal accountability in the first place.[791]

W.Va. 374, 513 S.E.2d 147 (W.Va.1998) (where defendant gave her son gun and drove him to where his father was, after which son shot and killed father, her abandonment defense rejected because she "did not do everything practicable to abandon the enterprise," such as taking back the gun or driving her son from where the father was located).

[782] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[783] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[784] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[785] Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").

[786] *State v. Formella*, 158 N.H. 114, 116–19, 960 A.2d 722, 724–26 (2008); *see, e.g., People v. Brown*, 26 Ill.2d 308, 186 N.E.2d 321 (1962); *Commonwealth v. Chhim*, 447 Mass. 370, 851 N.E.2d 422 (2006).

[787] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[788] *Id.* (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307, 200 N.E.2d 11, 14 (Ill. App. Ct. 1964)).

[789] *Id.*

[790] *Id.*; *see, e.g.,* Ky. Rev. Stat. Ann. § 502.040 cmt. (Withdrawal defense "allows an accomplice to avert liability through appropriate withdrawal, even though the offense which he aids is ultimately committed"); *State v. Allen*, 47 Conn. 121 (1879).

[791] In this sense, the withdrawal defense to accomplice liability "is clearly more lenient" than the renunciation defense to general inchoate crimes, which is typically comprised of an "'actual prevention' standard." ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Another way the withdrawal defense to accomplice liability is more lenient is that it generally has no subjective renunciation requirement (i.e., any motive underlying the withdrawal will suffice), whereas for general inchoate crimes the renunciation must be voluntary. *See id.*

The Model Penal Code provides the basis for most efforts at codifying a withdrawal defense to accomplice liability.[792] The relevant code language is contained in Model Penal Code § 2.06(6)(c), which provides:

> (6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
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> . . . .
>
> (c) he terminates his complicity prior to the commission of the offense and
>
> (i) wholly deprives it of effectiveness in the commission of the offense; or
>
> (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

This language, as the explanatory note highlights, was intended to codify a "special defense[] to a charge that one is an accomplice," which "relates to a termination of the actor's complicity prior to the commission of the offense."[793] More specifically, the specified defense "requires that the actor wholly deprive his conduct of its effectiveness in the commission of the offense or that he give timely warning to law enforcement authorities or otherwise make a proper effort to prevent the commission of the offense."[794]

With respect to the requirement in subsection (6)(c)(i) that "the accomplice must deprive his prior action of its effectiveness," the Model Penal Code commentary explains that "[t]he action needed for that purpose will, of course, vary with the accessorial behavior."[795] So, for example, "[i]f the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back the arms, and thus wholly deprive his aid of its effectiveness in the commission of the offense."[796] Conversely, if "complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime."[797]

Thereafter, the Model Penal Code commentary explains that subsection (6)(c)(ii) speaks to the fact that "[t]here will also be cases where the only way that the accomplice can deprive his conduct of effectiveness is to make independent efforts to prevent the crime."[798] Even under these circumstances, the drafters of the Model Penal Code believed that "the law should nonetheless accord the possibility of gaining an immunity, provided there is timely warning to the law enforcement authorities or there otherwise is proper

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[792] *See generally* Model Penal Code § 2.06(6) cmt. at 323-24.
[793] Model Penal Code § 2.06(6): Explanatory Note.
[794] *Id.*
[795] Model Penal Code § 2.06(6) cmt. at 326.
[796] *Id.*
[797] *Id.*
[798] *Id.*

effort to prevent commission of the crime."[799] That said, the drafters also believed that "[t]he sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule."[800] To that end, "Subsection (6)(c)(ii) accordingly provides that the actor must make 'proper effort' to prevent the commission of the offense."[801]

The Model Penal Code treatment of withdrawal in the complicity context is to be distinguished from its treatment of renunciation in the context of the general inchoate crimes. For example, with respect to criminal solicitations, Model Penal Code § 5.02(3) provides that "[i]t is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." And with respect to criminal conspiracies, Model Penal Code § 5.03(6) establishes that "[i]t is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[802]

The key phrase in these formulations—"complete and voluntary"—is defined in Model Penal Code § 5.01(4). This provision provides, first, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[803] Then this provision adds that "[r]enunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[804]

Overall, the Model Penal Code's renunciation defense to general inchoate crimes departs from—and is ultimately narrower than—its withdrawal defense in two primary ways.[805] First, Model Penal Code's renunciation defense incorporates an "actual prevention" standard, which entails that the defendant successfully prevent the target of the solicitation or conspiracy from being consummated—whereas a "proper effort" on behalf of the defendant will suffice to establish a withdrawal defense to complicity.[806] Second, the Model Penal Code's renunciation defense incorporates a voluntariness requirement, which requires that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the Model Penal Code's approach to withdrawal does not incorporate any subjective requirement (i.e., any motive

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[799] *Id.*
[800] *Id.*
[801] *Id.*
[802] The commentary to the Model Penal Code is careful to explain that the issue of renunciation "should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators." Model Penal Code § 5.03 cmt. at 456.
[803] *Id.* In specifying this motive of increased risk, the Model Penal Code drafters intended to distinguish between fear of the law reflected in a general "reappraisal by the actor of the criminal sanctions hanging over his conduct," which satisfies the requirement, and "fear of the law [that] is . . . related to a particular threat of apprehension or detection," which does not. Model Penal Code § 5.01 cmt. at 356.
[804] Model Penal Code § 5.01(4).
[805] *See* ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.
[806] *See id.*

underlying the withdrawal will suffice).[807]

Practically speaking, these differences mean that it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the Model Penal Code.[808] The following example is illustrative. V personally insults Y. Y is predisposed to let the insult slide, but X firmly persuades Y over the phone that he must respond with lethal violence to protect Y's reputation. X later has a change of heart (motivated, in part, by being alerted to the fact that the police were monitoring the phone call), and firmly communicates to Y his view that violence is the wrong path. However, X's proper effort at dissuading Y is unsuccessful; Y goes on to kill V anyways. On these facts, X would presumably satisfy the Model Penal Code's withdrawal standard, and, therefore, could not be deemed an accomplice to Y's murder of V. X would not, however, satisfy the Model Penal Code's narrower renunciation standard, and, therefore, could be held liable for the general inchoate crime(s) of solicitation and/or conspiracy to commit murder.

Since completion of the Model Penal Code, the drafters' recommendations concerning recognition of a withdrawal defense to complicity liability have been quite influential. It has been observed, for example, that "most of the recent recodifications" incorporate general provisions addressing when "withdrawal is a bar to accomplice liability" that are based on Model Penal Code § 2.06(6)(c).[809] And courts in jurisdictions that have not undertaken comprehensive code reform efforts have relied on Model Penal Code § 2.06(6)(c) through case law.[810]

While the Model Penal Code approach to withdrawal has had a broad influence on American criminal codes, legislatures in reform jurisdictions also routinely modify it. Many of these revisions are clarificatory or organizational; however, some are

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[807] *See id.*

[808] Distinguishing renunciation from withdrawal, one commentator observes that:

> A different rule is applied where the actor's liability is predicated upon the conduct of another. In such cases the actor may achieve immunity if he or she terminates complicity and makes a 'proper effort' to prevent companions from committing the crime. The failure of such an actor to prevent the offense is not an absolute bar to the defense if he or she has made a reasonable effort to do so. The former associates, of course, are liable for the crimes the subsequently they go on to complete. While avoiding liability for later offenses, the former accomplice would still seem to retain liability for any inchoate offenses, such as attempt or conspiracy, which he or she may have committed prior to abandonment. As to these offenses, the actor will be subject to the ordinary application of the law and will retain criminal liability unless he or she has succeeded in preventing the offense attempted or in thwarting the success of any conspiracy he or she may have joined.

Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 34–35 (1989).

[809] Model Penal Code § 2.06(6) cmt. at 325 ("Termination defenses have been provided by most, though not all, of the recently revised and proposed codes."); *see, e.g.,* Ark. Code Ann. § 5-2-404; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; Pa. Cons. Stat. Ann. tit. 18, § 306.

[810] *See, e.g., United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (citing Model Penal Code § 2.06(6)(c); *compare Kaiser v. Hannigan*, No. CIV. 97-3239-DES, 1999 WL 1289470, at *6 (D. Kan. Dec. 16, 1999), *aff'd sub nom. Kaiser v. Nelson*, 229 F.3d 1163 (10th Cir. 2000) (discussing Kansas case law).

substantive.[811] Among these varied substantive revisions, two are particularly noteworthy.[812]

First, various states narrow the scope of a withdrawal defense to accomplice liability by demanding that "the withdrawal must not be motivated by a belief that the circumstances increase the probability of detection or apprehension or render accomplishment of the crime more difficult, or by a decision to postpone the crime to another time or transfer the effort to another victim or objective."[813] Practically speaking, this imports the "voluntariness" and "completeness" requirements applicable to the renunciation defense provided by the Model Penal Code to general inchoate crimes.

Second, various states *potentially expand* the applicability of a withdrawal defense by explicitly applying it to those who cause crime to occur.[814] This revision addresses a noted "inconsistency" in Model Penal Code § 2.06(6),[815] which, as drafted, only addresses when "a person is not an accomplice in an offense committed by another person."[816] Importantly, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.[817] The other basis, often referred to as the innocent instrumentality doctrine, attaches legal accountability where one person, "acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct."[818] Textually speaking, then, the Model Penal Code suggests that a withdrawal defense is not available to those held criminally liable for causing crime to occur[819] —whereas these reform states explicitly clarify that it is.[820]

Modifications aside, it is nevertheless clear that the Model Penal Code approach to withdrawal has robust support in American legal practice. And it is also supported by

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[811] *See, e.g.,* Ala. Code § 13A-2-24 (adding third alternative of giving timely warning to intended victim); Colo. Rev. Stat. Ann. § 18-1-604 (must give timely warning to victim or police); Mo. Ann. Stat. § 562.041 (only alternative (i)); Utah Code Ann. § 76-2-307 (alternative (i) or timely warning to police or victim); Ind. Code Ann. § 35-41-3-10 (voluntarily abandoned his efforts to commit it and voluntarily prevented its commission); Me. Rev. Stat. Ann. tit 17-A, § 57 (informs accomplice of his abandonment and leaves the scene); Minn. Stat. Ann. § 609.05 (abandons purpose and makes a reasonable effort to prevent); Ohio Rev. Code § 2923.03 (terminates complicity, manifesting a complete and voluntary renunciation); Wis. Stat. Ann. § 939.05 (voluntarily changes his mind and notifies other parties within a reasonable time to allow them to withdraw).

[812] Note that the Model Penal Code formulation requires that the defendant "wholly deprive *it* of effectiveness." "It seems clear that this is meant to refer back to 'his complicity.'" ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that "[s]ome codes make this clear by repeating the phrase.")

[813] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing Conn. Gen. Stat. Ann. § 53a-10; N.Y. Penal Law § 40.10; *see, e.g.,* Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ky. Rev. Stat. Ann. § 502.040; N.J. Stat. Ann. § 2C:2-6;

[814] *See, e.g.,* Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

[815] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

[816] Model Penal Code § 2.06(6).

[817] *Compare* Model Penal Code § 2.06(2)(c) ("A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense") *with* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . 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").

[818] Model Penal Code § 2.06(2)(a).

[819] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

[820] Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

American legal commentary.[821] This commentary clarifies that at the heart of both the withdrawal defense and renunciation defense is the basic principle that:

> [T]hose that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.[822]

Consistent with this principle, Wayne R. LaFave argues that:

> Permitting withdrawal under the circumstances [specified by Model Penal Code § 2.06(6)] so as to avert criminal liability is certainly appropriate. One of the objectives of the criminal law is to prevent crime, and thus it is desirable to provide an inducement to those who have counseled and aided a criminal scheme to take steps to deprive their complicity of effectiveness.[823]

With that in mind, LaFave goes on to observe that "[w]hether the added requirements imposed by some statutes concerning the person's motives are desirable is debatable."[824] True, "one who withdraws merely because of a belief that the chances of apprehension have increased has not truly reformed."[825] That said, it "may be argued that even one acting under such a motive should be induced to take action directed toward prevention of the crime."[826]

This is particularly true give that—as Paul Robinson observes—a person who makes a "proper effort" at withdrawing from a crime that is *not voluntary or complete* will "nonetheless be eligible for liability for an inchoate offense."[827] As Robinson proceeds to argue:

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[821] *See, e.g.,* LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. For an argument that a person who withdraws lacks the *mens rea* of accomplice liability, see Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 484–85 (2013).

[822] Moriarty, *supra* note 65, at 5; *see also* LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.1(d)("The avoidance-of-harm rationale for such a defense is very strong. The person who solicits an offense is commonly in the best position to, and sometimes is the only person who can, avoid the commission of the offense. In addition, the possibility of effecting such avoidance is generally high; since the solicitor had the means to provide the motivation for the commission of the offense, he is also likely to have the means to effectively undercut that motivation.").

[823] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[824] *Id.*

[825] *Id.*

[826] *Id.*

[827] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see* LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) ("One who has participated in a criminal scheme to a degree sufficient for accomplice liability may also have engaged in conduct which brings him within the definition of conspiracy or solicitation. Whether his withdrawal is a defense to those crimes is a separate matter.").

> Where the defendant abandons his complicity in a way that generally neutralizes the assistance he provided—as is generally assured by the "proper effort" requirements described above—he no longer merits liability for the full substantive offense. His culpability is more akin to that of an attemptor: while he has not in fact caused or contributed to the offense, he did try to do so. In other words, where the "proper effort" standard is met, the defendant ought to escape complicity liability for the full offense, but ought nonetheless be eligible for liability for an inchoate offense, unless he also satisfies the more demanding complete and voluntary renunciation defense for inchoate offenses.[828]

It's important to point out that the broad support for the substantive policies that comprise the Model Penal Code's withdrawal provisions does not extend to the Code's recommended evidentiary policies. Whereas the Model Penal Code ultimately places the burden of disproving the existence of a withdrawal defense on the government beyond a reasonable doubt,[829] the majority approach is to require the defendant to persuade the factfinder of the presence of a withdrawal defense beyond a preponderance of the evidence.[830]

Scholarly commentary emphasizes a range of policy rationales, which help to explain this departure from the Model Penal Code. First, "as an accurate reflection of

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[828] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see also* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981) ("Retributively oriented commentators note that abandonment makes us reassess our vision of the defendant's blameworthiness or deviance."); LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.4 ("All of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.") (quoting Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4).

[829] *See, e.g.*, Model Penal Code § 1.12(2)(b) (defendant bears the burden of persuasion only where the statute specifically requires him to prove the matter by a preponderance); Model Penal Code § 2.06(6) (withdrawal defense to accomplice liability does not require defendant to prove by a preponderance); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Practically speaking, this means that once the defendant has met his or her burden of raising the issue of withdrawal, the prosecution is then required to *disprove* the presence of a withdrawal defense beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held legally accountable for a crime committed by another person.

[830] *See* LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) ("The prevailing view is that the defendant has the burden of proof with respect to such withdrawal."); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 ("The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant . . . . The burden of persuasion is generally on the defendant, by a preponderance of the evidence."); *United States v. Burks*, 678 F.3d 1190, 1196 (10th Cir. 2012) ("The burden of proving withdrawal in the conspiracy context unequivocally rests with the defendant, and we see no basis for distinguishing situations when accomplice liability is at issue."); *compare State v. Currie*, 267 Minn. 294, 306–08, 126 N.W.2d 389, 398–99 (1964) ("We think the rule ought to be that, once the state has established a prima facie case, the burden rests on the defendant of going forward with the evidence of withdrawal to a point where it can be said a reasonable doubt exists and that, having reached that point, the burden rests on the state of proving beyond a reasonable doubt that the defendant remained as a participant in the consummation of the crime."); Ala. Code § 13A-2-24 ("The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.").

reality, the defense will be relatively rare."[831] Second, the absence of a withdrawal defense will be difficult for a prosecutor to prove" given that (among other reasons) "the defense will frequently involve information peculiarly within the knowledge of the defendant which he is best qualified to present."[832] Third, and perhaps most important, presenting a withdrawal defense is "tantamount to an admission that [the] defendant did participate in a criminal [scheme]."[833] As a result, "one's sense of fairness is not as likely to be offended if the defendant is given the burden of demonstrating that it is more likely than not that he should be exculpated."[834]

An illustrative example of these policy considerations at work is the U.S. Supreme Court's recent decision in *Smith v. United States*, which held that the burden of persuasion for withdrawal from a conspiracy under federal law rests with the defendant, subject to a preponderance of the evidence standard.[835] "Where," as the *Smith* Court explained, "the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof."[836] This is particularly true in the context of repudiating a criminal enterprise, where "the informational asymmetry heavily favors the defendant."[837] Whereas "[t]he defendant knows what steps, if any, he took to dissociate" himself from the criminal enterprise,[838] it may be "nearly impossible for the Government

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[831] Buscemi, *supra* note 8, at 1173.
[832] *Id.*
[833] *Id.*
[834] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 171. As various legal commentators have observed, this reflects a:

> [S]ubtle balance which acknowledges that a defendant ought not to be required to defend until some solid substance is presented to support the accusation, but beyond this perceives a point where need for narrowing the issues coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim.

LAFAVE, *supra* note 7, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).
[835] *Smith v. United States*, 568 U.S. 106 (2013); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. In determining that the burden of persuasion for withdrawal from a conspiracy under federal law lies with the defense, the *Smith* held that doing so does not violate the Due Process Clause. *Id.* at 110. The *Smith* Court's reasoning can be summarized as follows:

> While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of the conspiracy crimes charged . . . .

ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. For a state appellate decision applying the same constitutional reasoning in the renunciation context, see *Harriman v. State*, 174 So. 3d 1044, 1050 (Fla. Dist. Ct. App. 2015); *see also Cowart v. State*, 136 Ga. App. 528 (1975); *People v. Vera*, 153 Mich. App. 411 (1986)).
[836] *Smith*, 568 U.S. at 111 (quoting *Dixon v. United States*, 548 U.S. 1, 9 (2006)).
[837] *Smith*, 568 U.S. at 111.
[838] *Id.* at 113. For example, "[h]e can testify to his act of withdrawal or direct the court to other evidence substantiating his claim." *Id.*

to prove the negative that an act of withdrawal never happened."[839] And, perhaps most importantly, "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense."[840] As a result, the *Smith* Court concluded, requiring the defendant to establish a withdrawal defense beyond a preponderance of the evidence is both "practical and fair."[841]

Consistent with the above considerations, the RCC incorporates a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a preponderance of the evidence. The RCC's recognition of a broadly applicable withdrawal defense comprised of broad "proper efforts" standard accords with the substantive policies reflected in the relevant Model Penal Code provisions. At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in two notable ways.[842] First, RCC § 213(a) clarifies that these exceptions apply equally across forms of legal accountability. Second, RCC § 213(b) establishes that the burdens of production and persuasion with respect to a withdrawal defense rests upon the defendant. These departures are supported by legislation, case law, and commentary.[843]

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[839] *Id.* at 113 ("Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him.").
[840] *Id.* at 110-11.
[841] *Id.*
[842] RCC § 213 is based on, but not identical to, general withdrawal provision incorporated into the Delaware Reform Code. More specifically, that provision reads as follows:

> (b) EXCEPTION TO ACCOUNTABILITY. Unless the statute defining the offense provides otherwise, a person is not so accountable for the conduct of another, notwithstanding Subsection (a), if . . . .
>
> (3) before commission of the offense, the person terminates his or her efforts to promote or facilitate its commission, and
>
> (A) wholly deprives his or her prior efforts of their effectiveness; or
>
> (B) gives timely warning to the proper law enforcement authorities;
>
> or
>
> (C) otherwise makes proper efforts to prevent the commission of the offense . . . .

Proposed Del. Crim. Code § 211 (2017).
[843] *See supra* notes 68-98 and accompanying text. RCC § 213 also departs from Model Penal Code formulation, which ambiguously requires that the defendant "wholly deprive *it* of effectiveness." However, "[i]t seems clear that this is meant to refer back to 'his complicity.'" ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that "[s]ome codes make this clear by repeating the phrase.") For this reason, RCC § 213 replaces "it" with "his or her prior efforts."

RCC § 22E-214. Merger of Related Offenses.

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

Many of the substantive policies incorporated into RCC § 212—for example, the elements test[844] and the principles of lesser harm, lesser culpability, and more specific offenses[845]—appear to reflect majority or prevailing national trends governing the law of merger. Other policy recommendations—for example, the principle of reasonable accounting[846] and the RCC treatment of offenses comprised of alternative elements[847]—address issues upon which American criminal law is either unclear or divided.

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

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

RCC § 212: Relation to National Legal Trends on Merger Policy. The issue of merger is "[o]ne of the more important and vexing legal issues" confronting sentencing courts.[848] 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."[849] If a defendant is charged with, and subsequently convicted

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

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

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

> Although the federal criminal code has a generic false statement statute that prohibits lies in matters under federal jurisdiction, it also contains a bewildering maze of statutes banning

of, two or more of these overlapping crimes based on a single course of conduct,[850] the sentencing court will then be faced with deciding whether to "merge" one or more of these convictions into the other(s).[851]

This judicial determination, while implicating the Fifth Amendment's prohibition against "twice [placing someone] in jeopardy of life or limb" for the "same offense,"[852] is ultimately one of discerning legislative intent, not constitutional limitation.[853] This is because, insofar as the validity of convictions and punishment imposed in a single proceeding is concerned, the United States Supreme Court has held that constitutional double jeopardy protections only preclude the imposition of punishment beyond what the legislature has authorized.[854] Practically speaking, then, a legislature is free to impose as

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> lies in specified settings. [There may be] 325 separate federal statutes proscribing fraud or misrepresentation.

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

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

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

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

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

[854] *See, e.g., Albernaz v. United States*, 450 U.S. 333, 344 (1981) ("[T]he question of what punishments are constitutionally permissible is not different from the question of what punishments the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishments, imposition of such sentences does not violate the Constitution."); *Whalen v. United States*, 445 U.S. 684, 691–92 (1980) ("The assumption underlying the [*Blockburger*] rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."); *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) ("Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes

much overlapping liability upon a single criminal act as it sees fit, provided that the penal consequences fall within the broad range permitted by the constitutional prohibition on cruel and unusual punishment and the due process requirement of fundamental fairness.[855] As a result, when courts are confronted with merger issues, "the focus is legitimately, inevitably, and almost exclusively on legislative intent."[856]

Discerning what the legislature intends in this particular legal context, however, is often quite difficult.[857] In the easy cases, the underlying offenses are part of the same grading scheme, and the only difference between them is that one incorporates a single additional element—for example, assault and assault *of a police officer*. Under these circumstances, it is reasonably safe to assume that the legislature *did not* intend to impose multiple liability. Conversely, where the offenses of conviction are not part of the same grading scheme, and share no common elements—for example, assault and theft—it is reasonably safe to assume that the legislature *did intend* to authorize multiple liability. Frequently, however, the underlying offenses being considered for purposes of a court's merger analysis will not clearly fit into either of these categories.[858] Instead, they will share some common elements but not others, bare a modicum of topical similarity, and will more generally have been drafted in a manner that renders legislative intent as to merger an enigma.[859] In these situations, courts must ultimately rely on default principles of statutory construction to guide their merger analyses.

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proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial."); *Todd v. State*, 917 P.2d 674, 677 (Alaska 1996) (concluding that role of Double Jeopardy Clause is "limited to protecting a defendant against receiving more punishment than the legislature intended"); *People v. Leske*, 957 P.2d 1030, 1035 (Colo. 1998) ("[D]efendant may be subjected to multiple punishments based upon the same criminal conduct as long as such punishments are 'specifically authorized' by the General Assembly."); *State v. Watkins*, 362 S.W.3d 530, 556 (Tenn. 2012).

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

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

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

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

[859] In rare situations, a criminal statute will communicate legislative intent as to the imposition of multiple liability for specific combinations of offenses. For illustrative examples involving *limits* on multiple liability, see Tenn. Code Ann. § 39–14–404(d) ("Acts which constitute an offense under this section may be prosecuted under this section or any other applicable section, but not both."); Tenn. Code Ann. § 39–14–149(c) ("If conduct that violates this section [a]lso constitutes a violation of § 39–14–104 relative to theft of services, that conduct may be prosecuted under either, but not both, statutes as provided in § 39–11–109."); Tenn. Code Ann. § 39–12–204(e) ("A person may be convicted either of one (1) criminal violation of this

Over the years, American legal authorities have developed a variety of principles for accomplishing this task.[860] The oldest and most widely adopted principle is the judicially-developed elements test.[861] Originally promulgating by the U.S. Supreme Court in *Blockburger v. United States*[862] as a constitutional limit on cumulative punishments, the elements test has since been utilized as the basis for discerning legislative intent as to merger.[863]

The elements test asks whether, in the situation of a criminal defendant who has engaged in a single course of conduct that satisfies the requirements of liability for two different statutes, "each provision requires proof of an additional fact which the other does not."[864] If an affirmative answer can be given to this question, then the operative assumption is that the legislature intended to impose multiple convictions and punishments, notwithstanding a substantial overlap in the proof offered to establish the crimes.[865] The

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section, including a conviction for conspiring to violate this section, or for one (1) or more of the predicate acts, but not both."). For an illustrative example involving the *authorization* of multiple liability, see 18 U.S.C. § 924(c)(1) ("Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.").

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

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

[862] 284 U.S. 299, 304 (1932). The defendant in *Blockburger* was charged with violations of federal narcotics legislation, and was ultimately convicted on one count of having sold a drug not in or from the original stamped package in violation of a statutory requirement, and on another count, of having made the same sale of the same drug not pursuant to a written order of the purchaser as required by the same statute. *Id.* The defendant contended that the two statutory crimes constituted one offense for which only a single penalty could be imposed. *Id.* The Court rejected this argument, holding that although both sections of the same statute had been violated by one sale, two offenses were committed because different evidence was needed to prove each of the violations, and therefore the defendant could be punished for both violations. *Id.*

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

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

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

emphasis of this evaluation is generally (though not invariably) placed on scrutinizing the elements of the two crimes, without regard to how those crimes were committed.[866]

While judicial adoption of the elements test is widespread, there is significant confusion and disagreement surrounding its particular details.[867] For example, although the *Blockburger* rule was first clearly articulated by the U.S. Supreme Court in 1932, "no Court majority exists on how to apply the test."[868] Indeed, both state and federal courts routinely struggle with the particular mechanics of the test.[869] Perhaps the greatest source of confusion revolves around the appropriate unit of analysis under the elements test—and the concomitant relevance (or lack thereof) of factual considerations—where one or more of the underlying offenses can be proven through alternative means.[870]

To illustrate, consider the question of whether multiple convictions for felony murder and the underlying felony, if based on the same course of conduct and perpetrated against a single victim, should be subject to merger under the elements test. The key question, per *Blockburger*, is whether each offense requires proof of a fact that the other does not. The answer to that question, however, depends upon how broadly/narrowly one understands the "offense" of felony murder. Consider, for example, a simplified felony murder statute that reads:

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

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

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

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

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

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

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

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

(D) Robbery.

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

The choice between these two constructions is quite significant for purposes of understanding the relationship between felony murder and the offense that serves as the basis of aggravation under the elements test. For example, selecting the broader offense-level characterization indicates that felony murder and the underlying offense should not merge since, in order to prove *felony murder generally*, one need not present facts that will establish that underlying offense (i.e., proof of any other underlying offense will suffice).[871] But if, in contrast, one applies the narrower, theory-specific view of felony murder—that is, *felony murder as alleged and/or proven*—then the elements test would seem to support merger as the only difference between the two offenses would be that the greater offense requires proof of a homicide.[872]

The U.S. Supreme Court, both in *Blockburger* and in various other cases, has frequently articulated the elements test in a manner that seems to support the first construction.[873] The Court often says, for example, that the elements test is comprised of a purely legal analysis, which is to be conducted without regard to the facts of a case.[874] If true, however, this would seem to effectively preclude the more theory-specific understanding of an offense that comprises the second construction, which hinges upon a consideration of the charging document and/or the facts proven at trial to appropriately circumscribe the merger analysis.[875]

At the same time, the U.S. Supreme Court has itself done just that, relying on the government's theory of felony murder liability in *Whalen v. United States*[876] to support the

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

[872] *See id.*

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

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

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

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

conclusion that both felony murder and the underlying offense (in that case, rape[877]) are subject to a presumption *against* cumulative punishment under the elements test.[878] "In this regard, the [*Whalen*] Court demonstrated a recognition that examination of the elements of the crimes *as charged* is sometimes necessary, especially when dealing with an offense that can be proven in alternate ways."[879]

Nuances in application aside, though, one aspect of the elements test is clear: it constitutes an exceedingly narrow approach to merger. In general, two offenses satisfy the elements test when (but only when) it is impossible to commit one offense without also committing the other offense. Practically speaking, this means that even the most minor variances in the elements between two substantially related offenses can provide the basis for concluding that one "requires proof of a fact that the other does not."[880] In effect, then, application of the elements test to issues of merger creates a strong presumption in favor of multiple liability for substantially overlapping offenses.[881]

With that presumption in mind, the drafters of the Model Penal Code sought to develop a statutory approach to dealing with issues of offense overlap and multiple liability

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

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

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

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

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

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

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

that was both broader and clearer than the common law approach. What they ultimately produced, Model Penal Code § 1.07, establishes that, "[w]hen the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense," but that the defendant "may not . . . be convicted of more than one offense" whenever the combination of offenses satisfy any one of a collection of legal principles.[882]

The narrowest principle is that embodied by the elements test. The relevant subsection, Model Penal Code § 1.07(4)(a), bars "convict[ion] of more than one offense if . . . [one offense is] established by proof of the same or less than all the facts required to establish the commission of the [other] offense." Such language, as the accompanying commentary clarifies, was intended to incorporate the approach to merger reflected in the U.S. Supreme Court's decision in *Blockburger v. United States.*[883]

Aside from codifying the *Blockburger* rule, the Model Penal Code also embraces a variety of merger principles that go beyond the elements test. For example, Model Penal Code § 1.07(1)(c) bars "convict[ion] of more than one offense if . . . inconsistent findings of fact are required to establish the commission of the offenses." This principle, as the accompanying commentary explains, was intended to preclude the imposition of logically inconsistent convictions, such as, for example, "robbery and receiving the stolen property, in which it was clear that the defendant had either robbed or received the goods but could not have done both."[884]

The Model Penal Code further precludes multiple convictions when one offense is merely a more specific version of the other. The relevant subsection, Model Penal Code § 1.07(1)(d), establishes that a person may not be convicted of more than one offense if "the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." To illustrate, the accompanying commentary gives the example of "a general statute prohibiting lewd conduct and [] a specific-statute prohibiting indecent exposure."[885] "In the absence of an expressed intention to the contrary," the drafters argue, "it is fair to assume that the

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

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

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

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

legislature did not intend that there be more than one conviction under these circumstances."[886]

Yet another bar on multiple liability established by the Model Penal Code applies where one offense is simply a less serious form of the other. The relevant subsection, Model Penal Code § 1.07(4)(c), establishes that a person may not be convicted of more than one offense if one "differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission."[887] Such language, as the accompanying commentary explains, was intended to address two "conceptually distinct situations; either one or both may apply to a given fact pattern."[888] In the first situation, the two offenses at issue differ "only in that a less serious injury or risk of injury is necessary to establish [] commission [of one]."[889] This includes, for example, the relationship between an "offense consisting of an intentional infliction of bodily harm" and "the charge of intentional homicide."[890] The second situation, in contrast, arises where one offense differs from another "only in that it requires a lesser degree of culpability," i.e., "offenses that are less serious types of homicides."[891]

The Model Penal Code further precludes multiple liability for an inchoate offense designed to culminate in an offense that is, in fact, completed. The relevant subsection, Model Penal Code § 1.07(1)(b), establishes that a person may not be convicted of more than one offense if one offense "consists only of a conspiracy or other form of preparation to commit the other."[892] The Model Penal Code commentary recognizes that convictions

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[886] *Id.*

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

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

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

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

[889] *Id.*

[890] *Id.*

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

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

for both a substantive offense and an inchoate offense designed to culminate in that same offense "would not necessarily be barred under the *Blockburger* test."[893] Nevertheless, convictions for both kinds of offenses, the drafters argue, "is not justifiable."[894] Reasoning that general inchoate offenses are "not designed to cumulate sanctions for different stages of conduct culminating in a criminal offense but to reach the preparatory conduct if the offense is not committed,"[895] the drafters ultimately concluded that "[i]t would be a perversion of the legislative intent to use these statutes to pyramid convictions and punishment."[896]

The Model Penal Code provides one other bar on multiple liability for general inchoate crimes in Article 5, which precludes punishing a defendant for combinations of inchoate offenses designed to culminate in the same offense. More specifically, the relevant provision, § 5.05(3) establishes that: "A person may not be convicted of more than one offense defined by this Article for conduct designed to commit or to culminate in the commission of the same crime." This language, as the accompanying commentary explains, reflects a policy "of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object."[897] Viewed in this way, the drafters believed there to be "no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense."[898]

Only a plurality of jurisdictions that have undergone comprehensive criminal code reform have opted to codify a comprehensive legislative framework modeled on Model

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

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

[895] *Id.* at 108.

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

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

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

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

Penal Code § 1.07.[899] Nevertheless, the individual limitations on multiple liability endorsed by the Model Penal Code drafters have had a broader influence on the current state of American merger policy as it is reflected in both criminal codes and reported cases.[900]

For example, numerous reform codes incorporate general provisions that—consistent with Model Penal Code § 1.07(4)(a)—preclude multiple liability where one offense "is established by proof of the same or less than all the facts required to establish the commission of the [other] offense."[901] And, various courts in jurisdictions lacking such general provisions have relied on the Model Penal Code's codification of *Blockburger*.[902]

Beyond *Blockburger*, however, "[m]any modern code jurisdictions follow the lead of the Model Penal Code and bar multiple convictions for offenses" that satisfy one of more of the broader general merger principles proscribed by section 1.07.[903] This is reflected in state general provisions applicable: (1) where, in accordance with Model Penal Code § 1.07(1)(c), the offenses implicate inconsistent findings of fact[904]; (2) where, in accordance with Model Penal Code § 1.07(1)(d), one offense is a more specific version of another more general offense[905]; and (3) where, in accordance with Model Penal Code § 1.07(4)(c), one

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

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

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

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

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

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

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

offense implicates a less serious harm and/or a less culpable mental state.[906] These principles have also been endorsed through case law.[907]

The Model Penal Code approach to dealing with merger issues relevant to general inchoate crimes has also been influential. For example, it has been observed that, consistent with Model Penal Code § 1.07(1)(b), "[i]t is almost universally the rule that a defendant may not be convicted of both a substantive offense and an inchoate offense designed to culminate in that same offense."[908] And it has also been observed that, in accordance with Model Penal Code § 5.05(3), "[m]any American jurisdictions prohibit

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

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

[908] ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84. Within this trend, however, there is significant variance. Some jurisdictions have adopted general provisions, which explicitly provide that "[n]o person shall be guilty of both the inchoate and the principal offense." 720 Ill. Comp. Stat. Ann. 5/8-5; *see* Utah Code Ann. § 76-4-302; Ala. Code § 13A-4-5(b); Ark. Code Ann. § 5-1-110(a)(2); Haw. Rev. Stat. Ann. § 701-109(1)(b), (4)(b); Ky. Rev. Stat. Ann. § 506.110(1); Mont. Code Ann. § 46-11-410(2)(b); Or. Rev. Stat. Ann. § 161.485; Wis. Stat. Ann. § 939.72. More frequently, though, jurisdictions adopt general provisions that bar conviction for the substantive offense and specific enumerated inchoate offenses. "The list of enumerated offenses commonly includes all inchoate offenses, although either conspiracy or solicitation are often omitted, thereby permitting conviction for those inchoate offenses and the related substantive offense." ROBINSON, *supra* note 182, at 1 CRIM. L. DEF. § 84; *see, e.g.,* Alaska Stat. Ann. § 11.31.140(c) (codifying limitation for attempt and solicitation only); Ariz. Rev. Stat. Ann. § 13-111 (codifying limitation for attempt only); Colo. Rev. Stat. Ann. § 18-1-408(5)(b) (codifying limitation for attempt and solicitation only); Del. Code Ann. tit. 11, § 206(b)(2) (codifying limitation for attempt only); Ga. Code Ann. §§ 16-4-2 (codifying limitation for attempt), 16-4-8.1 (codifying limitation for conspiracy); Ind. Code Ann. § 35-41-5-3(b) (codifying limitation for attempt only); Iowa Code Ann. § 706.4 (codifying limitation for conspiracy only); Kan. Stat. Ann. § 21-5109(b)(2) (codifying limitation for attempt only); Minn. Stat. Ann. § 609.04(2) (codifying limitation for attempt only); Mo. Ann. Stat. §§ 556.014 (codifying limitation for conspiracy), 556.046(1)(3) (codifying limitation for attempt); N.J. Stat. Ann. § 2C:1-8(d)(2) (codifying limitation for conspiracy and attempt); Ohio Rev. Code Ann. §§ 2923.01(G) (codifying limitation for conspiracy), 2923.02(C) (codifying limitation for attempt); Okla. Stat. Ann. tit. 21, § 41 (codifying limitation for attempt); Tenn. Code Ann. § 39-12-106(b)-(c) (codifying limitation for attempt and solicitation only and explicitly permitting conviction of conspiracy and substantive offense which was the object of that conspiracy); Va. Code Ann. § 18.2-23.1 (codifying limitation for conspiracy only).

conviction for more than one statutory inchoate crime for conduct designed to culminate in the same completed offense."[909]

While the substantive policies incorporated into the Model Penal Code have generally been influential, they nevertheless fail to capture at least three important aspects of contemporary American merger practice.[910] The first relates to the issue discussed earlier in the context of *Blockburger*: whether and to what extent factual considerations have a role to play in the application of merger principles. The Model Penal Code is ambiguous on the issue,[911] which, in practical effect, not only preserves much of the confusion surrounding application of the elements test,[912] but also extends it to many of

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

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

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

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

the other principles contained in § 1.07.[913] Absent clarification by the Model Penal Code, resolution of this issue has, in most cases, been delegated to state and federal courts.[914]

Contemporary legal trends pertaining to this issue are difficult to identify with precision.[915] Nevertheless, it can at least generally be said that American legal practice is

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

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

> § 210.3. Manslaughter.
>
> (1) Criminal homicide constitutes manslaughter when:
>
> > (a) it is committed recklessly; or
> >
> > (b) a homicide which would otherwise be murder is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.
>
> § 211.1 Assault.
>
> A person is guilty of assault if he:
>
> > (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
> >
> > (b) negligently causes bodily injury to another with a deadly weapon; or
> >
> > (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

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

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

[915] *See, e.g., Hopkins v. Reeves*, 524 U.S. 88, 98 (1998) (observing that "Nebraska has alternated between [approaches] in a relatively short period of time") (citing *State v. Williams,* 243 Neb. 959, 963-965, 503 N.W.2d 561, 564-565 (1993) (readopting statutory elements test), *overruling State v. Garza,* 236 Neb. 202, 207-208, 459 N.W.2d 739, 743 (1990) (reaffirming cognate evidence test), disapproving *State v. Lovelace,* 212 Neb. 356, 359-360, 322 N.W.2d 673, 674-675 (1982) (applying statutory elements test)); *Com. v. Jones,* 590 Pa. 356, 361, 912 A.2d 815, 818 (2006) (observing that the Pennsylvania Supreme Court's

comprised of three main approaches to conducting "analysis of lesser and greater included offenses" in the context of merger determinations.[916] In some jurisdictions, this judicial analysis is "limit[ed] to comparing the elements of the crimes, without reference to how the crimes were committed in a particular case."[917] The courts in other jurisdictions "assess the relationship between crimes by looking at the pleadings in a case."[918] And in still other jurisdictions, courts "analyze the actual proof submitted at trial, rather than only the pleadings, to examine the relationship between the crimes committed."[919] As a general rule, the fact-sensitive analyses conducted in the latter two groups of jurisdictions are broader, and therefore more likely to support merger, than the purely element-based analyses conducted in the former.[920]

The second way in which the Model Penal Code approach to merger fails to capture contemporary legal practice is reflected in the fact that many jurisdictions have adopted—whether through case law or legislation—general merger principles that are broader than those contained in § 1.07. The proportionality-based standards currently applied across a range of common law and reform jurisdictions are illustrative. Consider, for example, the Alaska approach to merger. In a "seminal case,"[921] *Whitton v. State*, the

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"own analysis of lesser and greater included offenses has evolved over time, in the sentencing merger context, from a strict statutory elements test to a hybrid of both the statutory elements and cognate-pleadings approaches."); *State v. Schoonover*, 281 Kan. 453, 481, 133 P.3d 48, 70 (2006).

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

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

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

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

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

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

Alaska Court of Appeals opted to abandon the *Blockburger* rule, which, while "widely used by the courts," failed to "cop[e] satisfactorily with the problem it was designed to solve."[922] More specifically, the *Whitton* court reasoned that:

> Legislative refinement of an essentially unitary criminal episode into numerous separate violations of the law has resulted in a proliferation of offenses capable of commission by a person at one time and in one criminal transaction. Since each violation by definition will usually require proof of a fact which the others do not, application of the same-evidence test will mean that each offense is punishable separately. But as the separate violations multiply by legislative action, the likelihood increases that a defendant will actually be punished several times for what is really and basically one criminal act.[923]

Given these shortcomings, the Alaska Court of Appeals chose to instead apply a proportionality-based approach to merger that "focus[es] upon the quality of the differences, if any exist, between the separate statutory offenses," with an eye towards discerning whether the "differences relate to the basic interests sought to be vindicated or protected by the statutes."[924]

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

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

[922] *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970).
[923] *Id.*
[924] *Id.* at 312.

> being indicated by the different punishments prescribed by the legislature.[925]

For another state-level approach to proportionality-based merger, consider the framework applied in Maryland. Under Maryland law, the elements test constitutes the baseline for addressing merger issues, but this baseline is also complemented by two other general merger principles that go beyond *Blockburger*.[926]

The first is a principle of lenity, which holds that, "even though offenses may be separate and distinct under the *Blockburger* [rule]," judges may nevertheless "find as a matter of statutory interpretation that the Legislature did not intend, under the circumstances involved, that a person could be convicted of two particular offenses growing out of the same act or transaction."[927] This principle effectively affords "the defendant the benefit of the doubt"[928] whenever the courts are "uncertain as to what the Legislature intended," notwithstanding the results generated by the elements test.[929]

The second, and even broader principle, applied by the Maryland courts is one of "fundamental fairness."[930] Under this principle, Maryland courts bar multiple convictions and punishment for substantially related offenses whenever it would be "[fundamentally] unfair to uphold convictions and sentences for both crimes."[931] Such an approach, as the Maryland courts have observed, make "[c]onsiderations of fairness and reasonableness" central to merger[932] in the context of an analysis that is "heavily and intensely fact-driven."[933]

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

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

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

[928] *Pair*, 33 A.3d at 1035–36.

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

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

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

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

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

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

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

While, in most instances, these more expansive merger principles have been promulgated by courts, in at least a few instances, they are the product of legislative enactment. For example, the Ohio Criminal Code contains a broad general merger provision, which provides that, "[w]here the same conduct . . . can be construed to constitute two or more allied offenses of similar import . . . the defendant may be convicted of only one."[934]

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

> For example, a thief theoretically is guilty not only of theft but of receiving stolen goods, insofar as he receives, retains, or disposes of the property he steals. Under this section, he may be charged with both offenses but he may be convicted of only one, and the prosecution sooner or later must elect as to which offense it wishes to pursue . . . .
>
> [Conversely,] an armed robber who holds up a bank and purposely kills two of the victims can be charged with and convicted of one count of aggravated robbery and of two counts of aggravated murder. Robbery and murder are dissimilar offenses, and each murder is necessarily committed with a separate animus, though committed at the same time.[935]

Interpreting this statute, the Ohio courts have explained that:

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

For other comparatively broad approaches, *see, e.g., United States v. Campbell*, 71 M.J. 19, 24 (C.A.A.F. 2012) ("[I]t was within the military judge's discretion to conclude that for sentencing purposes the three specifications should be merged and that it would be inappropriate to set the maximum punishment based on an aggregation of the maximum punishments for each separate offense. It is not difficult to see how the three specifications in this case might have exaggerated Appellant's criminal and punitive exposure in light of the fact that, from Appellant's perspective, he had committed one act implicating three separate criminal purposes."); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971) (analysis of LIO based on existence of an 'inherent' relationship between the greater and lesser offenses, i.e., they must relate to the protection of the same interests, and must be so related that in the general nature of these crimes, though not necessarily invariably, proof of the lesser offense is necessarily presented as part of the showing of the commission of the greater offense."); *see also, e.g., Staton v. Berbary*, No. 01-CV-4352(JG), 2004 WL 1730336, at *8-9 (E.D.N.Y. Feb. 23, 2004) ("The guiding principle," for purposes of merger of kidnapping and other crimes against persons, "is whether the restraint was so much the part of another substantive crime that the substantive crime could not have been committed without such acts and that *independent criminal responsibility may not fairly be attributed to them*.") (quoting *People v. Gonzalez*, 80 N.Y.2d 146, 153, 603 N.E.2d 938, 943 (1992)).

[934] Ohio Rev. Code Ann. § 2941.25.

[935] *Id.*

> [W]hen determining whether offenses are allied offenses of similar import within the meaning of [the Ohio Criminal Code], courts must ask three questions when the defendant's conduct supports multiple offenses: (1) Were the offenses dissimilar in import or significance? (2) Were they committed separately? and (3) Were they committed with separate animus or motivation? An affirmative answer to any of the above will permit separate convictions. The conduct, the animus, and the import must all be considered.[936]

Most expansive of all merger principles—whether judge-made or legislatively enacted—are the categorical bars on multiple convictions incorporated into the criminal codes in Minnesota and California (and perhaps also Arizona[937]). For example, Section 609.035 of the Minnesota Criminal Code establishes, in relevant part, that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses . . ."[938] Motivated by a legislative desire "to protect against exaggerating the criminality of a person's conduct and to make both punishment and prosecution commensurate with culpability,"[939] the Minnesota courts have construed this provision to "prohibit[] multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident."[940]

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

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.[941]

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

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

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

[938] Minn. Stat. Ann. § 609.035.

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

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

[941] Cal. Penal Code § 654.

> to prevent multiple punishment for a single act or omission, even though that act or omission violates more than one statute and thus constitutes more than one crime. Although the distinct crimes may be charged in separate counts and may result in multiple verdicts of guilt, the trial court may impose sentence for only one offense—the one carrying the highest punishment. In this way, punishment is commensurate with a defendant's culpability.[942]

The above general merger principles, all of which would appear to expand upon the protections afforded in the Model Penal Code, are to be contrasted with the third significant way that many jurisdictions depart from the Model Penal Code approach: by more narrowly curtailing the constraints on multiple liability for general inchoate crimes. This curtailment is reflected in two different ways. First, whereas Model Penal Code § 1.07 would preclude multiple liability for both a substantive offense and *any* inchoate offense designed to culminate in that offense, most jurisdictions instead bar conviction for the substantive offense and specific enumerated inchoate offenses.[943] This departure from the Model Penal Code approach is clearest in the context of criminal conspiracies.

Consider that the drafters of the Model Penal Code, in precluding convictions for both a conspiracy and its completed target, sought to overturn the common law rule, which authorized multiple liability for a conspiracy and its completed target.[944] The common law approach rested on a belief that, as the U.S. Supreme Court famously observed in *Callanan v. United States*, "collective criminal agreement—partnership in crime—presents a greater potential threat to the public than individual delicts."[945] The Model Penal Code drafters ultimately rejected this rationale, however. Motivated by their belief that punishment for inchoate offenses is justified because of the potential danger that the substantive offense intended will be committed, the drafters concluded that a conviction for a completed offense alone "adequately deals with such conduct."[946] Since publication of the Model Penal Code, however, "only [] a minority of the modern recodifications" have been persuaded by this argument.[947] Rather, the contemporary majority approach recognizes

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

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

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

[945] 364 U.S. 587, 593-94 (1961). More specifically, the common law rule emphasized that the "collective criminal agreement" at the heart of conspiracies: (1) "increases the likelihood that the criminal object will be successfully attained"; (2) "decreases the probability that the individuals involved will depart from their path of criminality"; and, perhaps most importantly, (3) "makes more likely the commission of crimes unrelated to the original purpose for which the group was formed." *Id.*

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

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

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."[948]

The second area of curtailment relates to merger of multiple general inchoate crimes. Both the text of Model Penal Code § 5.05(3) and the accompanying commentary indicate that the drafters intended to preclude liability for more than one general inchoate crime directed towards a single criminal objective, without regard to the nature of the conduct/amount of time that has elapsed between criminal efforts.[949] Practically speaking, this means that (for example) where X unsuccessfully attempts to murder V in 2010, and thereafter unsuccessfully attempts to murder V again (or, alternatively, unsuccessfully solicits Y to murder V) in 2012, X *cannot* be convicted for more than one general inchoate crime.[950] Given the unintuitive nature of this outcome, many jurisdictions with general provisions based on Model Penal Code § 5.05(3) appear to have incorporated—whether by statutory revision[951] or through judicial interpretation[952]—a "same course of conduct" requirement, which effectively limits merger to situations where the multiple inchoate offenses share a relatively close temporal/substantive relationship to one another.[953]

Viewed holistically, American merger practice exists on a spectrum. On the narrowest end are those jurisdictions that strictly apply the elements test without regard to

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

[949] *See, e.g.*, Model Penal Code § 5.05(3) ("A person may not be convicted of more than one offense defined by this Article for *conduct designed to commit or to culminate in the commission of the same crime*."); Explanatory Note on Model Penal Code § 5.05(3) (noting exception where inchoate "conduct . . . has *multiple objectives*, only some of which have been achieved"); Model Penal Code § 5.05(3), cmt. at 492 ("This provision reflects the policy, frequently stated in Article 5, of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object. Thus conceived, there is no warrant for cumulating convictions of attempt, solicitation and conspiracy to commit the same offense.").

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

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

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

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

any factual considerations. On the broadest end are those jurisdictions that apply a categorical bar on multiple convictions anytime they rest on the same course of conduct. And, in between those extremes, rests a variety of alternative approaches, including the various principles proscribed by the Model Penal Code and the broader proportionality-based standards. Which, then, is the best approach, all things considered?

In expert commentary, one finds a variety of perspectives on this question. Nevertheless, there appears to be general consensus on two key points. First, and perhaps most clear, is that the elements test is ill suited to provide the sole basis for merger analysis. In support of this conclusion, scholarly critics of the *Blockburger* rule tend to highlight—above and beyond the issues of clarity and consistency discussed earlier[954]—three main problems.

The first is one of disproportionality in convictions. This critique asserts that the elements test, as applied to any criminal code comprised of many substantially related overlapping offenses, effectively treats "defendants who commit what is, in ordinary terminology, a single crime [] as though they committed many different crimes."[955] Such treatment is, sentence length aside, problematic when viewed in light of the many "adverse collateral consequences of convictions."[956] This includes, for example, "the harsher treatment that may be accorded the defendant under the habitual offender statutes of some States; the possible impeachment by prior convictions, if the defendant ever becomes a witness in future cases; and, in some jurisdictions, less favorable parole opportunities."[957]

The second problem, which follows directly from the first, is that of disproportionality in sentencing. It is a product of the fact that a person who has been convicted of two or more offenses will, in many cases, be subject to a period of incarceration equal to the combined statutory maxima (and mandatory minima, if any) of those offenses.[958] 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

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

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

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

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

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

based on the same course of conduct will lead a defendant to face an overall level of sentencing exposure that is disproportionately severe.[959]

The third problem commonly recognized by critics of the elements test emphasizes the corrosive procedural dynamics that flow from the two proportionality problems just noted.[960] More 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 providing defendants with "greater incentives to plead guilty."[961]

While the legal commentary clearly supports rejecting an approach to merger limited to the elements test, the relevant authorities are less clear on what, precisely, should replace it. There appears to be general agreement that the right approach is one that goes beyond "merely [] examin[ing] whether two charges share elements," and instead asks judges to engage in a broader evaluation of "whether the statutes serve the same functional purpose or protect against the same harm and public interest, such that punishment under both for a single act constitutes double punishment."[962] Rooted in a "code's implicit principle of proportionality,"[963] this kind of analysis inevitably requires the exercise of

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

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

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

Here's one useful illustration:

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

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

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

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

judicial "common sense" in determining whether the differences between two or more substantially overlapping crimes "fundamentally change the character of one relative to the other."[964]

The most concrete example of this kind of approach is reflected in the writings and draft legislation developed by Paul Robinson and Michael Cahill.[965] Through this body of work, Robinson and Cahill have developed a comprehensive statutory framework for

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

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

> (a) *Limitations on Conviction for Multiple Related Offenses*. The trier of fact may find a defendant guilty of any offense, or grade of an offense, for which he or she satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses or grades of offenses if:
>
> (1) they are based on the same conduct and:
>
> (A) the harm or evil of one is:
>
> (i) entirely accounted for by the other; or
>
> (ii) of the same kind, but lesser degree, than that of the other; or
>
> (B) they differ only in that:
>
> (i) one is defined to prohibit a designated kind of conduct generally, and the other to prohibit a specific instance of such conduct; or
>
> (ii) one requires a lesser kind of culpability than the other; or
>
> (C) they are defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses; or
>
> (2) one offense consists only of an attempt or solicitation toward commission of:
>
> (A) the other offense; or (B) a substantive offense that is related to the other offense in the manner described in Subsection (a)(1); or
>
> (3) each offense is an inchoate offense toward commission of a single substantive offense; or
>
> (4) the two differ only in that one is based upon the defendant's own conduct, and another is based upon the defendant's accountability, under Section 211, for another person's conduct; or
>
> (5) inconsistent findings of fact are required to establish the commission of the offenses or grades.

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

dealing with issues of multiple liability that generally mirrors the Model Penal Code approach, with one important exception: the elements test is replaced with a broader principle that "asks whether the gravamen of one offense duplicates that of another."[966] More specifically, the key provision would preclude a court from:

> [E]nter[ing] a judgment of conviction for more than one of any two offenses if:
>
> (a) the two offenses are based on the same conduct and:
>
> (i) *the harm or wrong of one offense is*:
>
> (A) *entirely accounted for by the other offense*[.][967]

This italicized language is intended to "require[] facing squarely the challenge of determining what is, and what is not, a distinct harm meriting separate liability."[968] Which is to say: rather than "considering the theoretical possibility of committing one offense without committing another" under *Blockburger*, this "proposed standard calls for a consideration of the relevant offenses' purposes."[969]

One important aspect of the "entirely account for" standard, which sets it apart from the similarly broad standards currently applied by many courts,[970] is that it "could be implemented without reference to the particular facts of specific cases."[971] As a result, application of this standard

> would present issues of law regarding how defined offenses relate to each other—specifically, whether their relation is such that multiple liability is appropriate, or whether imposing liability for one offense would needlessly and improperly duplicate liability already imposed by a conviction for another offense.[972]

This aspect of the provision brings with it important benefits, namely, it means that "a court's finding regarding the appropriateness of multiple convictions for two separate offenses could be binding on all future cases involving those same offenses, thereby

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[966] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).
[967] Proposed Del. Crim. Code § 210(a); Proposed Ill. Crim. Code § 254(1)(a); Proposed Ky. Penal Code § 502.254(1)(a).
[968] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).
[969] Cahill, *supra* note 123, at 606; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).
[970] *See supra* notes 253-65 and accompanying text.
[971] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).
[972] Cahill, *supra* note 123, at 607; *see* Commentary on Proposed Del. Crim. Code § 210(a); Commentary on Proposed Ill. Crim. Code § 254(1)(a); Commentary on Proposed Ky. Penal Code § 502.254(1)(a).

enhancing predictability, stability, and evenhandedness in the imposition of multiple liability."[973]

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

The first three general merger principles contained in subsection (a) are substantively identical to the corresponding Model Penal Code principles contained in § 1.07. More specifically, RCC § 212(a)(1) adopts the Model Penal Code formulation of the elements test as reflected in § 1.07(4)(a).[974] Thereafter, RCC § 212(a)(2) recognizes the lesser harm, lesser culpability, and greater specificity principles codified by the Model Penal Code.[975] Then, RCC § 212(a)(3)—in accordance with Model Penal Code § 1.07(1)(c)—creates a presumption of merger where conviction for one offense is logically inconsistent with the other.[976] Adoption of these principles finds broad support in nationwide legislation, case law, and commentary.[977]

The fourth merger principle incorporated into subsection (a) goes beyond, and therefore is not rooted in, the Model Penal Code. More specifically, RCC § 212(a)(4) establishes a presumption of legislative intent as to merger when "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." This principle, which is the broadest in subsection (a), is a modified form of the proposal developed by Professors Robinson and Cahill.[978] Adoption of a broader,

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

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

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

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

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

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

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

proportionality-based standard is consistent with judicial practice in several states as well as general scholarly trends.[979] Because, however, the standard codified by RCC § 212(a)(4) is solely focused on a comparison of the elements of offenses—rather than on the specific facts of each case—it is also narrower than many of the proportionality-based approaches applied in the states.[980] Narrowing the scope of merger in this way is justified by the interests of administrative efficiency and uniformity of application.[981]

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

The first of these principles, RCC § 212(a)(5), generally precludes multiple liability for an attempt or solicitation—but not a conspiracy—and the completed offense.[982] This is in contrast to Model Penal Code § 1.07, which *also* precludes multiple liability for a conspiracy and the completed offense.[983] Both the coverage of attempt and solicitation in

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

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

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

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

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

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

this bar on multiple liability, as well as the concomitant exclusion of conspiracy,[984] is supported by nationwide legislation, case law, and legal commentary.[985]

The second relevant merger principle, RCC § 212(a)(6), generally precludes multiple liability for multiple inchoate crimes directed toward completion of the same criminal objective. Because this principle, like the other principles established in subsection (a), is subject to a "same course of conduct" limitation, it is more limited in scope than the principle reflected in Model Penal Code § 5.05(3), which appears to apply without regard to the amount (or nature) of time that has elapsed between criminal efforts.[986] This departure is justified by both state legislative and judicial practice, as well as, more broadly, the unintuitive outcomes that application of the Model Penal Code approach would otherwise appear to support.[987]

Subsections (b), (c), and (d) of RCC § 212 thereafter provide three substantive merger policies, which address issues upon which the Model Penal Code to merger is silent. The first, contained in RCC § 212(b), clarifies that the principles stated in subsection (a) are inapplicable "whenever the legislature clearly manifests an intent to authorize multiple convictions for different offenses arising from the same course of conduct." This explicitly codifies what is otherwise well established in American criminal law: that legislative intent is the touchstone of judicial merger analysis.[988]

The second, RCC § 212(c) provides a legal framework for applying the principles set forth in subsections (a) and (b) to statutes comprised of alternative elements. It requires judges to conduct the merger inquiry with reference to the unit of analysis most likely to facilitate proportionality in sentencing. This framework is supported by both case law and legal commentary.[989]

The third, RCC § 212(d), establishes a rule of priority to guide judicial selection of merging offenses. Under this rule, where two or more offenses are subject to merger, the conviction that ultimately survives—whether at trial or on appeal—should be [t]he most serious offense among the offenses in question."[990] However, "[i]f the offenses are of equal

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

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

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

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

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

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

[990] RCC § 212(d)(1).

seriousness," then "any offense that the courts deems appropriate" may remain.[991] This framework reflects American legal practice.[992]

The final provision in RCC § 212, subsection (e), establishes two general procedural principles relevant to the administration of the above-enumerated legal framework. The first is that "[a] person may be found guilty of two or more offenses that merge under this [s]ection."[993] And the second is that "no person may be subject to a conviction for more than one of those offenses after: (1) the time for appeal has expired; or (2) the judgment appealed from has been affirmed."[994] The former ensures that the law of merger does not impinge upon the ability of the fact finder to render verdicts, whereas the latter provides trial courts with the flexibility to leave resolution of merger issues to appellate courts. Both of these principles are rooted in state case law; however, it is unclear whether and to what extent they are representative of national legal trends.[995]

RCC § 212: Relation to National Legal Trends on Codification. There is wide variance between jurisdictions insofar as the codification of general merger policies are concerned.[996] Generally speaking, though, the Model Penal Code's general provision, §

[991] RCC § 212(d)(2).

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

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

[994] RCC § 212(e).

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

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

1.07,[997] provides the basis for most contemporary reform efforts.[998] The general merger principles incorporated into RCC § 212 incorporate aspects of the Model Penal Code approach to drafting while, at the same time, utilizing a few techniques which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

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

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

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

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

The first, and more general, is that the Code's limitations on multiple liability are articulated alongside a variety of other policies, which address materially distinct procedural issues. Beyond issues of sentencing merger, for example, Model Penal Code § 1.07 also addresses: (1) when a defendant may be subject to separate trials for multiple offenses based on the same conduct[999]; (2) the authority of the court to order separate trials[1000]; and (3) when a jury may be instructed on (and the defendant convicted of) an offense that was never charged in the indictment.[1001]

As a purely organizational matter, employing a single general provision to address disparate topics such as these is problematic. Grouping proportionality-based limitations relevant to multiple punishment alongside procedural limitations on separate trials and the submission of jury instructions is both confusing and unintuitive. However, the specific manner in which these materially different policies are intertwined with one another is—organizational concerns aside—particularly troublesome given that it may have substantive policy implications. This is because the Model Penal Code's approach to both sets of issues, "like most legislative efforts, ultimately leans on the notion of an 'included offense.'"[1002]

Consider that Model Penal Code § 1.07(1)(a) precludes multiple convictions where, *inter alia* "one offense is included in the other, as defined in Subsection (4) of this Section."[1003] Subsection (4) thereafter enumerates a variety of principles—including the elements test—for determining what constitutes an included offense.[1004] Importantly, however, these principles do not only place limitations on multiple convictions under the Code. Rather, they also provide the legal basis for determining: (1) when, pursuant to Subsection (4), "[a] defendant may be convicted of an [uncharged] offense"[1005]; as well as (2) when, pursuant to Subsection (5), the court is "obligated to charge the jury with respect to an [uncharged offense]."[1006] Subsequent general provisions in the Model Penal Code then further rely on the same included offense principles proscribed in § 1.07(4). For example, Model Penal Code § 1.08(1) provides that "[a] finding of guilty of a lesser

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

[1000] *See* Model Penal Code § 1.07(3) ("When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.").

[1001] *See* Model Penal Code § 1.07(5) ("The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.").

[1002] Cahill, *supra* note 123, at 605.

[1003] Model Penal Code § 1.07(1)(a).

[1004] Model Penal Code § 1.07(4).

[1005] Model Penal Code § 1.07(4).

[1006] Model Penal Code § 1.07(5).

included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside."[1007]

That both the Model Penal Code and many state criminal codes utilize the included offense concept in this overlapping way is not surprising. "The Model Penal Code was drafted during the high point of the general theory of lesser included offense law in the mid-twentieth century."[1008] And, still today, the included offense concept is employed by the American legal system to serve a variety of functions, which include: (1) "provid[ing] notice to defendants of what crimes, not named in an indictment or formal charge, may be prosecuted at trial"; (2) "offer[ing] prosecutors flexibility in charging offenses by permitting them to add or substitute less serious charges without suffering the cost and delay that would be occasioned by reindicting or amending charging instruments"; (3) "bestow[ing] on defendants an opportunity to reduce their liability to a more appropriate, less serious level"; (4) "recogniz[ing] the right of jurors to be informed of related offenses that might apply"; and (5) "establish[ing] limits on multiple prosecutions and cumulative punishments."[1009]

That said, this overlapping usage—reflected in both the Model Penal Code and American legal practice more generally—is problematic given the materially distinct interests safeguarded by the included offense concept across such varied contexts.[1010] To illustrate, consider just one of the procedural issues the included offense concept is utilized as the basis for answering: determining when a jury may or should be instructed on an offense that was not specifically charged in the indictment.[1011] The general rule is that a jury may be instructed on an uncharged offense if it is necessarily included in a charged offense.[1012]

Because instructing a jury on uncharged offenses directly implicates a defendant's constitutional rights to "due process and notice," while raising basic "concerns of fundamental fairness," it may make sense to apply a narrow/formalistic interpretation of what actually constitutes an included offense in this particular context.[1013] Where, in

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[1007] Model Penal Code § 1.08(1).

[1008] Hoffheimer, *supra* note 195, at 356.

[1009] *Id.* at 357.

[1010] *See, e.g.,* Poulin, *supra* note 185, at 596 ("[S]uccessive prosecutions—reprosecution after acquittal or conviction—pose markedly different issues from multiple punishment imposed in a single proceeding."); Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183 (2004) (same); *Grady v. Corbin*, 495 U.S. 508, 509, *overruled by United States v. Dixon*, 509 U.S. 688 (1993) ("Successive prosecutions, whether following acquittals or convictions, raise concerns that extend beyond [] the possibility of an enhanced sentence" implicated by merger/multiple punishment).

[1011] *See, e.g., Schmuck v. United States*, 489 U.S. 705, 718 (1989); *Hamling v. United States*, 418 U.S. 87, 117 (1974); *Cole v. Arkansas*, 333 U.S. 196 (1948).

[1012] LAVE ET AL., *supra* note 249, at 6 CRIM. PROC. § 24.8(d) ("No area of law relating to jury instructions has created more confusion than that governing when a court may or must put before the jury for its decision a lesser-included offense, that is, an offense not specifically charged in the accusatory pleading that is both lesser in penalty and related to the offense specifically charged.").

[1013] As the Pennsylvania Supreme Court has observed:

> Where due process and notice are at issue, it is prudent to primarily focus the analysis on the statutory elements of a crime to determine whether crimes are lesser and greater included offenses because due process protects an accused against any unfair advantage. [] When a defendant may be convicted on a charge absent from the indictment, concerns of

contrast, "sentencing merger is at issue," the central policy interest of proportionate punishment arguably supports a broader reading of what constitutes an included offense.[1014] And, just as important, there is no countervailing constitutional interest weighing against an expansive interpretation of "included offense" in the context of merger.[1015] (Indeed, if anything, a broader reading of "included offense" in the merger context affirmatively serves a defendant's constitutional rights to be free from cruel and unusual punishment and afforded substantive due process.[1016])

Employing the same included offense concept to address different issues which implicate distinct policy/constitutional considerations has the potential to cause a variety of problems.[1017] Most relevant here, however, is that it creates a risk that courts will—either unintentionally or unthinkingly—transplant an appropriately limited view of what constitutes an "included offense" for purposes of dealing with instructional issues into the sentencing context for purposes of evaluating legislative intent as to multiple punishment.[1018] (Conversely, broad construction of what constitutes an "included offense" for purposes of dealing with sentencing merger may "dilute[] double jeopardy protection from successive prosecution."[1019]) From a drafting perspective, then, there appears to be

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> fundamental fairness dictate that analysis of potential greater and lesser included offenses proceed in a more narrow fashion than when sentencing merger is at issue.

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

[1014] *Id.*; *see also Reynolds v. State*, 706 P.2d 708, 711 (Alaska Ct. App. 1985) ("For if two offenses are so fundamentally disparate—so different in their basic social purposes—that merger between them is not compelled and separate sentences would be permissible upon conviction of both, then no greater/lesser-included offense relationship can arise, no matter how clearly intertwined these offenses may be in the factual and evidentiary setting of a given case.").

[1015] *See, e.g., Byrd v. United States*, 598 A.2d 386, 398 (D.C. 1991) ("The gradation of punishment for an offense is clearly a matter of legislative choice, whether it be as severe as authorizing dual punishment for lesser-included offenses . . . *or as mild as prohibiting the imposition of multiple convictions even where two offenses clearly involve different elements*.").

[1016] *See supra* note 187 and accompanying text.

[1017] *See, e.g.,* Hoffheimer, *supra* note 195, at 371 (noting that the elements "test goes too far towards permitting subsequent prosecutions and under-protects defendants from multiple prosecution and punishment"); *State v. Keffer*, 860 P.2d 1118, 1131 (Wyo. 1993) ("We are satisfied the statutory elements analysis should be used as the foundation for double jeopardy protection in connection with both multiple prosecutions and multiple or cumulative punishments."); *see generally, e.g.,* Poulin, *supra* note 185; Antkowiak, *supra* note 180; Nolan, *supra* note 244.

[1018] *See, e.g., Jones,* 590 Pa. at 356-72 (highlighting historical development of elements test in Pennsylvania); *Fraser v. State*, 523 S.W.3d 320, 330 (Tex. App. 2017) (observing that the "query" into merger of felony murder with the underlying offense "is not the same as determining whether the underlying offense is a lesser-included offense to the offense of murder."); *see also Matter of D.B.H.*, 549 A.2d 351, 353 (D.C. 1988) ("[W]hether or not simple assault is a lesser-included offense of a charged robbery in general, it cannot be considered, for purposes of providing sufficient notice to the accused, a lesser-included offense of the robbery charged here.").

[1019] Poulin, *supra* note 185, at 598 ("[M]ultiple punishment as a double jeopardy question not only generates unwarranted confusion, but also dilutes double jeopardy protection from successive prosecution. Because of the dominant role of legislative intent in determining appropriate punishment, the protection from multiple punishment should simply not be treated as an aspect of double jeopardy protection . . ."); *see also id.* at 646 (["T]he courts must distinguish between the analysis appropriate for double jeopardy claims based on successive prosecution, and that appropriate for claims of multiple punishment. Although conflating the two types of analysis has not led to excessive protection against punishment, it has eroded double jeopardy protection against successive prosecution, making it vulnerable to legislative fragmentation of offenses.").

little to gain, and much to lose, from applying a single concept to address the qualitatively "different" and "distinct" issues that traditionally fall under the included offense umbrella.[1020]

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

Each of the above revisions finds support in case law,[1021] legislation,[1022] and legal commentary.[1023] When viewed collectively, they should go a long way towards "disentangl[ing]" the problematic "Gordian knot" that overlapping usage of the included offense concept has effectively tied between the law of merger and other procedural topics.[1024] And, when considered in light of the substantive modifications/additions to the Model Penal Code made by the rest of RCC § 212, they comprise part of a clear, comprehensive, and accessible merger framework.

RCC § 22E-215. De Minimis Defense.

[No national legal trends section.]

[1020] Cahill, *supra* note 123, at 606-07.
[1021] *See* sources cited *supra* notes 344 & 354 (cases recognizing the importance of distinguishing between contexts when applying the included offense concept).
[1022] *See* sources cited *supra* notes 328-39 (statutes specifically addressing sentencing merger).
[1023] *See* sources cited *supra* note 298 (highlighting importance of addressing merger issues separate from other procedural issues, and without reliance on included offense concept).
[1024] Poulin, *supra* note 185, at 598; *see id.* at 647 ("Once the courts understand that the propriety of successive prosecution is a question distinct from the question of multiple punishment and that, unlike punishment, successive prosecution threatens the core of double jeopardy protection, they will have taken a critical step toward cutting the Gordian knot of double jeopardy jurisprudence."). At minimum, this separation serves the interests of clarity and consistency. However, it may also serve the interests of proportionality by mitigating the risk that the law of merger will be narrowed in pursuit of unrelated constitutional and policy goals.

Chapter 3. Inchoate Liability.

RCC § 22E-301. Criminal Attempt.

1. § 22E-301(a)—Definition of Attempt

Relation to National Legal Trends. Subsection 301(a) is in part consistent with, and in part departs from, national legal trends.

As a matter of substantive policy, the principles of *mens rea* elevation (for results) and equivalency (for circumstances) governing the culpable mental state requirement of an attempt, as well as the broad rejection of impossibility claims, incorporated into the Revised Criminal Code generally reflect majority legal trends. In contrast, the dangerous proximity test incorporated into the Revised Criminal Code to deal with incomplete attempts reflects a minority legal trend. The latter departure is primarily based upon considerations of current District law.

Comprehensively codifying the culpable mental state requirement and conduct requirement governing criminal attempts is in accordance with widespread, modern legislative practice. However, the manner in which § 301(a) codifies these requirements departs from modern legislative practice in a variety of ways. The foregoing departures are motivated by considerations of clarity and consistency.

A more detailed analysis of national legal trends and their relationship to § 301(a) is provided below. It is organized according to four main topics: (1) the culpable mental state requirement for an attempt; (2) the definition of an incomplete attempt; (3) the treatment of impossibility; and (4) codification practices.

Subsections (a)(1) & (2): Relation to National Legal Trends on Culpable Mental State Requirement. National legal trends relevant to the culpable mental state requirement governing a criminal attempt strongly support two substantive policies: (1) requiring an intent to cause the results of the target offense; and (2) allowing the culpable mental state, if any, governing the circumstances of the target offense to suffice for an attempt conviction. Both of these substantive policies are incorporated into the Revised Criminal Code.

There exist two basic approaches to the culpable mental state requirement of an attempt: the common law approach, which reflects offense analysis, and the Model Penal Code Approach, which reflects element analysis.[1]

The common law approach to the *mens rea* of attempts is easily summarized: to convict for an attempt to commit any offense, even one of "general intent," requires proof of a "specific intent."[2] However, the meaning of this rule is less than clear: to say that a

[1] The crime of attempt is a relatively recent development in the common law, and an even more recent development in state criminal codes. *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.2. The offense first arose in its present form during the late eighteenth century; however, up until the mid-twentieth century, most states punished, but did not define, criminal attempts. Model Penal Code § 5.01 cmt. at 300. Most attempt statutes "were simply general penalty provisions [that] did not elaborate upon the term 'attempt.'" *Id.* This is still true today in some jurisdictions; however, the vast majority of reform codes have adopted comprehensive general attempt statutes, which specifically codify the culpable mental state requirement governing an attempt (among other issues). *Id.*

[2] *See* J. C. Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 429 (1957).

criminal attempt is a "specific intent crime" papers over the very questions it is supposed to answer, namely, what *kind* of "intent" is required; and to *which* objective elements of the target offense does that "intent" apply?[3] By conceptualizing criminal offenses as being comprised of a monolithic *actus reus* subject to an "umbrella culpability requirement that applie[s] in a general way to the offense as a whole," the common law approach to culpability, offense analysis, is unable to provide a clear answer to these questions.[4]

What is clear from case law, however, is that the "specific intent" rule governing criminal attempts is intended to set a threshold requirement for the culpable mental state applicable to the result element in a criminal attempt, namely, the government must prove, at minimum, that the actor *intended* to cause the result elements (if any) of the target offense—regardless of whether some lesser culpable mental state will suffice for the target offense.[5] This threshold requirement is clearly reflected in the fact that the common law uniformly rejected the possibility of reckless or negligent attempts.[6]

More ambiguous, however, is the common law view on whether knowledge as to a result element constitutes a sufficient foundation for attempt liability.[7] Although attempt traditionally has been considered to be a "specific intent" crime requiring the most elevated form of mental state, the concept of a specific intent "has always been an ambiguous one and might be thought to include results that the actor believed to be the inevitable consequences of his conduct."[8] There is scant case law on this issue; nevertheless, the common law authorities that do exist are consistent with the "traditional view" of specific intent more generally, namely that it encompasses both a person who "consciously desires [a] result" as well as a person who "knows that that result is practically certain to follow from his conduct."[9]

The common law view of circumstances is similarly unclear, which is perhaps unsurprising given how poorly situated the common law approach to culpability, offense analysis, is to addressing the issue of *mens rea* as to circumstances in any context. That being said, common law authorities have occasionally stumbled across the issue, and, when they have, they appear to have taken the view that the culpable mental state, if any, governing the circumstance of the target offense similarly applies to that offense when charged as an attempt.[10]

The Model Penal Code approach to the *mens rea* of attempts is generally in accordance with the substantive policies reflected in the common law, but more clearly frames them in terms of element analysis.

Most significantly, Model Penal Code § 5.01(1)(b) establishes that a person may be convicted of a criminal attempt if he or she acts with the "purpose" of causing any results

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[3] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).
[4] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 155 (2d. 2012).
[5] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05; *Braxton v. United States*, 500 U.S. 344, 350-51 (1991).
[6] *See* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 749 (1983); *People v. Viser*, 62 Ill. 2d 568, 581 (1975).
[7] *See, e.g.*, Model Penal Code § 5.01 cmt. at 305; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.
[8] Wechsler et al., *supra* note 51, at 577.
[9] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 5.2; *see, e.g.*, *Coleman v. State,* 373 So.2d 1254, 1256-57 (Ala. Crim. App. 1979); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *State v. Krocker*, 331 Wis. 2d 487, 489 (2010).
[10] *See, e.g.*, *State v. Davis*, 108 N.H. 158, 160-61 (1967).

in the target offense, or, alternatively, the "belief"—which is intended to signify the non-conditional form of knowledge[11]—that the person's conduct will cause any results in the target offense.[12] This formulation explicitly establishes that acting with either of the two alternative mental states that comprise the traditional understanding of intent—namely, "desir[ing] that [one's] acts cause [one or more] consequences *or* know[ing] that those consequences are practically certain to result from [one's] acts"[13]—constitutes a sufficient basis for attempt liability.[14] However, by explicitly covering purpose and the non-conditional form of knowledge, the Model Penal Code's statement on the *mens rea* of the results of an attempt implicitly excludes lesser culpable mental states, such as recklessness or negligence, as a viable basis of liability.[15] Which is to say that Model Penal Code § 5.01(b) was intended to be consistent with "the common law rule that one cannot be liable for an attempt to commit a 'crime of recklessness.'"[16]

In contrast to the foregoing intent-based approach to results, the Model Penal Code applies a principle of *mens rea* equivalency to circumstances. The relevant Model Penal Code language establishes that the government must prove that the defendant "acted with the kind of culpability otherwise required for commission of the crime."[17] The Model Penal Code commentary clarifies that, pursuant to this language, the principle of *mens rea* elevation applicable to results should not be understood to "encompass all the circumstances included in the formal definition of the substantive offense. As to them, it is sufficient that he acts with the culpability that is required for commission of the crime."[18]

Finally, the Model Penal Code also tacitly recognizes the distinction between an actor's plans to engage in future conduct and the culpable mental state, if any, an actor possesses with respect to the results and circumstances related to that future conduct. Illustrative is the Model Penal Code's provision on incomplete attempts, § 5.01(1)(c), which, when read in light of other relevant Code language, requires the government to

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[11] As Robinson and Grall observe: "'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." Robinson & Grall, *supra* note 94, at 758 n.301. In other words, "[k]nowledge would not be the proper way to describe this mental state [in the context of attempts], because it would be odd to describe the defendant as having knowledge of a result when the result does not in fact occur." Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998).

[12] Model Penal Code § 5.01(1)(b) explicitly applies to completed attempts, where "the offender has . . . performed all of the conduct that would, if successful, constitute the target offense." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 901 n.59 (2007) [hereinafter, Cahill, *Reckless Homicide*]. With respect to incomplete attempts, in contrast, wherein the offender is interrupted prior to carrying out his plans, the Model Penal Code states that the accused must "purposely do[] or omit[] to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Model Penal Code § 5.01(1)(c). Some have suggested this indicates a strict purpose requirement applies to results for incomplete attempts. *See* Cahill, *Reckless Homicide*, *supra* note 100, at 900-01. However, the Model Penal Code drafters appear to explicitly rebut this reading in the commentary, clarifying that the principle reflected in § (b) extends to § (c) when both provisions are "read in conjunction with [one another]." Model Penal Code § 5.01 cmt. at 305 n.17; *see e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[13] *Tison v. Arizona*, 481 U.S. 137, 150 (1987); *see, e.g.*, *State v. Smith*, 490 N.W.2d 40, 45 (Wis. Ct. App. 1992).

[14] *See, e.g.*, Wechsler et al., *supra* note 51, at 577.

[15] *See, e.g.,* Michaels, *supra* note 99, at 1031-32.

[16] Robinson & Grall, *supra* note 94, at 749; *see, e.g.*, DRESSLER, *supra* note 91, at § 27.09.

[17] Model Penal Code § 5.01(1).

[18] Model Penal Code § 5.01 cmt. 297.

prove the following. First, that the defendant was "acting with the kind of culpability otherwise required for commission of the crime" with respect to circumstances.[19] Second, that the defendant was acting with either the "purpose" to cause, or a "belief" that his or her conduct would likely cause, any relevant results.[20] And third, that the defendant "purposely" engaged in "an act or omission constituting a substantial step in a course of conduct *planned to culminate in his commission of the crime*."[21]

The latter planning requirement complements, but is ultimately distinct from, the culpable mental state requirements governing circumstances and results that precede it. It reflects the common-sense and intuitive notion that in order to be held liable for an attempt to commit an offense, an actor must have been committed to engaging in future conduct that, if completed, would satisfy the objective elements of that offense[22]—separate and apart from whether that actor possessed the requisite *mens rea* as to the results and circumstances of that offense.[23]

Today, American criminal law as a whole is generally consistent with the substantive policies reflected in the Model Penal Code approach to the *mens rea* of attempts (which, in large part, are also the substantive policies reflected in the common law approach).[24] This consistency is reflected in statutes, case law, and commentary.

For example, it appears that in most jurisdictions, proof of either purpose or a knowledge-like mental state as to a result will suffice for an attempt conviction.[25] So, for

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[19] This language is drawn from the generally applicable prefatory clause of Model Penal Code § 5.01(1).

[20] This language is drawn from Model Penal Code § 5.01(1)(b), but is intended to be "read in conjunction with" Model Penal Code § 5.01(1)(c). Model Penal Code § 5.01 cmt. at 305 n.17; *see* DRESSLER, *supra* note 91, at § 27.09.

[21] Model Penal Code § 5.01(1)(c).

[22] That is, "under the circumstances as he believes them to be," at least. Model Penal Code § 5.01(1)(c).

[23] So, for example, 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." Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 755 (2012) [hereinafter, Cahill, *Incomplete Attempt*].

[24] *See, e.g.*, Wechsler et al., *supra* note 51, at 575-76.

[25] In some jurisdictions, this is clearly established by general provisions. *See, e.g.,* Okla. Stat. Ann. tit. 21, § 44; Ark. Code Ann. § 5-3-201; Haw. Rev. Stat. § 705-500; Neb. Rev. Stat. § 28-201; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; *but see* N.J. Stat. Ann. § 2C:5-1. (One state, which lacks a general provision on the *mens rea* of attempt, specifies by statute that knowledge is an appropriate basis for attempted murder. *See* Iowa Code Ann. § 707.11.) Still other jurisdictions have codified general attempt statutes employing broad language that fail to clarify the issue. *See, e.g.,* Alaska Stat. § 11.31.100; 720 Ill. Comp. Stat. Ann. 5/8-4; Tex. Penal Code § 15.01; Ariz. Rev. Stat. Ann. § 13-1001; Colo. Rev. Stat. Ann. §18-2-101(1); Ind. Code Ann. §35-41-5-1(a); N.D. Cent. Code §12.1-06-01; Ariz. Rev. Stat. Ann. § 13-1001; Me. Rev. Stat. tit. 17-A, § 152. The state courts that have addressed the issue in these jurisdictions most frequently appear to fill in the legislative silence with a knowledge rule. *See, e.g., State v. Nunez*, 159 Ariz. 594, 597 (Ct. App. 1989); *Bartlett v. State*, 711 N.E.2d 497, 499-500 (Ind. 1999); *Gentry v. State*, 881 S.W.2d 35, 40 (Tex. App. 1994); *Free v. State*, 455 So. 2d 137, 147 (Ala. Crim. App. 1984); *People v. Krovarz*, 697 P.2d 378, 381 (Colo. 1985). However, a minority appear to have adopted a purpose rule. *See People v. Kraft*, 478 N.E.2d 1154, 1160 (Ill. App. Ct. 1985); *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984).

In one jurisdiction, Utah, there has been a noteworthy dialogue between the courts and legislature on this issue. Circa 2003 Utah's attempt statute did not clarify the *mens rea* for the result elements of an attempt. *See* Utah Code Ann. § 76–4–101. Interpreting this ambiguous language in *State v. Casey*, the Utah Supreme Court held that knowledge as to a result element was an insufficient basis for an attempt conviction; only purpose would suffice. 82 P.3d 1106, 1110 (2003). The following year, the Utah state legislature amended its attempt provision to "clarify that an attempt to commit a crime includes situations where the

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."[26]

This broad acceptance of knowledge/belief as to a result as an appropriate basis for attempt liability is based on the view that:

> the manifestation of the actor's dangerousness [by way of knowing conduct] is as great—or very nearly as great—as in the case of purposive conduct. In both instances 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.[27]

It's worth noting, however, that the foregoing policy concerning knowledge/belief-based attempts is mostly academic as cases involving the distinction rarely seem to arise.[28]

Vastly more significant, instead, is whether a lesser culpable mental state, such as recklessness or negligence, as to a result is sufficient for an attempt conviction. At stake in this issue is the legal system's treatment of a wide range of endangerment activities, including, perhaps most notably, risky driving.

For example, if recklessness as to a result element is considered to be a viable basis for attempt liability, then many instances of risky driving could be charged as multiple counts of attempted reckless homicide—or perhaps even attempted depraved heart murder—on the following theory. As to *actus reus*: the reckless driver who closely speeds past pedestrians has engaged in conduct dangerously close to causing the death of others. As to *mens rea*: the reckless driver who speeds for the thrill of it has consciously created a substantial (or extreme) risk of death to every pedestrian he has passed.

Likewise, if negligence as to a result element is considered to be a viable basis for attempt liability, then many instances of inadvertently risky driving could be charged as multiple counts of attempted negligent homicide—or even attempted manslaughter—on the following theory. 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. As to *mens rea*: the negligent driver who inadvertently created a substantial (or extreme) risk of death to every pedestrian he has passed should have been aware of that risk.

As a matter of practice, theories of liability such as these have rarely been accepted: "Under the prevailing view, an attempt thus cannot be committed by recklessness or

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defendant is aware that his actions are reasonably certain to cause a result that is an element of the offense . . . ." CRIMINAL OFFENSE ATTEMPT AMENDMENTS, 2004 Utah Laws Ch. 154 (S.B. 143); *see* Utah Code Ann. § 76-4-101.

[26] Model Penal Code § 501 cmt. at 305.

[27] *Id.*; *see, e.g.*, Wechsler et al., *supra* note 51, at 575-76; Cahill, *Reckless Homicide*, *supra* note 100, at 900-01.

[28] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; DRESSLER, *supra* note 91, at § 27.05.

negligence or on a strict liability basis, even if the underlying crime can be so committed."[29] Consistent with this prevailing view, American legal authorities have soundly rejected offenses such as attempted depraved heart murder, attempted reckless manslaughter, attempted reckless assault, and attempted negligent homicide.[30] Which is not to say the forms of conduct that would be covered by such offenses goes unpunished; however, it is typically covered by special misdemeanor reckless endangerment statutes or other specific risk-creation laws.[31]

It's worth noting that the foregoing legal trends appear to be based upon both conceptual and public policy-based rationales.[32] The conceptual rationale emphasizes that because an attempt "seems necessarily to involve the notion of an intended consequence,"[33]

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[29] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3; *see, e.g., State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007). In a comprehensive survey of national legal trends on non-intentional attempts Michael Cahill observes that: "In nearly all jurisdictions to consider the question, courts have held that no such offenses exist." Cahill, *Reckless Homicide*, *supra* note 100, at 882. The exception appears to be Colorado, which recognizes the offense of attempted reckless manslaughter, see *People v. Thomas*, 729 P.2d 972 (Colo. 1986), and attempted extreme-indifference murder, see *People v. Castro*, 657 P.2d 932 (Colo. 1983), but not attempted criminally negligent homicide, see *People v. Eggert*, 923 P.2d 230 (Colo. Ct. App. 1995). Cahill also observes that:

> There is authority in Florida and Louisiana suggesting that in those states, attempt may not require intent as to any resulting harm an offense requires. That authority, however, often uses the term "intent" in a way that seems to implicate the common-law distinction, now obsolete under a proper reading of most modern codes, between "specific intent" and "general intent."

Cahill, *Reckless Homicide*, *supra* note 100, at 956.

[30] For rejection of attempted depraved heart murder, see, for example, *State v. Vigil*, 842 P.2d 843, 848 (Utah 1992); *United States v. Kwong*, 14 F.3d 189, 194–95 (2d Cir. 1994). For rejection of attempted reckless manslaughter, see, for example, *Dixon v. State*, 772 A.2d 283, 288 n.9 (Md. 2001); *People v. Foy,* 587 N.Y.S.2d 111, 112 (1992); *State v. Dunbar,* 117 Wash.2d 587 (1991) (*en banc*). As the Hawaii Supreme Court observed:

> Our research efforts have failed to discover a single jurisdiction that has recognized the possibility of attempted involuntary manslaughter. On the other hand, the cases holding that attempted involuntary manslaughter is a statutory impossibility are legion . . . . We agree with the rest of the Anglo-American jurisprudential world that there can be no attempt to commit involuntary manslaughter.

State v. Holbron, 904 P.2d 912, 920, 930 (Haw. 1995). Likewise, "[a]fter reviewing the [pertinent] legal authority," the Nebraska Supreme Court determined that "attempted *reckless* assault" is not a viable offense. *State v. Hemmer*, 3 Neb. App. 769, 777 (1995). For rejection of attempted negligent homicide, and other attempted negligence offenses, see, for example, *State v. Nolan*, 01C01-9511-CC-00387, 1997 WL 351142 (Tenn. Crim. App. June 26, 1997); *Sacchet v. Blan*, 353 Md. 87 (1999); *State v. Hembd*, 197 Mont. 438 (1982).

[31] The basis for these statutes is Model Penal Code § 211.2, which establishes that "[a] person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." As Cahill observes: "Following the Model Penal Code's lead, twenty-four states have adopted a general [reckless endangerment] offense." Cahill, *Reckless Homicide*, *supra* note 100, at 924 (collecting citations).

[32] *State v. Stensaker*, 725 N.W.2d 883, 889 (N.D. 2007) (quoting LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3).

[33] Smith, *supra* note 90, at 434.

the notion of recklessly or negligently attempting to achieve some consequence is—as a variety of courts have phrased it—a "logical impossibility."[34] The public policy-based rationale for rejecting reckless or negligent attempts, in contrast, is focused on keeping the "floodgates [of] attempt liability" shut.[35] It is argued, for example, that allowing for recklessness or negligence (and of course strict liability) as to the result element of an attempt risks turning "every endangering action" into a serious felony.[36]

The circumstances of an attempt, in contrast, are viewed through an entirely different lens by American legal authorities. Consistent with the Model Penal Code approach, modern criminal codes frequently clarify that the culpable mental state requirement, if any, governing the circumstances of the target offense govern that of the attempt.[37] Case law is also in accordance with this principle of *mens rea* equivalency. Noteworthy judicial opinions on the *mens rea* for the circumstances of an attempt have held that strict liability circumstance elements in the target offense should remain a matter of strict liability for an attempt,[38] reckless circumstance elements in the target offense should remain a matter of recklessness for an attempt,[39] and so on and so forth.

The foregoing principle of *mens rea* equivalency is widely understood to achieve "common-sense result . . . in accordance with principle."[40] Here, for example, is how one state legislature has framed the issue:

> Suppose, for example, that it is an independent crime to intentionally kill a police officer and that recklessness with respect to the victim's identity as a police officer is sufficient to establish that attendant circumstance. If a defendant attempts to kill a police officer recklessly mistaken as to the intended victim's identity (e.g., the defendant recklessly believes the police officer to be a night security guard), attempt liability ought to result. . . . It would hardly make sense to hold that the defendant should be relieved of attempt liability in the situation hypothesized because the defendant did not intend that the victim be a police officer. Furthermore, it would be anomalous to hold that had the defendant succeeded, and the substantive

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[34] *State v. Huff*, 469 A.2d 1251, 1253 (Me. 1984); *see, e.g.*, *State v. Coble*, 527 S.E.2d 45, 48 (N.C. 2000); *State v. Grant*, 418 A.2d 154, 156 (Me. 1983); *Knapik v. Ashcroft*, 384 F.3d 84, 91 (3d Cir. 2004); *see also also* Great Britain Law Commission, *Attempt, and Impossibility in Relation to Attempt, Conspiracy and Incitement*, 102 GREAT BRITAIN LAW COMM'N REP. 1, 12 (1980) (discussing *Regina v. Mohan*, Q.B. 1, 11 (1976)); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 160 (1978).

[35] Michaels, *supra* note 99, at 1033.

[36] *Id; see, e.g.*, Model Penal Code § 5.01 cmt. 303-04.

[37] As a legislative matter, endorsement of a principle of *mens rea* equivalency to circumstance elements appears to be more or less universal in modern criminal codes. *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Conn. Gen. Stat. Ann. § 53a-49; Ky. Rev. Stat. Ann. § 506.010;Me. Rev. Stat. tit. 17-A, § 152; Neb. Rev. Stat. § 28-201; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Okla. Stat. Ann. tit. 21, § 44; Tenn. Code Ann. § 39-12-101. Likewise, judicial decisions, drawn from inside and outside of reform jurisdictions, are similarly in accord. *See, e.g., State v. Sorabella,* 277 Conn. 155, 891 A.2d 897 (2006); *Maxwell v. State*, 168 Md.App. 1 (2006); *State v. Chhom*, 128 Wash.2d 739, 911 P.2d 1014 (1996); *State v. Nunez*, 159 Ariz. 594, 596 (Ariz. Ct. App. 1989); *People v. Miller*, 87 N.Y.2d 211 (1995).

[38] *See, e.g.*, *State v. Mateyko*, 53 S.W.3d 666, 677 (Tenn. 2001); *Neal v. State*, 590 S.E.2d 168 (Ga. Ct. App. 2003).

[39] *See, e.g.*, *State v. Galan*, 134 Ariz. 590, 591-92 (Ct. App. 1982); *Sergie v. State*, 105 P.3d 1150 (Alaska App. 2005).

[40] Smith, *supra* note 90, at 434.

> crime been consummated, the defendant would be guilty of the substantive crime but that, upon the failure of the defendant's attempt, the defendant's lack of intent with respect to an attendant circumstance precludes penal liability for the attempt.[41]

Consistent with the foregoing analysis, "virtually all commentators agree" that a principle of *mens rea* equivalency is appropriate in the context of circumstances.[42]

Finally, the Model Penal Code's recognition of the planning requirement—occasionally referred to as "future conduct intention"[43]—uniquely implicated by incomplete attempts has been well received. For example, numerous reform codes codify the requirement that, for incomplete attempts, the defendant's conduct must have been "planned to culminate in commission of the crime."[44] This basic notion has similarly been recognized by judges, too. As a variety of courts have observed, an attempt conviction requires proof that the defendant possessed an "intent to perform acts which, if completed, would constitute the underlying offense,"[45] in which context the term "intent" serves as a stand-in for the planning requirement.[46] Commentators have also been quite supportive of

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[41] Commentary on Haw. Rev. Stat. Ann. § 705-500; *see, e.g.,* Wechsler et al., *supra* note 51, at 575.
[42] DRESSLER, *supra* note 91, at § 27.05; *see, e.g.*, Cahill, *Reckless Homicide*, *supra* note 100, at 900.
[43] Robinson, *Functional Analysis*, *supra* note 27, at 864.
[44] *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-1001; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ky. Rev. Stat. Ann. § 506.010; N.J. Stat. Ann. § 2C:5-1.
[45] *See, e.g., People v. Frysig*, 628 P.2d 1004, 1010 (Colo. 1981); *Bloomfield v. State*, 234 P.3d 366, 372 (Wyo. 2010); *State v. Covarrubias*, A-92-500, 1993 WL 80588, at *12 (Neb. Ct. App. Mar. 23, 1993); *State v. Adams*, 745 P.2d 175, 178 (Ariz. Ct. App. 1987).
[46] Here's how one commentator describes future conduct intention, synonymous with planning, and distinguishes it from present conduct intention, synonymous with voluntariness:

> For all commission offenses, a present conduct intention is required, satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed. For example, an actor does not satisfy this culpability requirement if he does not intend to push the victim but rather does so accidentally as he catches his balance from his own fall. A requirement of present conduct intention essentially duplicates the voluntariness requirement discussed above.
>
> The requirement of a future conduct intention, on the other hand, has a critical independent role to play. It serves to show that the actor is planning to do more than what he has already done. Most prominently, attempt liability requires that the actor must intend . . . to engage in the conduct constituting the offense. Such a future conduct intention also is present in substantive offenses that are or that contain codified inchoate offenses. Burglary, for example, requires that an actor enter a building "with purpose to commit a crime therein." Note that the requirement of a present conduct intention applies to a corresponding objective element of offense definition, the conduct element, that the actor also must satisfy, just as the requirements of a present circumstance culpability and a future result culpability typically apply to a corresponding objective element. A requirement of a future conduct intention, in contrast, by definition has no corresponding objective element but rather exists on its own; the actor need not be shown to have performed the conduct.

Robinson, *Functional Analysis*, *supra* note 27, at 864.

recognizing this planning requirement as distinct from the *mens rea* as to the results and circumstances of an attempt.[47]

Consistent with the strong majority trends relevant to the *mens rea* of attempt, as well as the compelling considerations of public policy that each rests upon, the Revised Criminal Code codifies a definition of attempt comprised of: (1) a principle of *mens rea* elevation applicable to results that allows for both purpose and belief-based attempts, see § 301(a)(1); and (2) a principle of *mens rea* equivalency applicable to circumstances, see § 301(a)(2). Both of these principles are, in turn, preceded by a prefatory requirement of planning, which helps to clarify their appropriate application.

Subsection (a)(3): Relation to National Legal Trends on Incomplete Attempts. American criminal law is comprised of a variety of standards for addressing incomplete attempts each of which finds support in a range of competing policy considerations. Generally speaking, however, the substantial step test, originally developed by the Model Penal Code, is the majority approach while the dangerous proximity test, originally developed by the common law, is the minority approach. Following current District law, § 301(a)(3) incorporates the dangerous proximity test into the Revised Criminal Code.

The nature of the conduct that will support an attempt conviction has long been the subject of controversy in American criminal law.[48] At the heart of the problem is disagreement over the following issue: at what point has an actor crossed the line between mere preparation and perpetration necessary to justify attempt liability?

There is universal agreement that so-called complete attempts—where a person carries out all that he or she planned to do in order to consummate an offense[49]—constitute an appropriate basis for criminal liability.[50] There also is universal agreement that incomplete attempts—where a person is frustrated from carrying out his or her plan due to interference from external forces[51]—should, as a general category, provide a basis for criminal liability.[52] What is less clear, however, is how to define the contours of this category, a challenging task that entails deciding where in the "ebb and flow of events

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[47] *See, e.g.,* Robinson, *Functional Analysis*, *supra* note 27, at 864; Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1170-71 (1997); Cahill, *Incomplete Attempts*, *supra* note 111, at 755; Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173, 202-03 (2011).

[48] More than a century ago, Holmes observes that "[e]minent 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 . . . ." O.W. Holmes, Jr., THE COMMON LAW 68 (1881). Since then, little has changed. *See, e.g.*, Thomas Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 79 (1940); LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.3.

[49] 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. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[50] *See, e.g.*, *Gray v. State*, 43 Md. App. 238, 239 (1979); *Regina v. Eagleton*, 6 Cox Crim. Cas. 559 (1855); *Rex v. Scofield*, Cald. 397 (1784).

[51] 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. Cahill, *Reckless Homicide*, *supra* note 100, at 901 n.59.

[52] Indeed, "[n]o jurisdiction operating within the framework of Anglo-American law requires that the last proximate act occur before an attempt can be charged." Model Penal Code § 5.01 cmt. at 321 n.97; *see, e.g.*, *United States v. Coplon*, 185 F.2d 629, 633 (2d Cir. 1950).

leading from preparation to consummation" the line between reprehensible and criminal ought to be drawn.[53]

Over the years, courts and legislatures have developed a wide range of tests to address this issue. Broadly speaking, however, there exist two main categories of approaches: the common law standards and the Model Penal Code standard.

The common law standards, as a class, tend to emphasize the relationship between the conduct of the accused and the end of the chain of criminal activity (that is, how much remains to be done). As a result, they tend to draw the line between preparation and perpetration comparatively late in the criminal timeline.

Most of the common law standards focus on closeness to completion.[54] This emphasis is most obvious under the so-called physical proximity test, which asks whether the defendant's conduct was "sufficiently near [the completed offense] to stand either as the first or some subsequent step in a direct movement towards the commission of the offense after the preparations are made."[55]

Proximity is also at the heart of another influential common law standard, the so-called probable desistance test, which focuses on whether a defendant has become close enough such that it could be said that he or she was otherwise unlikely to voluntarily desist from her criminal efforts.[56] Under this test, the line of preparation has been crossed when the defendant has committed an act that in the *ordinary course of events* would result in the commission of the target crime *except for the intervention of some extraneous factor*.[57]

Perhaps the most influential of all common law standards is the "dangerous proximity" test.[58] Originally set forth by Oliver W. Holmes in a series of opinions[59] and an acclaimed book,[60] this standard likewise emphasizes closeness to completion, though it also adds an additional gloss, which focuses on dangerousness.[61] More specifically, the dangerous proximity test draws the line between preparation and perpetration at an act that is "dangerously close" to success, where such closeness is calculated by weighing "the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result."[62] Under such an approach, the line between

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[53] FLETCHER, *supra* note 122, at 140.
[54] *See* Model Penal Code § 5.01 cmt. at 325.
[55] *State v. Dowd*, 28 N.C. App. 32, 37 (1975); *see, e.g.*, *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).
[56] *See* Model Penal Code § 5.01 cmt. at 325; *see also supra* notes 50-52 and accompanying text (discussing this test).
[57] *See, e.g.*, *Young v. State*, 303 Md. 298, 310 (1985); *Commonwealth v. Kelley*, 58 A.2d 375, 377 (Pa. Super. Ct. 1948).
[58] For an "analysis of criminal law authorities writing near the turn of the century," which "reveals that Justice Holmes' dangerous proximity approach to defining the attempt was . . . dominant," see Mark E. Roszkowski, *Attempted Monopolization: Reuniting A Doctrine Divorced from It's Criminal Law Roots and the Policy of the Sherman Act*, 73 MARQ. L. REV. 355, 389 n.189 (1990); *see, e.g.*, 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW §§ 739, 759(1), 762(4) (8th ed. 1892); 1 J. BISHOP, BISHOP ON CRIMINAL LAW §§ 739, 759(1), 762(4) (9th ed. 1923); 1 F. WHARTON, A TREATISE ON CRIMINAL LAW § 181 (8th ed. 1880); 1 F. WHARTON, WHARTON'S CRIMINAL LAW § 220 (12th ed. 1932).
[59] *See Commonwealth v. Kennedy*, 170 Mass. 18 (1897); *Commonwealth v. Peaslee*, 177 Mass. 267 (1901); *Hyde v. United States*, 225 U.S. 347 (1912) (Holmes, J. dissenting); *see also Commonwealth v. Bell*, 455 Mass. 408, 429-30 (2009) (describing the genesis of the test).
[60] *See* HOLMES, *supra* note 136, at 68–69.
[61] *See* FLETCHER, *supra* note 122, at 141-42.
[62] *Kennedy*, 170 Mass. at 22.

preparation and attempt is determined on a sliding scale: the greater the gravity of the offense, the larger the probability of it occurring, and the nearer the act to the crime, the more likely that act is to constitute an attempt.[63]

There exists one additional common law standard worth noting, which does not emphasize proximity, the "unequivocality test" or "*res ipsa loquitur* test."[64] Under the unequivocality test, conduct oriented towards commission of an offense does not constitute a criminal attempt unless it is "of such a nature that it is itself evidence of the criminal intent with which it is done, i.e., an act that bears criminal intent on its face, an act that can have no other purpose than the commission of that specific crime."[65] Which is to say that under such an approach the person's *conduct* must, standing alone, unambiguously manifest her criminal intent to commit an offense.[66]

The common law standards can be contrasted with the approach developed by the Model Penal Code, the substantial step test. This relevant standard emphasizes the relationship between the conduct of the accused and the beginning of the chain of criminal activity (that is, how much has been done), and, therefore, draws the line between preparation and perpetration comparatively early in the criminal timeline.

The substantial step test specifically allows for an attempt conviction to rest upon proof that the accused engaged in an "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the actor's] commission of the crime."[67] By using the terminology of a substantial *step*, this formulation, like the various proximity approaches, maintains an emphasis on distance. However, it flips the orientation: rather

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[63] So, for example, the Massachusetts Supreme Court in *Commonwealth v. Kennedy* (an opinion penned by Holmes) observed that where the relevant act was attempted murder by poisoning, the gravity of the crime, coupled with the great harm likely to result from poison, would warrant finding attempt liability at an earlier stage than might be the case with less dangerous crimes. *Kennedy*, 170 Mass. at 22. Applying this reasoning in *Bell v. State*, the Georgia Supreme Court held the "potentially and immediately dangerous circumstances" presented by D's entry of a company's premises carrying dynamite with intent to destroy one of the company's buildings justified drawing the line between preparation and attempt earlier on in the chain of criminal conduct. 118 Ga. App. 291, 293 (1968).

[64] *See* Model Penal Code § 5.01 cmt. at 325.

[65] *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see, e.g.*, *Young*, 303 Md. at 310.

[66] The true import of the unequivocality test is its robust evidentiary implications, namely, it limits the factfinder to a consideration of external conduct in its evaluation of whether the line between preparation and perpetration has been crossed, thereby excluding from consideration any oral or written communications of the accused, such as a verbal confession or one articulated in writing. In practical effect, this means that:

> It is as if the jury observed the conduct in video form with the sound muted (so as not to hear the actor's potentially incriminating remarks), and sought to decide from the conduct alone whether the accused was attempting to commit the offense for which she was prosecuted.

DRESSLER, *supra* note 91, at § 27.06. "If there is only one reasonable answer to this question then the accused has done what amounts to an 'attempt' to attain that end." J.W. Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230, 236 (1934). But if, in contrast, "there is more than one reasonably possible answer, then the accused has not yet done enough." *Id.* It's worth noting that under this test the government may still prove that the accused satisfied the culpability requirement for an attempt by relying upon any evidence; however, the government may only make its case regarding the conduct requirement under such an approach by relying on outwardly observable behavior. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 453; J. SALMOND, JURISPRUDENCE 404 (7th ed. 1924).

[67] Model Penal Code § 5.01(1)(c).

than emphasizing closeness to consummation, it focuses upon how far from the beginning of the chain of criminal activity an actor has gone.[68] "That further major steps must be taken before the crime can be completed," as the MPC drafters, explained, "does not preclude a finding that the steps already undertaken are substantial."[69] The Model Penal Code drafters intended the substantial step test to "broaden[] liability" beyond that provided for under the common law standards.[70]

The comparative breadth of these tests can be observed through the following variations on a burglary scenario involving a locksmith who decides to steal a safe that he's been working on.[71] Here is the first scenario:

> Ray, a locksmith, recalls working on a safe in a coin shop. The safe was kept in a back room and always contained valuable coins. Ray decides that he will rob the safe in the coin shop. To make sure that the safe is still there, Ray goes to the coin shop and checks out the situation before the robbery. Ray tells a friend what he has decided to do.[72]

On these facts, Ray's conduct would likely provide the basis for an attempt conviction under the substantial step test. For example, the drafters of the Model Penal Code explicitly clarified that this kind of "reconnoitering" behavior should be included within the auspices of the substantial step test.[73] Their view, in turn, is reflected in

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[68] Model Penal Code § 5.01 cmt. at 329. For further discussion, see ROBINSON & CAHILL, *supra* note 92, at 451-452; 1 RUSSELL ON CRIME 182, 184 (J.W. Cecil Turner ed., 12th ed. 1964).

[69] Model Penal Code § 5.01 cmt. at 329; *see, e.g., People v. Hawkins*, 311 Ill.App.3d 418, 428 (Ill. 2000) (Under the Model Penal Code, "[a] substantial step can be the very first step beyond mere preparation. That more steps could conceivably have been taken before actual commission of a crime does not render that first step insubstantial.").

[70] Model Penal Code § 5.01 cmt. at 331. At the same time, the Model Penal Code drafters were also cognizant of the fact that broadening attempt liability in this way enhanced the risk of convicting innocent actors given that attempt prosecutions may uniquely center around innocuous conduct that is susceptible to being misconstrued. *See* ROBINSON & CAHILL, *supra* note 92, at 467; Robinson, *Functional Analysis*, *supra* note 27, at 866. In order to address the increased risk of false positives inherent in the expansion of attempt liability under the substantial step test, then, the Model Penal Code drafters devised a 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." Model Penal Code § 5.01(2).

This requirement effectively constitutes a modified version of the evidentiary limitation imposed by the unequivocality test. "Rigorously applied," for example, "the res ipsa loquitur doctrine would provide immunity in many instances in which the actor had gone far toward the commission of an offense and had strongly indicated a criminal purpose." Model Penal Code § 5.01 cmt. at 331. The Model Penal Code's corroboration requirement, in contrast, recognizes that "an actor's conduct may be incriminating in a general way without showing beyond a reasonable doubt that the actor had the purpose of committing a particular crime." *Id.* It would therefore allow for other forms of extrinsic evidence, such as confessions, to be considered as part of the fact-finder's overall analysis of whether conduct requirement is met, so long as the conduct being analyzed is not itself wholly equivocal. *See id.*; Wechsler et al., *supra* note 51, at 590.

[71] This scenario is drawn from PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995) (Study 1).

[72] *See* ROBINSON & DARLEY, *supra* note 159.

[73] More specifically, "reconnoitering the place contemplated for the commission of the crime" is considered to a fact pattern that, "if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law" under Model Penal Code § 5.01(2). In practical effect, this means that where such

contemporary judicial application of the substantial step test, which reaches both reconnoitering behavior[74] and other comparable forms of preparation.[75] In contrast, fact patterns merely involving reconnoitering behavior, as well as various other situations wherein important contingencies remain to be fulfilled, tend to fall short of satisfying the common law standards as a matter of case law.[76] Before upholding an attempt conviction reached under the common law standards, appellate judges typically require proof of further progress.

To illustrate the nature of the progress necessary to satisfy the common law standards, consider the following developments to the burglary scenario discussed earlier:

> Ray, having spoken with his friend, decides to make a special tool to crack the safe. Thereafter, he travels to the coin shop, parks his car in the adjoining lot, and exits his vehicle. Ray is then stopped by the police who—having been informed of Ray's plans by Ray's friend—arrest him.[77]

On these facts, Ray's conduct would likely satisfy all of the common law standards. That Ray is sufficiently close to the site of the job would, based upon prevailing case law, indicate that he has satisfied the physical proximity test, dangerous proximity test, and the probable desistance test.[78] And the fact that Ray made a special tool to crack the safe would likely provide the basis for satisfying unequivocality test.[79]

Today, both the common law standards and the Model Penal Code approach have been endorsed by American legislatures and, in those jurisdictions where the legislature has not clearly spoken, by the courts. However, these two different approaches have not been endorsed in equal measure: the Model Penal Code standard appears to reflect the majority approach, while the common law standards appear to reflect the minority approach.

On the legislative level, twenty-four reform codes have adopted a comprehensive general attempt provision that incorporates the substantial step test.[80] Although some of

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circumstances are present, the judge "cannot directly acquit the defendant," while the prosecutors are automatically allowed "to discharge their burden of production whenever evidence of the specified acts is present." Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1238-39 (2007).

[74] *See, e.g.*, *United States v. Wesley*, 417 F.3d 612, 620 (6th Cir. 2005); *United States v. Ivic*, 700 F.2d 51, 67 (2d Cir. 1983); *United States v. Rahman*, 189 F.3d 88, 129 (2d Cir. 1999).

[75] *See, e.g.*, *United States v. Spencer*, 439 F.3d 905, 916 (8th Cir. 2006); *United States v. Jessup*, 305 F.3d 300, 304 (5th Cir. 2002); *United States v. Felix*, 867 F.2d 1068, 1071 (8th Cir. 1989); *United States v. Haynes*, 372 F.3d 1164, 1168-9 (10th Cir. 2004); *United States v. Piesak*, 521 F.3d 41, 44–45 (1st Cir. 2008).

[76] *See, e.g., People v. Rizzo*, 246 N.Y. 334, 338-39 (1927); *People v. Volpe*, 122 N.Y.S.2d 342, 348 (Cty. Ct. 1953); *State v. Christensen*, 55 Wash. 2d 490, 493 (1960); *People v. Youngs*, 122 Mich. 292, 293 (1899); *Commonwealth v. Bell*, 455 Mass. 408, 425 (2009).

[77] *See* ROBINSON & DARLEY, *supra* note 159.

[78] *See, e.g.*, *Bell v. State*, 118 Ga. App. 291, 293 (1968); *People v. Acosta*, 609 N.E.2d 518, 521-22 (N.Y. 1993); *Cody v. State*, 605 S.W.2d 271, 273 (Tex. 1980); *People v. Mahboubian*, 74 N.Y.2d 174, 191 (1989); *see also* ROBINSON & DARLEY, *supra* note 159.

[79] *See, e.g.*, *People v. Staples*, 6 Cal. App. 3d 61, 68 (Ct. App. 1970); *Laster v. State*, 275 S.W.3d 512, 526 n.12 (Tex. Crim. App. 2009); *see also* ROBINSON & DARLEY, *supra* note 159.

[80] *See, e.g.*, Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-201; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 531; Ga.Code Ann. § 16-4-1; Haw. Rev. Stat. § 705-500;

these jurisdictions modify the substantial step test in one or more ways, the core of the relevant legislative provisions reflects the Model Penal Code's more expansive approach to drawing the line between preparation and perpetration.[81] Outside of reform jurisdictions, moreover, courts have also been quite receptive to the Model Penal Code standard: various appellate courts on the state[82] and federal[83] level have adopted the substantial step test by judicial pronouncement.

Notwithstanding the contemporary popularity of the Model Penal Code standard, however, its adoption has not been uniform.[84] For example, a handful of criminal codes reflect—either explicitly or as interpreted—the common law standards. Illustrative is the Wisconsin Code, which, by requiring "acts toward the commission of the crime which demonstrate *unequivocally*, under all the circumstances, that the actor formed that intent and would commit the crime *except for the intervention* of another person or some other extraneous factor," explicitly mandates *both* unequivocality *and* proximity.[85] In contrast, the general attempt statutes in other states—for example, California, Massachusetts, and New York—are comprised of vague language that bears the influence of the common law tests,[86] and have been interpreted by the state courts in a manner that reflects their common law origins.[87]

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720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Ky. Rev. Stat. Ann. § 506.010; Me. Rev. Stat. Ann. tit. 17-A, § 152; Minn. Stat. Ann. § 609.17; Mo. Ann. Stat. § 564.011; Neb. Rev. Stat. § 28-201; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.D. Cent. Code § 12.1-06-01; Or. Rev. Stat. § 161.405; Pa. Cons. Stat. Ann. tit. 18, § 901; Tenn. Code Ann. § 39-12-101; Utah Code Ann. § 76-4-101 Wash. Rev. Code § 9A.28.020; Wyo. Stat. § 6-1-301.

[81] For example, the North Dakota Criminal Code defines a "a 'substantial step' [as] any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime." N.D. Cent. Code § 12.1-06-01. Or similarly consider the Delaware Criminal Code, which defines a substantial step as "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which the defendant is charged with attempting." Del. Code Ann. tit. 11, § 532.

[82] *See, e.g.*, *State v. Ferreira*, 463 A.2d 129, 132 (R.I. 1983); *Young*, 303 Md. at 312-13; *State v. Glass*, 139 Idaho 815, 819 (2003); *see also* Ernest G. Mayo, *The Model Penal Code and Rhode Island: A Primer*, R.I. B.J., January/February 2004, at 19, 23.

[83] *See, e.g.*, *United States v. Lam Kwong-Wah,* 924 F.2d 298, 301 (D.C. Cir. 1991); *United States v. Doyon*, 194 F.3d 207, 210 (1st Cir. 1999); *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983); *United States v. Cruz-Jiminez*, 977 F.2d 95, 101-02 (3d Cir. 1992); *United States v. Neal*, 78 F.3d 901, 906 (4th Cir. 1996); *United States v. Mandujano,* 499 F.2d 370, 376 (5th Cir.1974); *United States v. Williams,* 704 F.2d 315, 321 (6th Cir. 1983); *United States v. Leiva,* 959 F.2d 637, 642 (7th Cir. 1992); *United States v. Watson,* 953 F.2d 406, 408 (8th Cir.1992); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1096 (9th Cir. 2011); *United States v. Prichard*, 781 F.2d 179, 181 (10th Cir. 1986); *United States v. McDowell,* 705 F.2d 426, 427 (11th Cir. 1983). *See also United States v. Resendiz-Ponce*, 549 U.S. 102, 107 (2007); *Braxton v. United States,* 500 U.S. 344, 349 (1991). *But see infra* note 177 (discussing variances in application of the substantial step test, which accord with the common law approach).

[84] *See, e.g.*, Robert Batey, *Minority Report and the Law of Attempt*, 1 OHIO ST. J. CRIM. L. 689, 694-96 (2004).

[85] Wis. Stat. Ann. § 939.32.

[86] For example, the California Code requires proof of "a direct but ineffectual act done toward . . . commission" of the target offense. Cal. Penal Code § 21a. Likewise, the Massachusetts Code requires proof of "any act toward . . . commission" of the target offense. Mass. Gen. Laws Ann. ch. 274, § 6. And the New York Code requires proof of "conduct which tends to effect the commission of such crime." N.Y. Penal Law § 110.00. Under the common law, phrases such as these were similarly understood to mean proximity. *See, e.g.*, *United States v. Jackson*, 560 F.2d 112, 119 (2d Cir. 1977).

[87] *See, e.g.*, *Rizzo*, 246 N.Y. at 336-37; *People v. Warren*, 66 N.Y.2d 831, 832-33 (1985); *People v. Luna*, 170 Cal. App. 4th 535, 540-41 (2009); *People v. Dillon*, 668 P.2d 697, 702 n.1 (1983); *Commonwealth v.*

One important caveat to the foregoing survey bears notice: the influence of the substantial step test may be overstated, and the influence of the common law standards understated, by looking solely at the express formulations offered by a given jurisdiction. For example, it is not uncommon for appellate courts—whether at the state[88] or federal level[89]—to construe and apply the substantial step test in fashion so narrow and proximity-focused that it is the equivalent of the common law standards.[90]

The foregoing variance and disagreement over how to deal with incomplete attempts is not surprising when viewed in light of the conflicting policy considerations implicated by this area of law. Drawing the line between preparation and perpetration implicates the classic divide between effective crime prevention and the protection of individual rights.[91]

For example, it is argued that the *broader* the conduct requirement (i.e, the farther the conduct must be to the completion of the offense), the *greater* the risk that "equivocal behavior may be misconstrued by an unfriendly eye as preparation to commit a crime"[92]—or that a person with a less than fully-formed criminal intent will be arrested before she has

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Bell, 455 Mass. 408, 425 (2009); *Commonwealth v. Ortiz*, 408 Mass. 463, 472 (1990); *State v. Henthorn*, 581 N.W.2d 544, 547 (Wis. Ct. App. 1998); *State v. Thiel,* 515 N.W.2d 847, 861 (1994).

[88] Illustrative is the experience in Indiana. The Indiana Criminal Code clearly endorses the substantial step test. *See* Ind. Code Ann. § 35-41-5-1 ("A person attempts to commit a crime when, acting with the culpability required for commission of the crime, the person engages in conduct that constitutes a substantial step toward commission of the crime"). However, in *Collier v. State*, the Court of Appeals of Indiana deemed that the following conduct "did not constitute a substantial step toward commission of the crime of murder": (1) the defendant repeatedly told his neighbor he was going to kill his wife; (2) then drove to his wife's place of employment with an ice pick, a box cutter, and binoculars; (3) then parked outside the door through which he knew his wife would exit; (4) then fell asleep or passed out. 846 N.E.2d 340, 345-50 (Ind. Ct. App. 2006). In justifying its decision, the court explicitly relied on the principle of dangerous proximity, which had previously been endorsed by the Indiana Supreme Court. *Id.* at 345 (citing *Ward v. State*, 528 N.E.2d 52, 53 (Ind. 1988)) (quoting HOLMES, *supra* note 136, at 68 (1881) and Francis B. Sayre, *Criminal Attempts,* 41 HARV. L. REV. 821, 846 (1928)).

[89] Illustrative is the experience in the Ninth Circuit, which, like all federal courts of appeal, has endorsed the substantial step test by case law, but seems to apply it in a manner consistent with the common law approach. Under governing Ninth Circuit precedent, "[a]n attempt conviction requires evidence that the defendant intended to violate the statute and took a *substantial step* toward completing the violation." *E.g.*, *United States v. Goetzke*, 494 F.3d 1231, 1235 (9th Cir. 2007). Yet, "to constitute a substantial step" in the Ninth Circuit a defendant's actions must "unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *E.g.*, *United States v. Hofus*, 598 F.3d 1171, 1174 (9th Cir. 2010). This framing effectively defines a substantial step by reliance on the common law's unequivocality and probable desistance standards. *See supra* notes 144-54 and accompanying text. Not only that, but this reliance, in turn, appears to have produced outcomes in the case law that are consistent with common law standards. Consider, for example, the following trio of bank robbery decisions, where the Ninth Circuit rejected attempt liability under circumstances which quite clearly seem to satisfy the substantial step test: *United States v. Buffington*, 815 F.2d 1292, 1301 (9th Cir. 1987); *United States v. Still*, 850 F.2d 607, 608 (9th Cir. 1988); and *United States v. Harper*, 33 F.3d 1143, 1147 (9th Cir. 1994). *See also United States v. Yossunthorn*, 167 F.3d 1267, 1271 (9th Cir. 1999). For relevant discussion, see Batey, *supra* note 172, at 694-96.

[90] For similar variance in the application of the substantial step test in other jurisdictions, see Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 444-45 (1988).

[91] *See, e.g.*, Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 611 (2012).

[92] Model Penal Code § 5.01 cmt. at 294.

had the opportunity to reconsider and voluntarily desist.[93] On this view, a narrow conduct requirement—for example, any of the common law standards—is most desirable because it limits the risk that suspicious looking, but innocent, conduct will be punished,[94] while, at the same time, providing people with a reasonable window of time within which to abandon their criminal enterprise.[95]

Conversely, it is argued that the *narrower* the conduct requirement (i.e., the closer the conduct must be to the completion of the offense), the *longer* police will have to abstain from intervention, and the *greater* the risk that an actor will successfully complete an offense.[96] On this view, a broad conduct requirement—for example, the substantial step test—is most desirable because it can help to ensure that police do not "confront insoluble dilemmas in deciding when to intervene, facing the risk that if they wait the crime may be committed while if they act they may not yet have any valid charge."[97]

The foregoing tension between collective security and individual liberty runs parallel to an even deeper policy dispute pervading the criminal law: what is the appropriate basis of, and justification for, criminal liability?[98] On this issue, there are two competing viewpoints: objectivism and subjectivism.[99] "At the heart of the dispute" between these two theories is "[t]he distinction between requiring a dangerous act and searching for dangerous persons goes to the heart of the dispute."[100]

Objectivism posits that the criminal law, in determining guilt and calibrating punishment, ought to primarily focus on the dangerousness of an act. Such dangerousness, moreover, ought to be "objectively discernible at the time that it occurs," even without "special knowledge about the offender's intention."[101] This focus on dangerous acts, in turn, supports a narrow conduct requirement, such as any of the common law standards. "Objectivists begin with the commission of some substantive offence as the paradigm of

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[93] DRESSLER, *supra* note 91, at § 27.01.

[94] This is because "[t]he farther that one moves from the paradigm of a completed act—as one moves backwards successively through attempt, to advanced planning, to initial planning, and so forth—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); *see* Alec Walen, *Criminalizing Statements of Terrorist Intent: How to Understand the Law Governing Terrorist Threats, and Why It Should Be Used Instead of Long-Term Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 803, 842 (2011).

[95] The argument here is that "a system of law must treat its citizens as autonomous agents [that provides them with] as much freedom as possible to determine their own conduct," which, in the context of criminal attempts, requires a meaningful *locus poenitentiae*. R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.*, Garvey, *supra* note 135, at 212.

[96] DRESSLER, *supra* note 91, at § 27.01.

[97] Model Penal Code § 5.01 cmt. at 322; *see, e.g.*, Omri Ben-Shahar & Alon Harel, *The Economics of the Law of Criminal Attempts,* 145 U. PA. L. REV. 299, 328 (1996); *Young*, 303 Md. at 308.

[98] *See* DRESSLER, *supra* note 91, at § 27.03.

[99] *See, e.g.*, FLETCHER, *supra* note 122, at 173-174; Garvey, *supra* note 135, at 183; Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[100] FLETCHER, *supra* note 122, at 173-174.

[101] *Id.* at 116.

criminality, and seek to capture only conduct that comes close to that paradigm by the general law of attempts: conduct that is 'proximate' to the completion of that offence."[102]

Subjectivism, in contrast, posits that the underlying concern, or gravamen, of a criminal offense is an actor's culpable-decision making—that is, his or her intention to engage in or risk harmful or wrongful activity.[103] This focus on dangerous persons in turn supports a broader conduct requirement, such as the substantial step test. "Subjectivists begin with the assumption that any conduct directed towards the commission of a substantive offence is a candidate for criminalization, and then ask how far beyond the 'first act' the intending criminal needs to have progressed before we can safely and properly convict her."[104]

In sum, while the Model Penal Code approach reflects the majority practice in American criminal law (variance in application aside), there exists a strong minority of jurisdictions that appear to apply the common law standards, including, most notably, the dangerous proximity test at the heart of current District law. Furthermore, this variance among jurisdictions is driven by difficult and conflicting considerations of public policy and penal theory. It is therefore unclear which standard for an incomplete attempt is "best," all things considered. What is clear, however, is that the conduct requirement of attempt currently applied in the District, the dangerous proximity test, falls within the boundaries of American legal practice, is justifiable, and represents a longstanding policy reflected in District law.

Subsection (a)(3)(B): Relation to National Legal Trends on Impossibility. The strong majority trend within American criminal law is to broadly reject the relevance of impossibility claims to attempt liability. However, there also appears to be one generally accepted, if infrequently litigated, exception to this broad rejection of impossibility claims: the situation of inherent impossibility, which may constitute a defense to a criminal attempt. Subsection 301(a)(3)(B) incorporates both of these principles into the Revised Criminal Code.

The central question posed by the topic of impossibility is as follows: what is the relevance of a defendant's claim that, by virtue of some mistake concerning the conditions he or she believed to exist at the time he or she acted, the target offense could not have been completed?[105] Typically raised as a defense to an attempt charge, claims of this nature assert that impossibility of completion should by itself—and without regard to whether the defendant acted with the requisite culpable mental states and engaged in significant conduct—preclude the imposition of attempt liability.[106]

Anglo-American criminal law has long struggled to deal with impossibility claims.[107] Part of the reason for the confusion, however, is a general failure on behalf of both courts and commentators to clearly distinguish between the different varieties of

[102] DUFF, *supra* note 183, at 386.
[103] FLETCHER, *supra* note 122, at 172.
[104] DUFF, *supra* note 183, at 386.
[105] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[106] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07.
[107] As Dressler phrases it: "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." DRESSLER, *supra* note 91, at § 27.07.

impossibility claims.[108] Consider, for example, that there exist four basic categories of impossibility claims with which any legal system seeking to proscribe the limits of attempt liability must grapple.[109]

The first category of impossibility 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.[110] 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).[111] 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.[112]

The second category of impossibility is *pure legal impossibility*, which arises where a person acts under a mistaken belief that the law criminalizes his or her intended objective.[113] For an illustrative scenario presenting impossibility of this nature, consider the situation of a 44-year-old-male who has consensual sexual intercourse with a 17-year-old female in a jurisdiction that sets the age of consent for intercourse at 16. Imagine that this male acts under a false belief that the age of consent is actually 18. On these facts, the actor clearly has not committed statutory rape, but what about attempted statutory rape—that is, might attempt liability be premised on the fact that the man thought he has was committing statutory rape?[114]

The third category of impossibility 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.[115] 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.[116] Or similarly consider the prosecution of a defendant who makes plans to engage in illicit sexual activity with a person he believes to be an underage female, but who is actually an undercover police office, for attempted sexual performance by a child.[117]

The fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed

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[108] *See* DRESSLER, *supra* note 91, at § 27.07; LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.
[109] This general framework and breakdown is drawn from DRESSLER, *supra* note 91, at § 27.07.
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] As Dressler observes, "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." *Id.* 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?" *Id.*
[115] *Id.*
[116] *See People v. Thousand*, 631 N.W.2d 694 (Mich. 2001).
[117] *See Chen v. State*, 42 S.W.3d 926 (Tex. Crim. App. 2001); *see also United States v. Tykarsky*, 446 F.3d 458 (3d Cir. 2006).

could not accomplish the ends sought."[118] Inherent impossibility can take the form of pure factual impossibility: consider, for example, the situation of a person who attempts to kill by witchcraft[119] or by throwing red pepper in the eyes of another.[120] And it can also take the form of hybrid impossibility, such as where a person attempts to kill what is obviously a statue.[121] The common denominator underlying inherent impossibility, then, 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."[122]

As a matter of legal practice, there exist two main approaches to dealing with impossibility claims: the common law approach and the Model Penal Code approach.

The common law approach to impossibility primarily revolves around two main rules: (1) factual impossibility is not a defense to an attempt charge; and (2) legal impossibility is a defense to an attempt charge.[123] Although it is not always clear what, precisely, the import of these two common law rules is (given the existence of four categories of impossibility claims), at minimum they support two general propositions.

First, *pure factual impossibility* claims generally do not constitute a defense to an attempt charge under the common law approach.[124] For example, relying on the common law's rule that factual impossibility is not a defense, courts have upheld attempt convictions in the following situations: (1) a pickpocket who puts her hand in the victim's pocket only to discover that it is empty;[125] (2) a male rapist trying to engage in nonconsensual sexual intercourse only to discover that he is impotent;[126] (3) an assailant shooting into the bed where the intended victim customarily sleeps only to discover that it is empty;[127] and (4) an individual pulling the trigger of a gun aimed at a person who is present only to discover that the gun is unloaded.[128]

Second, *pure legal impossibility* claims do constitute a defense to an attempt charge under the common law approach.[129] So, for example, an actor is not guilty of a criminal attempt if, unknown to her, the legislature has repealed a statute that the actor believes that she is violating, such as when an actor attempts to sell "bootleg" liquor after the repeal of the Prohibition laws.[130] All the more so, actors are not guilty of attempts to violate laws that are purely the figments of their guilty imaginations, such as when an actor fishes in a lake without a license believing that he needs a license for that lake though in fact he does not.[131] The common law approach to these kinds of situations is not at all surprising,

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[118] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).
[119] *See Commonwealth v. Johnson*, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).
[120] *See Dahlberg v. People*, 80 N.E. 310, 311 (Ill. 1907).
[121] *See Trent v. Commonwealth*, 156 S.E. 567, 569 (Va. 1931).
[122] Brodie, *supra* note 206, at 244-45.
[123] DRESSLER, *supra* note 91, at § 27.07.
[124] *See id.*
[125] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[126] *See Waters v. State*, 234 A.2d 147 (Md. Ct. Spec. App. 1967).
[127] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[128] *See State v. Damms*, 100 N.W.2d 592 (Wis. 1960).
[129] *See* DRESSLER, *supra* note 91, at § 27.07.
[130] DRESSLER, *supra* note 91, at § 27.07.
[131] *See Commonwealth v. Henley*, 474 A.2d 1115, 1119 (Pa. 1984).

however, once one considers what cases of pure legal impossibility really amount to: "perform[ing] a lawful act with a guilty conscience," that is, acting with a mistaken belief that one is committing crime.[132]

Less clear, and more controversial, under the common law approach to impossibility is the disposition of *hybrid impossibility* claims, which, as noted earlier, arise where three conditions are met: (1) the actor's goal is illegal; (2) commission of the target offense is impossible due to a *factual mistake* (and not simply a misunderstanding of the law); and (3) this factual mistake relates to the *legal status* of some attendant circumstance that constitutes an element of the charged offense.[133] Impossibility of this nature is viewed in varying ways under the common law approach.

For example, some courts view hybrid impossibility as a form of legal impossibility, and, therefore, accept such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has not attempted to receive stolen property if the defendant's belief that the goods were stolen was in error;[134] (2) a defendant has not attempted to take deer out of season if he shoots a stuffed deer believing it to be alive;[135] (3) a defendant has not attempted to bribe a juror when he offers a bribe to a person he mistakenly believes to be a juror;[136] and (4) a defendant has not attempted to illegally contract a valid debt when he believes the debt to be valid but where it was unauthorized and a nullity.[137]

Other courts, in contrast, view hybrid impossibility as a form of factual impossibility, and, therefore, reject such claims as a viable defense to attempt liability. This perspective is reflected in the following judicial holdings: (1) a defendant has attempted to receive stolen property where he mistakenly believed that the property received was stolen;[138] (2) a defendant has attempted to commit a narcotics offense where he mistakenly believed that the substance sold,[139] received,[140] or smoked[141] was an illegal drug; and (3) a defendant has attempted to commit rape when he mistakenly believes the girl with whom he had sexual intercourse is alive.[142]

On one level, the foregoing split over treatment of hybrid impossibility under the common law approach can be understood to reflect a substantive policy disagreement: recognition of hybrid impossibility as a defense to an attempt charge is arguably aligned

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[132] DRESSLER, *supra* note 91, at § 27.07. The common law's recognition that legal impossibility will provide a defense to an attempt charge accordingly amounts to little more than a necessary extension of the legality principle—the well-accepted prohibition against punishing people for conduct that did not violate a duly-enacted law at the point in time in which he or she acted. *See, e.g.*, ROBINSON & CAHILL, *supra* note 92, at 514; Larry Alexander, *Inculpatory and Exculpatory Mistakes and the Fact/Law Distinction: An Essay in Memory of Mike Bayles*, 12 LAW & PHIL. 33, 46 (1992).

[133] *See* DRESSLER, *supra* note 91, at § 27.07.

[134] *See People v. Jaffe*, 185 N.Y. 497 (1906); *Booth v. State*, 398 P.2d 863 (Okla. Crim. App. 1964).

[135] *See State v. Guffey*, 262 S.W.2d 152 (Mo. Ct. App. 1953).

[136] *See State v. Taylor*, 133 S.W.2d 336 (Mo. Ct. App. 1939); *State v. Porter*, 242 P.2d 984 (Mont. 1952).

[137] *See Marley v. State*, 33 A. 208 (N.J. 1895).

[138] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).

[139] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).

[140] *See People v. Siu*, 271 P.2d 575 (Cal. Ct. App. 1954).

[141] *See United States v. Giles*, 42 C.M.R. 960 (A.F. Ct. Mil. Rev. 1970).

[142] *See United States v. Thomas*, 32 C.M.R. 278 (C.M.A. 1962).

with objectivist legal principles,[143] while rejection of hybrid impossibility as a defense to an attempt charge is arguably aligned with subjectivist legal principles.[144] That being said, the impetus behind the disparate outcomes under the common law approach may be more directly rooted in a basic confusion surrounding how to characterize situations involving hybrid impossibility under its binary factual/legal categorization scheme.

Consider, for example, a case involving a defendant who shoots a corpse, believing it to be a living human being. On these facts, the defense would describe the situation as one of legal impossibility under the common law approach: "As a matter of law, shooting a corpse is not, and never can, constitute murder, because the offense of criminal homicide, by definition, only applies to the killing of human beings."[145] The prosecutor, however, would frame with situation in terms of factual impossibility: "If the factual circumstances had been as the defendant believed them to be—that the 'victim' had been alive when the defendant shot him—he would be guilty of murder."[146] As these examples illustrate, skillful lawyering can frame hybrid impossibility claims as either factual or legal impossibility under the common law approach.[147]

One final aspect of the common law approach to impossibility bears notice: broad acceptance of inherent impossibility as a viable basis for defending against an attempt charge.[148] This is reflected in the fact that "where the means chosen are totally ineffective to bring about the desired result,"[149] courts that subscribe to the common law approach generally seem reluctant to impose attempt liability.[150] So, for example, if a person attempts to kill another by "invok[ing] witchcraft, charms, incantations, maledictions,

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[143] That is, an objectivist might argue that hybrid impossibility should constitute a defense to an attempt charge because "only the attempter may know of his mistake as to the circumstance," which means that "such conduct is less likely to be known by others and, therefore less likely to be socially disruptive." ROBINSON & CAHILL, *supra* note 92, at 516. This is particularly true, the objectivist might argue, where hybrid impossibility scenarios "involve objectively innocuous conduct," such as, for example, where "a person shoots at a tree stump believing it to be a human or where a person receives non-stolen property believing it to be stolen." DRESSLER, *supra* note 91, at § 27.07.

[144] That is, the subjectivist would argue that the actor who intends to commit an offense but is unable to do so due to hybrid legal impossibility is no less dangerous than the actor whose inability is the product of factual impossibility. *See, e.g.*, Wechsler et al., *supra* note 51, at 578. What's the difference, for example, between the child rapist who arranges a meeting with what turns out to be an undercover officer and the child rapist who arrives at the wrong meeting spot? Surely not one of dangerousness, the subjectivist would point out, given that both evidence the same propensity for wrongdoing. *See* DRESSLER, *supra* note 91, at § 27.07.

[145] DRESSLER, *supra* note 91, at § 27.07.

[146] *Id.*

[147] DRESSLER, *supra* note 91, at § 27.07.

[148] *See, e.g.*, LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 91, at § 27.07; John F. Preis, *Witch Doctors and Battleship Stalkers: The Edges of Exculpation in Entrapment Cases*, 52 VAND. L. REV. 1869, 1904 (1999).

[149] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973).

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

hexing or voodoo," that person would be excluded from the scope of attempt liability under the common law approach.[151]

The rejection of inherently impossible attempts reflected in the common law approach rests upon two basic rationales: (1) the relevant conduct is not sufficiently dangerous to merit criminalization; and (2) it's hard to know whether people who engage in such conduct actually intend to commit the target offense in the first place.[152] While the rationales underlying the common law approach are fairly uniform, however, the actual legal standards developed by American courts, legislatures, and commentators to articulate it vary substantially.[153]

For example, some legal authorities address inherent impossibility through a requirement that the actor's conduct have been "reasonably adapted,"[154] "intrinsically adapted,"[155] or "apparently adapted"[156] to commission of the offense to support an attempt conviction. Others would limit their general rejection of the impossibility defense with a requirement that completion of a crime at least have been "apparently possible," and,

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[151] Keedy, *supra* note 82, at 469 (collecting citations). As one judge phrases it:

> "[H]exing" with lethal intent, belongs to the category of "trifles," with which "the law is not concerned." Even though a "voodoo doctor" just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I cannot conceive of an American court upholding a conviction of such a maledicting "doctor" for attempted murder or even attempted assault and battery.

Commonwealth v. Johnson, 167 A. 344, 348 (Pa. 1933) (Maxey, J., dissenting).

[152] One commentator lays out these two rationales as follows. First, it is argued that inherently impossible attempts, in contrast to standard impossible attempts, do not even present a *risk* of harm:

> The impossible attempt—the person shooting at an empty bed—still creates a risk that some harm might occur. The obviously impossible attempt, however—the person casting a spell on another—does not. Where the act constituting the attempt does not invoke criminal sanction, the actor is being punished only for his dangerous mental state.

Brodie, *supra* note 206, at 245. Second, but related, is the fact that, where an inherently impossible attempt is at issue, it can be hard to determine whether the defendant even possessed this "dangerous mental state" in the first place:

> For example, it 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 becomes too wide to cross.

Id. at 245-46. *See, e.g.*, *United States v. Oviedo*, 525 F.2d 881, 885 n.11 (5th Cir. 1976) ("Mens rea is within one's control but . . . it is not subject to direct proof . . . It is not subject to direct refutation either. It is the subject of inference and speculation.")

[153] *See, e.g.*, Jeffrey F. Ghent, Annotation, *Impossibility of Consummation of Substantive Crime as Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime*, 37 A.L.R. 3d 375 (1971); J. H. Beale, Jr., *Criminal Attempts*, 16 HARV. L. REV. 491, 492 (1903).

[154] *E.g.*, *Seeney*, 563 A.2d at 1083; *Robinson*, 608 A.2d at 116; *Johnson*, 756 A.2d at 464; *In re N*-----, 2 I. & N. Dec. 201, 202 (B.I.A. 1944).

[155] *E.g.*, *State v. Wilson*, 30 Conn. 500, 506 (1862).

[156] *E.g.*, *Collins v. City of Radford*, 113 S.E. 735, 741 (Va. 1922); *People v. Arberry*, 114 P. 411, 415 (Cal. Ct. App. 1910).

therefore, the likelihood of failure not patently "obvious."[157] Where, in contrast, the defendant employs "an absurd or obviously inappropriate selection of means," [158] or the "impossibility would [otherwise] have been clearly evident to a person of normal understanding,"[159] other legal authorities would hold that attempt liability simply may not attach. Communicative differences aside, however, all of the foregoing standards share a fundamental similarity: they render a basic connection between means and ends an essential component of attempt liability.[160]

The common law approach to impossibility can be contrasted with the Model Penal Code approach, which generally eschews categorization and instead broadly renders irrelevant impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[161]

Illustrative is the Model Penal Code's formulation of the substantial step test, which establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[162] The inclusion of the foregoing italicized actor-oriented language effectively abolishes impossibility defenses premised on pure factual impossibility or hybrid impossibility.[163] It does so, moreover, in a manner that obviates the need for courts to rely upon the common law's classification scheme.[164] That is, by broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders distinctions between pure factual impossibility and hybrid impossibility immaterial.[165]

The Model Penal Code approach to impossibility also departs from the common law approach with respect to its treatment of inherent impossibility. Whereas the common law approach recognizes an inherent impossibility defense (by essentially making non-inherent impossibility an element of an attempt), the Model Penal Code views inherent impossibility to be, at most, a matter of sentencing mitigation. That is, "[t]he approach of

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[157] Wechsler et al., *supra* note 51, at 583 (citing *State v. McCarthy*, 115 Kan. 583, 589 (1924); *State v. Block*, 333 Mo. 127, 131 (1933)).
[158] Wechsler et al., *supra* note 51, at 583–84 (citing *Commonwealth v. Kennedy*, 170 Mass. 18, 21, (1897)).
[159] *E.g.*, Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11.
[160] *See, e.g.*, Ken Levy, *It's Not Too Difficult: A Plea to Resurrect the Impossibility Defense*, 45 N.M. L. REV. 225, 273-74 (2014); Preis, *supra* note 236, at 1902-04.
[161] Model Penal Code § 5.01 cmt. at 297.
[162] Model Penal Code § 5.01(1)(c).
[163] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.
[164] *See* Model Penal Code § 5.01 cmt. at 318; Wechsler et al., *supra* note 51, at 579.
[165] ROBINSON & CAHILL, *supra* note 92, at 514. Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

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

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 51, at 579.

the Code is to [generally] eliminate the defense of [inherent] impossibility," but to thereafter authorize the court to account for the relevant issues at sentencing.[166]

The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt . . . is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal.[167] First, the court may "impose sentence for a crime of lower grade or degree."[168] Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution."[169] In neither case, however, does § 5.05(2) or "the commentaries to Model Penal Code . . . attempt to define what constitutes an 'inherently unlikely' attempt."[170]

Today, the heart of the Model Penal Code approach to impossibility—namely, the Code's broad rejection of factual and hybrid impossibility claims through application of an actor-centric approach that focuses on the situation as the defendant viewed it—appears to constitute the majority American approach.[171] In reform jurisdictions, this is frequently achieved by codifying statutory language modeled on Model Penal Code § 5.05(1)(c), which requires the fact-finder to consider the relevant "circumstances as [the defendant] believes them to be.[172] However, reform jurisdictions also achieve the same policy

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[166] Model Penal Code § 5.01 cmt. at 318. In rejecting the common law approach, the drafters of the Model Penal Code reasoned that:

> Using impossibility as a guide to dangerousness of personality presents serious difficulties. Cases can be imagined in which it might be argued that the nature of the means selected, say black magic, substantially negates dangerousness of character. On the other hand, it is probable that one who tries to commit a crime by inadequate methods and fails will realize the futility of his conduct and seek more efficacious means . . . .
>
> The approach of the Code is to eliminate the defense of impossibility in all situations. The litigated cases to date have not presented instances in which the actor's futile efforts indicate that he is not likely to succeed in the future in committing the crime contemplated or some similar offense. Nor is it likely that attempts of this nature, if they do occur, will be detected or prosecuted. Nonetheless, to provide a method of coping with any such case should one arise, article 5 provides, in its sentencing provision, that in "extreme cases" where "neither [the] . . . conduct nor the actor presents a public danger," the court may dismiss the prosecution.

Wechsler et al., *supra* note 51, at 585. The Model Penal Code drafters specifically rejected a reasonableness-based test "[s]ince it can not be affirmed that those who make unreasonable mistakes are not potentially dangerous." *Id.*

[167] Model Penal Code § 5.05(2).

[168] *Id.*

[169] *Id.*

[170] Brodie, *supra* note 206, at 247. Indeed, "the accompanying commentaries only restate the rule," namely, "In 'extreme cases' under Section 5.05(2), the court is authorized to 'dismiss the prosecution.'" *Id.* (quoting Model Penal Code § 5.05(2) cmt. 3).

[171] For example, as one commentator observes: "[m]ost states have abolished the defense of hybrid [] impossibility on the subjectivist ground that an actor's dangerousness is 'plainly manifested' in such cases." DRESSLER, *supra* note 91, at § 27.07; *see, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).

[172] *See, e.g.,* Ky. Rev. Stat. Ann. § 506.010; Conn. Gen. Stat. Ann. § 53a-49; Neb. Rev. Stat. Ann. § 28-201; Ariz. Rev. Stat. Ann. § 13-1001; Ark. Code Ann. § 5-3-201; Del. Code Ann. tit. 11, § 531; N.H. Rev. Stat.

outcome by codifying more general rules that broadly state that "impossibility"[173] or "factual and legal impossibility" [174] are not defenses.

Comparable trends are also reflected in the case law outside of reform jurisdictions.[175] For example, notwithstanding the absence of a general federal attempt statute, most federal courts seem to reject defenses premised on either factual or hybrid impossibility.[176] This also appears to be the case in similarly situated non-reform states, where the prevailing trend appears to be the rejection of factual and hybrid impossibility defenses by way of decisional law.[177] At the same time, many courts also seem to agree that the categories of impossibility attempts are themselves so are so "fraught with intricacies and artificial distinctions that the[y] [have] little value as an analytical method for reaching substantial justice."[178] As a result, various courts have "declined to participate in the sterile academic exercise of categorizing a particular set of facts as representing 'factual' or 'legal' impossibility," and instead have applied a non-categorical approach that bears the influence of the Model Penal Code.[179]

Notwithstanding the broad influence of the Model Penal Code approach to impossibility, however, the Code's treatment of inherent impossibility has not been widely followed. Instead, the common law approach—which views "inherent impossibility [as] an accepted defense in attempt cases," and not as a matter of sentencing mitigation—appears to constitute the majority trend in America.[180]

On a legislative level, a majority of jurisdictions have declined to codify general provisions addressing inherent impossibility—presumably, because "the likelihood of prosecution under such circumstances [is] too unrealistic to make such a provision

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Ann. § 629:1; Wyo. Stat. § 6-1-301; Haw. Rev. Stat. § 705-500; Tenn. Code Ann. § 39-12-101; Okla. Stat. Ann. tit. 21, § 44; La. Rev. Stat. Ann. § 14:27. *See also* Ind. Code Ann. § 35-41-5-1(b) ("It is no defense that, *because of a misapprehension of the circumstances* . . . it would have been impossible for the accused person to commit the crime attempted.").

[173] *See, e.g.,* 720 Ill. Comp. Stat. Ann. 5/8-4; Ind. Code Ann. § 35-41-5-1; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17; Mont. Code Ann. § 45-4-103; Or. Rev. Stat. Ann. § 161.425; 18 Pa. Cons. Stat. Ann. § 901.

[174] *See, e.g.,* Ala. Code § 13A-4-2; Alaska Stat. Ann. § 11.31.100; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 562.012; N.Y. Penal Law § 110.10; N.D. Cent. Code Ann. § 12.1-06-01; Ohio Rev. Code Ann. § 2923.02; Utah Code Ann. § 76-4-101; Wash. Rev. Code Ann. § 9A.28.020.

[175] For an overview, see *People v. Thousand*, 465 Mich. 149, 157-162 (2001).

[176] *See, e.g.*, *United States v. Farner*, 251 F.3d 510, 512-13 (5th Cir. 2001); *United States v. Everett*, 700 F.2d 900, 907 (3d Cir. 1983); *United States v. Johnson*, 767 F.2d 673, 675 (10th Cir. 1985); *United States v. Pennell,* 737 F.2d 521, 525 (6th Cir. 1984); *United States v. Reeves,* 794 F.2d 1101, 1105 (6th Cir. 1986).

[177] *See, e.g.*, *State v. Latraverse*, 443 A.2d 890, 894 (R.I. 1982); *State v. Curtis*, 603 A.2d 356, 358 (Vt. 1991); *State v. Rios*, 409 So. 2d 241, 244-45 (Fla. Dist. Ct. App. 1982); *Duke v. State*, 340 So. 2d 727, 730 (Miss. 1976); *State v. Lopez*, 669 P.2d 1086, 1087-88 (N.M. 1983); *State v. Hageman*, 296 S.E.2d 433, 441 (N.C. 1982).

[178] *State v. Moretti,* 244 A.2d 499, 503 (N.J. 1968).

[179] *Thousand*, 465 Mich at 162 (citing *Darnell v. State*, 558 P.2d 624 (Nev. 1976); *State v. Moretti*, 244 A.2d 499 (N.J. 1968); *People v. Rojas*, 358 P.2d 921 (Cal. 1961)).

[180] Preis, *supra* note 236, at 1902; *see, e.g.*, CHARLES E. TORCIA, 4 WHARTON'S CRIM. L. § 698 (15th ed. Westlaw 2017); *see also* FLETCHER, *supra* note 122, at 166 ("The consensus of Western legal systems is that there should be no liability, regardless of the wickedness of intent, for sticking pins in a doll or chanting an incantation to banish one's enemy to the nether world.").

necessary."[181] Among those that have addressed the issue, moreover, there is a split between Model Penal Code and common law-based statutory approaches. On the one hand, the Model Penal Code's mitigation-based sentencing provision intended to deal with inherent impossibility, § 5.05(2), "has only been adopted by some three states."[182] On the other hand, a similar number of jurisdictions codify the common law approach to inherent impossibility by incorporating "a reasonableness element in[to] their definition of attempt crimes."[183] In the absence of applicable general provisions, however, "the defense of inherent impossibility is frequently recognized by state and federal courts."[184] And it is also widely supported by legal literature.[185]

Viewed collectively, then, "case law[,] legislative pronouncements and scholarly commentary [on] inherent impossibility" indicate that the common law approach to the issue is the majority trend.[186]

Consistent with the foregoing analysis of national legal trends, § 301(a)(3)(b) is comprised of two different substantive policies relevant to impossibility. First, and most importantly, § 301(a)(3)(b) incorporates the Model Penal Code's actor-centric approach to impossibility. By focusing on the situation as the defendant viewed it, the Revised Criminal Code necessarily abolishes factual impossibility and hybrid impossibility defenses. Second, § 301(a)(3)(b) incorporates the common law approach to inherent impossibility. By requiring that the actor's conduct be reasonably adapted to commission of the target offense, the Revised Criminal Code necessarily excludes inherently impossible attempts from the scope of attempt liability. The foregoing components, when viewed as a matter of substantive policy, appear to reflect majority legal trends and current District law.

Subsection 301(a): Relation to National Trends on Codification. The Model Penal Code's general attempt provision, § 5.01, constitutes the basis for all modern legislative efforts to comprehensively codify the culpable mental state requirement and the conduct requirement for criminal attempts.[187] While broadly influential as a matter of codification,

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[181] ROBINSON, *supra* note 259, 1 CRIM. L. DEF. § 85 (quoting Mich. 2d Proposed Rev. § 1001(2), Commentary (1979)).

[182] Brodie, *supra* note 206, at 247 (citing Ark. Code Ann. § 5-3-101; N.J. Stat. Ann. § 2C:5-4; and 18 Pa. Cons. Stat. Ann. § 905); *see also id.* at 247 n.54 ("Colorado also allows a dismissal of prosecutions when there is an inherently unlikely attempt, but limits this dismissal to attempted conspiracy charges") (citing (Colo. Rev. Stat. Ann. § 18-2-206). Furthermore, and "[p]erhaps because of the unpredictable definition of 'inherently unlikely' attempts," courts in these jurisdictions seem to "prefer to address questions of inherently unlikely attempts under the framework of de minimis harm" under Model Penal Code § 2.12. *Id.* at 247-48.

[183] Brodie, *supra* note 206, at 253; *see* Minn. Stat. Ann. § 609.17; Iowa Code Ann. § 707.11; N.J. Stat. Ann. § 2C:5-1.

[184] Preis, *supra* note 236, at 1902; *see* cases cited *supra* notes 237-48.

[185] *See, e.g.*, John Hasnas, *Once More unto the Breach: The Inherent Liberalism of the Criminal Law and Liability for Attempting the Impossible*, 54 HASTINGS L.J. 1, 9, 32-33 (2004); Peter Westen, *Impossibility Attempts: A Speculative Thesis*, 5 OHIO ST. J. CRIM. L. 523, 544 (2008); Brodie, *supra* note 206, at 247 n.54.

[186] Preis, *supra* note 236, at 1902.

[187] As the Model Penal Code commentary observes:

> [Criminal statutes defin[ing] the scope of attempts with greater particularity . . . to a significant extent reflect the influence of the Model Penal Code proposals, which have

however, the Model Penal Code's definition of an attempt appears to contain a variety of drafting flaws. Consistent with the interests of clarity, consistency, and accessibility, § 301(a) endeavors to address these flaws through a variety of legislative revisions.

The Model Penal Code's approach to codification of a definition for attempt reads:

> (1) *Definition of Attempt*. A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> > (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
> >
> > (b) when causing a particular result is an element of the crime, 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; or
> >
> > (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[188]

Reflected in the foregoing language are three notable drafting decisions: (1) a decision to codify three different conduct requirements; (2) a decision to intersperse the culpable mental state requirement governing an attempt among distinct subsections; and (3) a decision to utilize the undefined terms "circumstances" and "belief" to serve different purposes. Each of these decisions is arguably flawed, and, when viewed collectively, they combine to produce a general provision that is confusingly organized, unnecessarily complex, and ambiguous on key issues.

Perhaps the most significant drafting flaw is the Model Penal Code's three-part approach to stating the conduct requirement of an attempt.[189] More specifically, § (a) addresses the situation of a defendant who mistakenly believes he has satisfied the objective elements of the substantive offense—as would be the case where an actor receives what he believes to be stolen property only to discover that he has been embroiled in a sting operation. Thereafter, § (b) addresses the situation of a defendant who believes he has done everything he needs to do to cause the prohibited result—as would be the case when an actor loads an explosive device and then lights the fuse only to discover that the device is inoperable. And finally, § (c) addresses the situation of a defendant who believes he has taken a substantial step towards commission of the offense—as would be the case when an actor mistakenly loads a shotgun with defective bullets, searches out the intended victim, but then is arrested prior to firing his weapon.

> formed the basis for the definition of attempt offense in most of the recently enacted and proposed codes.

Model Penal Code § 5.01 cmt. at 300.

[188] Model Penal Code § 5.01(1).

[189] The discussion of this drafting flaw is drawn from Robinson & Grall, *supra* note 94, at 745-51.

These three different formulations make for a lengthy and confusing definition of an attempt. They do so unnecessarily, moreover, since the first two situations are surplusage because they are covered by the third situation. For example, if the defendant believes he has completed the offense (subsection (a)), or believes he has done everything he needed to do to cause the prohibited result (subsection (b)), he necessarily has taken a substantial step towards commission of the offense (subsection (c)). Given, then, that the definition of an incomplete attempt in § (c) is by itself sufficient to create liability for the situations contemplated by §§ (a) and (b), the latter two subsections are superfluous.

The second drafting issue reflected in Model Penal Code § 5.01(1) is the intermingled and disorganized approach it applies to the *mens rea* of criminal attempts. More specifically, the prefatory clause of Model Penal Code § 5.01(1) requires the defendant to have acted "with the kind of culpability otherwise required for commission of the crime."[190] Thereafter, however, §§ (a) and (c) respectively require that the actor "purposely engage[ ] in conduct which would constitute the crime" and "purposely do[ ] or omit[ ] to do anything which [is] a substantial step in a course of conduct planned to culminate in his commission of the crime."[191] Subsection (b), in contrast, does not have a similar purpose requirement with respect to conduct, but it does apply a belief requirement to the result element: the accused must have the "purpose of causing or [act] with the belief that [he] will cause such result without further conduct on his part."[192] When this disjointed and apparently conflicting language is viewed collectively, it is very difficult to surmise—from the text alone, at least—the policy determinations that the Model Penal Code drafters actually intend to communicate.

The Model Penal Code's structural drafting flaws are exacerbated by a pair of more narrow drafting issues: the overlapping and ambiguous use of the terms "circumstances" and "belief." Consider, for example, that Model Penal Code § 5.01(1)(a) creates liability where the defendant "engages in conduct which would constitute the crime if the attendant *circumstances* were as he *believes* them to be."[193] Likewise, Model Penal Code § 5.01(1)(b) creates liability where the defendant "does or omits to do anything . . . with the *belief* that it will cause such result without further conduct on his part."[194] And Model Penal Code § 5.01(1)(c) creates liability where the defendant "does or omits to do anything that, under the *circumstances* as he *believes* them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[195]

As is evident from these provisions, the terms "circumstances" and "belief" are central to understanding the intended operation of Model Penal Code § 5.01(1). At the same time, these terms are ambiguous, susceptible to differing interpretations, and are never defined in § 5.01 (or in any other general provision).[196] Further complicating matters is the fact that the terms appear to be used to serve different purposes in different contexts.

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[190] Model Penal Code § 5.01(1).
[191] Model Penal Code § 5.01(1)(a), (c).
[192] Model Penal Code § 5.01(1)(b).
[193] Model Penal Code § 5.01(1)(a).
[194] Model Penal Code § 5.01(1)(b).
[195] Model Penal Code § 5.01(1)(c).
[196] For example, use of the term "belief" is ambiguous because beliefs come in various degrees. A belief might be as strong as "a practical certainty," which is the purely subjective form of knowledge. But beliefs

Consider, for example, that whereas the reference to "circumstances" and "belie[f]" in § (a) seem to be respectively operating as a stand in for circumstance *elements* and the actor's *mens rea* as to such elements,[197] use of the terms "circumstances" and "belie[f]" in § (c) appear to indicate a much broader scope.[198] (Just how broad, however, is unclear.[199]) And the general use of the term "belie[f]" in §§ (a) and (c) is to be contrasted with the more specialized use of the term "belie[f]" in § (b), which more narrowly deals with the *mens rea* of an attempt for result elements.[200]

When viewed collectively, then, the statutory language employed by the Model Penal Code fails to clearly communicate the intended operation of § 5.01(1). It is only by reference to the commentary of the Model Penal Code—and, in many cases, academic commentary building on that legislative commentary—that the meaning of the relevant terms can be understood.[201]

In accordance with the foregoing analysis, the Revised Criminal Code seeks to improve upon the Model Penal Code approach to statutory drafting in a variety of ways.

First, the Revised Criminal Code expressly states the culpable mental state requirement respectively applicable to results and circumstances. Based on a reading of the statutory text alone, the differential treatment of circumstances, subject to a principle of *mens rea* equivalency under § 301(a)(2), and results, subject to a principle of *mens rea*

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can also be moderate: for example, one might "believe that something is likely true." Weaker yet, someone might possess "belief as to a mere possibility." It is, therefore, not clear just how strong a belief the Model Penal Code would require when it employs the term. Use of the term "circumstances" is similarly ambiguous because it might refer to circumstance elements, i.e., the statutory requirement that the victim of an assault be a police officer for APO. Alternatively, however, it might more broadly refer to all relevant aspects of the situation—including conduct elements and result elements as well as circumstance elements..

[197] Note, however, that the problem with this reading is that it:

> might be interpreted to mean that the only impossible attempts punished are those that arise from an actor's mistake as to an "attendant circumstance" that is an element of the offense charged. The mistake rendering an attempt impossible is often of this nature, as when an actor is prosecuted for attempted bribery when he bribes a person he mistakenly believes is a "public official," as required by one circumstance element of the offense definition of bribery. But in many cases the mistake does not concern a circumstance element of the offense definition.

ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

[198] For example, as one commentator observes:

> Model Penal Code § 5.01(1)'s reference to "circumstances as he believes them to be" includes conduct elements and result elements as well as circumstance elements. Thus, a person who is arrested just as he is about to shoot to kill a person who, as it turns out, is already dead is guilty under Model Penal Code § 5.01(1)(c), despite the fact that the "circumstances" about which he is mistaken is the result element of "killing."

Westen, *supra* note 273, at 565 n.28.

[199] For example, the relevant circumstances presumably encompass not only "conduct elements and result elements as well as circumstance elements," Westen, *supra* note 273, at 565 n.28, but also situational facts—for example, the operability of a murder weapon—which are not elements *per se*, but facts that relate to those elements.

[200] *See, e.g.,* Model Penal Code § 5.01 cmt. at 305; Wechsler et al., *supra* note 51, at 575-76.

[201] *See, e.g.,* Robinson & Grall, *supra* note 94, at 745-51; ROBINSON, *supra* note 259, at § 1 CRIM. L. DEF. § 85.

elevation under § 301(a)(1), is clear. And neither should be confused with the planning requirement stated in the prefatory clause of § 301(a).

Second, and relatedly, the contours of the latter principle of *mens rea* elevation governing results is communicated by the Revised Criminal Code in a more precise manner. By employing the phrase "with intent," "as defined in § 206(b)(3), § 301(a)(1) clearly communicates that a culpable mental state comparable to knowledge will provide the basis for attempt liability as to results, without any of the ambiguities associated with "belief."

Third, the Revised Criminal Code articulates the conduct requirement of an attempt through a simpler and more accessible formulation, which respectively addresses incomplete attempts, see § 301(a)(3)(A), and impossibility attempts, see § 301(a)(3)(B). This formulation provides fact-finders with the two most important standards, each of which is articulated in a manner that privileges simplicity and avoids unnecessary complexity.[202]

Fourth, and relatedly, the Revised Criminal Code abolishes the impossibility defense by incorporating actor-centric language into the latter standard, § 301(a)(3)(B) that, while substantively similar to the relevant language employed in the Model Penal Code, avoids any of the above-discussed ambiguities associated with the terms "circumstances" or "belie[f]" reflected in the Model Penal Code. At the same time, the reasonable adaptation limitation that accompanies the relevant impossibility language in § 301(a)(3)(C) effectively imports the common law approach to inherent impossibility.[203]

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[202] As discussed *supra*, § 301(a)(3), by codifying the dangerous proximity test, departs from the substantive policies underlying the Model Penal Code's preferred substantial step test. However, it's worth noting that the language in § 301(a)(3) also departs from the articulation in criminal codes that similarly reject the Model Penal Code test. In the latter set of jurisdictions, the relevant general provisions are typically comprised of exceptionally language only broadly gesturing towards the common law approach. *See supra* note 174 and accompanying text. It is only by judicial interpretation, then, that these statutes have been interpreted to yield the dangerous proximity test. *See supra* note 175 and accompanying text. By clearly codifying the dangerous proximity test, in contrast, § 301(c)(a)(3) will avoid the need for this kind of judicial supplementation.

[203] As discussed *supra*, § 301(a)(3)(b), by codifying a reasonable adaptation limitation on impossible attempts, constitutes a codification departure from the majority of reform codes, which decline to codify general provisions addressing the issue of inherent impossibility—whether they follow the Model Penal Code approach or the common law approach. Furthermore, although § 301(a)(3)(b) is generally consistent with the substantive policies reflected in the majority (common law) approach to the issue, its precise language departs from the few criminal codes that do, in fact, codify this approach to inherent impossibility. For example, in these jurisdictions, the relevant statutory language relies on confusing exception clauses framed in the double negative. Illustrative is Minn. Stat. Ann. § 609.17, which reads: "An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, *unless such impossibility would have been clearly evident to a person of normal understanding.*" Similarly consider Iowa Code Ann. § 707.11, which reads: "It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and *the actor's expectations were not unreasonable in the light of the facts known to the actor*." Under the Revised Criminal Code, in contrast, the requirement of reasonable adaptation is articulated in the affirmative, alongside the definition of impossible attempts reflected in § 301(a)(3)(B). This departure—which is based on current District law—is intended to enhance the overall clarity of the Revised Criminal Code.

The foregoing drafting revisions find support in a broad range of authorities, including modern legislative practice,[204] judicial opinions,[205] and scholarly commentary.[206] When viewed collectively, they will enhance the clarity, simplicity, and accessibility of the Revised Criminal Code.

§ 22E-301(b)—Proof of Completed Offense Sufficient Basis for Attempt Conviction

Relation to National Legal Trends. Subsection (b) is consistent with both common law principles and modern legislative practice.

Historically, the crime of attempt was sometimes "defined as if failure were an essential element," such that a person could not be convicted of an attempt if the crime was actually committed.[207] The basis for this principle was "derived from the old common law rule of merger, whereby if an act resulted in both a felony and a misdemeanor the misdemeanor was said to be absorbed into the felony."[208] However, the relevant "English merger rule was laid to rest by statute in 1851," at which point American legal authorities began to abandon it as well.[209] Today, "the common law rule that 'failure' is an essential element of an attempt, and that a person cannot be convicted of an attempt if the crime was actually committed, has been rejected."[210]

With the contemporary abandonment of failure as an essential element of an attempt there has been a broad acceptance that proof of a completed offense may suffice for an attempt conviction.[211] This approach to the prosecution of criminal attempts is reflected in both contemporary legislative practice and common law authorities. For example, a significant number of modern criminal codes incorporate general provisions effectively establishing that "a defendant may be convicted of the attempt even if the completed crime is proved," subject to a limitation that a person may not be convicted of

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[204] For example, a majority of reform codes substantially simplify the Model Penal Code's three-tier approach to drafting. As Michael Cahill observes: "[o]nly eleven states have adopted some version of [Model Penal Code § 5.01(1)(a)]" while "[o]nly three states have adopted a version of [Model Penal Code § 5.01(1)(b)." Cahill, *Reckless Homicide*, *supra* note 100, at 916 n.103 (collecting statutory citations). Many jurisdictions instead opt for a much simpler and more straightforward formulation along the lines of the general approach to codification reflected in Model Penal Code § 5.01(1)(c). *See, e.g.,* Or. Rev. Stat. Ann. § 161.405; Wash. Rev. Code Ann. § 9A.28.020; Colo. Rev. Stat. Ann. § 18-2-101.

[205] For example, courts are apt to utilize clearer and more accessible language to describe the appropriate actor-centric perspective from which impossibility claims are to be evaluated. Rather than relying upon the Model Penal Code's problematic "under the circumstances as he believes them to be" language, Model Penal Code § 5.01(1)(c), for example, some federal judges have instead relied upon the recognition that "a defendant should be treated in accordance with the facts as he supposed them to be." *United States v. Quijada*, 588 F.2d 1253, 1255 (9th Cir. 1978); *see United States v. Nosal*, No. CR-08-0237 EMC, 2013 WL 4504652, at *11 (N.D. Cal. Aug. 15, 2013).

[206] For broad academic criticism of the Model Penal Code approach to drafting consistent with § 301(a) across a range of issues, see, for example, Robinson & Grall, *supra* note 94; Westen, *supra* note 273; ROBINSON, *supra* note 259, at 1 CRIM. DEF. § 85; Brodie, *supra* note 206.

[207] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see Lewis v. People*, 124 Colo. 62 (1951); *People v. Lardner*, 300 Ill. 264 (1921).

[208] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5; *see* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 653 (2d ed.1961).

[209] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[210] Commentary to La. Stat. Ann. § 14:27; *see, e.g., Commonwealth v. LaBrie*, 473 Mass. 754 (2016); Model Penal Code § 1.07 cmt. at 132.

[211] *See* LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

both an attempt and the completed offense.[212] And "many recent cases" issued in jurisdictions lacking such general provisions have similarly endorsed these principles by way of common law.[213] Broad acceptance of these principles has endured, moreover, notwithstanding a general recognition that "[w]hen attempt carries a more demanding *mens rea* than a completed offense," it does not necessarily qualify as "a lesser included offense" under the elements test.[214]

Legislatures and courts have offered a range of rationales in support of this "modern view" on attempt prosecutions.[215] It has been observed, for example, that "requiring 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."[216] Furthermore, "just as where one indicted for manslaughter or battery . . . cannot escape conviction by showing that he committed the more serious offense of murder or aggravated battery," one who "is indicted for an attempt" should not be able to escape conviction by pointing to "evidence showing that the offense was actually committed."[217] And perhaps most fundamentally, a defendant convicted of an attempt based upon proof of a completed offense can hardly complain "where the determination of his case was more favorable to him than the evidence warranted."[218]

In accordance with the foregoing authorities, § (b) establishes that proof of a completed offense constitutes an alternative basis of establishing attempt liability, subject to a merger rule prohibiting convictions for both the attempt and the completed offense.

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[212] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing Ala. Code § 13A-4-5; Alaska Stat. § 11.31.140; Ariz. Rev. Stat. Ann. § 13-110; Cal. Penal Code § 663; Colo. Rev. Stat. Ann. § 18-2-101; Ga. Code Ann. § 16-4-2; Idaho Code § 18-305; La. Rev. Stat. Ann. § 14:27; Mont. Code Ann. § 45-4-103; Nev. Rev. Stat. Ann. § 193.330; Or. Rev. Stat. § 161.485; Tenn. Code Ann. § 39-12-101; Tex. Penal Code Ann. § 15.01; Utah Code Ann. § 76-4-101; Wis. Stat. Ann. § 940.46.); *but see* Miss. Code Ann. § 97-1-9; Okla. Stat. Ann. tit. 21, § 41. This is related to, but distinct from, another proposition established by some criminal codes: that "[a] person charged with commission of a crime may be convicted of the offense of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment." Ga. Code Ann. § 16-4-3; *see, e.g.,* Wash. Rev. Code Ann. § 10.61.003; Me. Rev. Stat. Ann. tit. 17-A, § 152; Neb. Rev. Stat. § 29-2025; Nev. Rev. Stat. Ann. § 175.501; N.C. Gen. Stat. § 15-170; Okla. Stat. Ann. tit. 22, § 916; R.I. Gen. Laws Ann. § 12-17-14; Vt. Stat. Ann. tit. 13, § 10 ; Wash. Rev. Code § 10.61.003; W. Va. Code § 62-3-18 Wyo. Stat. § 7-11-502; *see also* Model Penal Code § 1.07(4)(b) (discussed in *Commonwealth v. Sims*, 591 Pa. 506, 522–23 (2007)).

[213] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *United States v. York*, 578 F.2d 1036 (5th Cir. 1978); *Richardson v. State*, 390 So.2d 4 (Ala. 1980); *State v. Moores*, 396 A.2d 1010 (Me. 1979); *Lightfoot v. State*, 278 Md. 231 (1976); *State v. Gallegos*, 193 Neb. 651, (1975); *State v. Canup*, 117 N.C.App. 424 (1994); *United States v. Rivera-Relle*, 333 F.3d 914 (9th Cir. 2003); *but see* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, § 694, at 587–88 (15th ed. 1996); *People v. Bailey*, 54 Cal.4th 740, 143 Cal.Rptr.3d 647 (2012). This is related to, but distinct from, another proposition established by many courts: "that an attempt conviction may be had on a charge of the completed crime." LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5 (citing *State v. Miller*, 252 A.2d 321 (Me. 1969) and *Crawford v. State*, 107 Nev. 345 (1991)). For federal case law addressing this issue, see, for example, *United States v. Castro-Trevino,* 464 F.3d 536, 542 (5th Cir. 2006); *United States v. Marin,* 513 F.2d 974, 976 (2d Cir.1975); *Simpson v. United States,* 195 F.2d 721, 723 (9th Cir. 1952).

[214] LAFAVE & ISRAEL, *supra* note 306, at 6 CRIM. PROC. § 24.8(e).

[215] LAFAVE, *supra* note 13, at 2 SUBST. CRIM. L. § 11.5.

[216] *LaBrie*, 473 Mass. 754, 46 N.E.3d 519 (2016) (quoting *York*, 578 F.2d 1036).

[217] Commentary to La. Stat. Ann. § 14:27.

[218] *People v. Vanderbilt*, 199 Cal. 461, 249 P. 867 (1926).

3. § 22E-301(c)—Penalties for Criminal Attempts

Relation to National Legal Trends. Subsection 301(c) is in accordance with American legal trends. Consistent with RCC § 301(c)(1), a strong majority of jurisdictions apply a generally applicable proportionate penalty discount to grade criminal attempts. And regardless of which attempt grading principle a given jurisdiction adopts, nearly all of them recognize statutory exceptions consistent with RCC § 301(c)(2).

The historical development of the punishment of attempts, like every other area of attempt policy, can be understood through the competing objectivist and subjectivist perspectives on criminal liability.[219] At the heart of the dispute between these two theories is whether the criminal law—both in determining guilt and calibrating punishment—ought to primarily focus on the dangerousness of an act, or, alternatively, the dangerousness of an actor.[220]

On the objectivist understanding of criminal liability, causing (or risking) social harm is the gravamen of a criminal offense.[221] It therefore follows that greater punishment should be imposed where the harm actually occurs and less punishment when—as is the case with an attempt—it does not.[222] From the objectivist perspective, result-based grading is a fundamental component of any just penal system.[223]

The common law approach to grading criminal attempts reflects this objectivist perspective. In the early years of the common law, any attempt "was a misdemeanor, regardless of the nature or seriousness of the offense that the person sought to commit."[224] In later years, legislatures began to apply more serious penalties to criminal attempts, though these penalties were distributed in varying, and frequently haphazard, ways.[225] For the most part, though, these penalties were still significantly less severe than those

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[219] *See generally, e.g.,* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173 (2011); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[220] FLETCHER, *supra* note 99, at 173-174.

[221] *Id.* at 171; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

[222] FLETCHER, *supra* note 99, at 173-174.

[223] *See generally* Ashworth, *supra* note 99, at 725; Garvey, *supra* note 99, at 173.

[224] DRESSLER, *supra* note 101, at § 27.05.

[225] Consider, for example, the observations of the Model Penal Code drafters:

> [Common law attempt penalty] statutes fitted into a number of identifiable patterns . . . One common provision set specific maximum penalties, ranging from 10 to 50 years, for attempts to commit crimes punishable by death or life imprisonment, and fixed the penalty for all other attempts at one half of the maximum for the completed crime. Another common provision established a number of categories according to the nature or severity of the completed crime, specifying a different range of penalties, definite prison terms and fines, for attempts to commit crimes encompassed within each category. Closely related was the now common solution in which attempt is graded one class below the object offense. There were also a number of states that used a combination of these approaches. Some jurisdictions, on the other hand, provided a fixed maximum penalty for all attempts encompassed by the general attempt provision. A few . . . authorized a penalty for the attempt that was as great as the penalty for the completed crime.

MPC § 5.05, cmt. at 485.

governing the completed offense.[226] There was, however, one notable exception: "Assault With Intent" to offenses (AWIs), which were "functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual completion of the offense and carrying heavier penalties."[227] But even accounting for AWIs, the common law approach to grading attempts was one that viewed the realization of intended harm as material to evaluating the seriousness of an offense.[228]

This objectivist view of attempt liability is to be contrasted with a subjectivist perspective, under which an actor's culpable decision-making—that is, his or her intention to engage in or risk harmful or wrongful activity—is considered to be the gravamen of an offense.[229] If, as subjectivism posits, an actor's dangerous decisionmaking ought to be the focus of criminal laws, then there is no reason to distinguish between an actor who consummates an intended harm and an actor (such as a criminal attempter) who does not—both are equally dangerous, and, therefore, both ought to receive the same punishment.[230]

This subjectivist perspective pervades the work of the Model Penal Code, the drafters of which explicitly sought to replace the common law's objectivist approach to grading with one that affords the actual occurrence of the requisite harm or evil implicated by an offense minimal, if any, significance.[231] Illustrative of the Code's commitment to subjectivism is the general principle of equal punishment reflected in Model Penal Code § 5.05(1), which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted."

Premised on the subjectivist view that "sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction," the Model Penal Code approach to grading criminal attempts was intended to render results largerly immaterial insofar at the maximum statutorily authorized punishment is concerned.[232] Importantly, though, the Model Penal Code does not equalize the sanction for all attempts. Rather, the general rule stated in Model Penal Code § 5.05(1) is also subject to a narrow, but significant, exception: "[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." This carve out subjects attempts to commit

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[226] DRESSLER, *supra* note 101, at § 27.05.

[227] Model Penal Code § 211.1 cmt. at 181-82. AWIs prohibit the commission of a simple assault accompanied by an intent to commit some further, typically more serious, criminal offense. Illustrative examples include assault with intent to commit murder, assault with intent to commit rape, and assault with intent to commit mayhem, each of which require proof of a simple assault in addition to the respective inchoate mental states of intending to commit murder, rape, and mayhem. Offenses of this nature were created to "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." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

[228] *See* MPC § 211.1 cmt. at 181-82.

[229] *See* DRESSLER, *supra* note 101, at § 27.05 ("Subjectivists assert that, in determining guilt and calibrating punishment, the criminal law in general, and attempt law in particular, should focus on an actor's subjective intentions (her mens rea)—her choice to commit a crime—which simultaneously bespeak her dangerousness and bad character (or, at least, her morally culpable choice-making), rather than focus on the external conduct (the actus reus), which may or may not result in injury on a particular occasion.").

[230] *See* DRESSLER, *supra* note 101, at § 27.03 ("[A]pplying subjectivist theories, anyone who attempts to commit a crime is dangerous. Whether or not she succeeds in her criminal venture, she is likely to represent an ongoing threat to the community.").

[231] MPC § 211.1 cmt. at 181-82. DRESSLER, *supra* note 101, at § 27.05 ("[T]he criminal attempt provisions of the Model Penal Code are largely based on subjectivist conceptions of inchoate liability, whereas the common law of attempts includes many strands of objectivist thought, as well as some subjectivism.").

[232] Model Penal Code § 5.05 cmt. at 490.

the most serious crimes—for example, murder and aggravated assault—to a principle of proportionate penalty discounting.[233]

One other aspect of the Model Penal Code's broadly (though not entirely) subjectivist approach to grading attempts bears comment: the elimination of AWI offenses, which were frequently employed at common law. The drafters' decision to omit AWI offenses from the Code's Special Part was based on their view that the "modern grading of attempt according to the gravity of the underlying offense [renders] laws of this type unnecessary."[234]

The Model Penal Code approach to grading attempts has, in some respects, been quite influential. For example, since completion of the Code, many state legislatures have applied more uniform grading practices to attempts, while, at the same time, jettisoning their AWI offenses.[235] Importantly, however, the Code's most significant policy proscription—the subjectivist recommendation of equalizing attempt penalties—has not been hugely influential, either inside or outside of reform jurisdictions. Rather, the vast majority of American criminal codes continue to reflect the common law, objectivist approach to grading attempts.[236]

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[233] Here's how the drafters of the Model Penal Code justified this collective attempt grading framework:

> 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. It is only when and insofar as the severity of sentence is designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is doubtful, however, that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1028–29 (1961).

[234] Model Penal Code § 211.1 cmt. at 181-82.

[235] As one commentator observes, "virtually all modern codes" have eliminated AWI offenses based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime." LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 16.2; *but see* N.M. Stat. Ann. § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary."); Nev. Rev. Stat. § 200.400 ("A person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny is guilty of a category B felony . . . A person who is convicted of battery with the intent to kill is guilty of a category B felony . . . ."); Mich. Comp. Laws § 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). For various jurisdictions that have not modernized their codes and still retain such offenses, see MPC § 211.1 cmt. at 182 n.39 (collecting statutes).

[236] *See generally* DRESSLER, *supra* note 101, at § 27.05 ("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.").

For example, the criminal codes in 36 jurisdictions contain general attempt penalty provisions punishing most attempts less severely than completed offenses.[237] In contrast, only 14 jurisdictions appear to have adopted general attempt penalty provisions equalizing the sanction for most criminal attempts,[238] though it should be noted that even where this legislative practice is followed, it's questionable whether the actual sentences imposed for attempts are actually equivalent to those for completed offenses.[239]

Similarly reflective of the Code's relative lack of influence over state level attempt grading policies is the fact that a strong majority of the "modern American codes that are highly influenced by the Model Penal Code" nevertheless adopt an objectivist approach to grading attempts.[240] For example, as one analysis of legislative trends in reform jurisdictions observes: whereas "[n]early two-thirds of American jurisdictions have adopted [MPC-based] codes," fewer "than 30% of these have adopted the Code's [attempt] grading provision or something akin to it."[241]

It's important to point out that within these majority and minority legislative practices, "[c]onsiderable variation is to be found . . . concerning the authorized penalties for attempt."[242] Most significant is that among those criminal codes generally embracing a principle of proportionate punishment discounting, the nature of that discount varies materially.[243] For example, many of these jurisdictions grade attempts at a set number of

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[237] *See* Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664; Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42; Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6; Mich. Comp. Laws Ann. § 750.92; Vt. Stat. Ann. tit. 13, § 9; Nev. Rev. Stat. Ann. § 193.330; P.R. Laws Ann. tit. 33, § 3122; D.C. Code § 22-1803. Note that "Rhode Island defines no attempt offenses at all in its code." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007)

[238] Del. Code Ann. tit. 11, § 531; Haw. Rev. Stat. § 705-502; Mont. Code Ann. § 45-4-103; S.C. Code Ann. § 16-1-80; Md. Code Ann., Crim. Law § 1-201; Conn. Gen. Stat. Ann. § 53a-51; N.D. Cent. Code Ann. § 12.1-06-01; Ind. Code Ann. § 35-41-5-1; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-4; Wyo. Stat. § 6-1-304; Pa. Cons. Stat. Ann. tit. 18, § 905; Wyo. Stat. § 6-1-304; Miss. Code. Ann. § 97-1-7.

[239] "It has been noted," for example, "that 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 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)).

[240] Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 381 (2003).

[241] 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).

[242] LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[243] This is due, in part, to the fact that the punishment differential between classes varies. For an illustrative example, consider that while Oregon, Colorado, and Arizona all apply a one-grade discount to criminal attempts, the value of that discount varies both between and among jurisdictions.

For example, Oregon's approach treats attempts as a: (1) class A (20 year) felony if the offense attempted is murder or treason (punishable by death); (2) class B (10 year) felony if the offense attempted is a class A (20 year) felony; (3) class C (5 year) felony if the offense attempted is a class B (10 year) felony;

penalty classes—usually one but occasionally two[244]—below the class affixed to the completed offense.[245] In contrast, a substantial number of these jurisdictions either explicitly punish attempts at half the amount of the target offense,[246] or, in the alternative, incorporate some combination of grade lowering and halving of statutory maxima.[247]

Another notable area of variance within American legislative attempt grading practices relates to the recognition of exceptions. A strong majority of American criminal codes explicitly recognize statutory exceptions to their generally applicable grading rules (regardless of rules they actually endorse).[248] But at the same time, the contours of these exceptions vary substantially. For example, numerous criminal codes exempt varying categories of offenses from their generally applicable grading rules—and this is so, moreover, in jurisdictions that broadly endorse a principle of proportionate punishment

(4) class A (1 year) misdemeanor if the offense attempted is a class C (5 year) felony or an unclassified felony; (5) class B (6 month) misdemeanor if the offense attempted is a class A (1 year) misdemeanor; and (6) class C (30 day) misdemeanor if the offense attempted is a class B (6 month) misdemeanor. Or. Rev. Stat. Ann. § 161.405.

Compare this with Colorado's approach, under which a criminal attempt to commit: (1) a class 1 felony (punishable by death) is a class 2 (24 year) felony; (2) a class 2 (24 year) felony is a class 3 (12 year) felony; (3) a class 3 (12 year) felony is a class 4 (6 year) felony; (4) a class 4 (6 year) felony is a class 5 (3 year) felony; (5) a class 5 (3 year) or 6 (1.5 year) felony is a class 6 (1.5 year) felony; (6) a class 1 (1.5 year) misdemeanor is a class 2 (1 year) misdemeanor; (7) a misdemeanor other than a class 1 (1.5 year) misdemeanor is a class 3 (6 month); and (8) a petty offense is a crime of the same class as the offense itself.

Now compare both of these approaches with Arizona's approach—reflected in its maximum statutory guidelines applicable to first time felony offenders—under which a criminal attempt to commit: (1) a class 1 (20) felony is a class 2 (10 year) felony; (2) a class 2 (10 year) felony is a class 3 (7 year) felony; (3) a class 3 (7 year) felony is a class 4 (3 year) felony; (4) a class 4 (3 year) felony is a class 5 (2 year) felony; and a class 5 felony (2 year) is a class 6 (1.5) felony. Ariz. Rev. Stat. Ann. § 13-1001.

[244] States vary widely in the number of penalty classes they use, with most having fewer than those in the RCC. *See* COMMENTARY TO RCC § 801. In states with fewer classes, the difference in penalties between classes is generally greater, such that a downward adjustment of just one class for an attempt penalty may amount to a fifty percent reduction in the maximum imprisonment exposure.

[245] Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Nev. Rev. Stat. Ann. § 193.330; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301.

[246] *See* Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[247] Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6.

[248] Among jurisdictions that apply a principle of equal punishment to grading attempts, only about five appear to apply it unequivocally, without exception. Robinson, *supra* note 121, at 320 n.67.

discounting[249] as well as those that endorse one of equal punishment.[250] Likewise, an even larger number of American criminal codes exempt varying individual offenses from their generally applicable grading rules—which, again, is reflected in jurisdictions that broadly endorse a principle of proportionate punishment discounting [251] as well as those that endorse one of equal punishment.[252]

Statutory variances aside, it is nevertheless clear that American legislative practice, when viewed as a whole, clearly supports the common law, objectivist approach to grading attempts. Less clear, however, is the position supported by expert opinion: there exists a substantial amount of legal commentary on the relevance of results to punishment, which reflects an ongoing and persistent amount of scholarly disagreement over the appropriate grading of criminal attempts.[253] At the same time, there is another perspective on the

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[249] *E.g.,* N.Y. Penal Law § 110.05 (exempting attempts to commit some Class A-I felonies and all class A-II felonies from standard attempt penalty discount); Minn. Stat. Ann. § 609.17(4) (applying different attempt penalty discount to offenses subject to life imprisonment); Ga. Code Ann. § 16-4-6 (applying different attempt penalty discount to offenses subject to life imprisonment or death); Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[250] *E.g.,* Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[251] *E.g.*, Alaska Stat. § 11.31.100 (exempting attempted murder from standard attempt penalty discount); Ariz. Rev. Stat. Ann. § 13-1001 (exempting attempted murder from standard attempt penalty discount); Fla. Stat. Ann. § 777.04 (applying standard attempt penalty discount "except as otherwise provided"); Ill. Comp. Stat. Ann. ch. 720, § 5/8-4 (exempting attempted murder from standard attempt penalty discount); Me. Rev. Stat. tit. 17-A, § 152 (exempting attempted murder from standard attempt penalty discount); Mo. Ann. Stat. § 564.011 (applying standard attempt penalty discount "unless otherwise provided); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated"); Ohio Rev. Code Ann. § 2923.02 (applying standard attempt penalty discount except for attempts to commit various enumerated serious offenses); Or. Rev. Stat. § 161.405 (exempting attempted murder or treason from standard attempt penalty discount); Utah Code Ann. § 76-4-102 (exempting various enumerated serious felonies from standard attempt penalty discount); Wash. Rev. Code § 9A.28.020 (exempting various enumerated serious felonies from standard attempt penalty discount); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Kan. Stat. Ann. § 21-5301(c)(exempting enumerated list of offenses from standard attempt penalty discount); Wis. Stat. Ann. § 939.32(1) (exempting enumerated list of offenses from standard attempt penalty discount); *see also* Tenn. Code Ann. § 39-12-107 (no attempts to commit class c misdemeanor).

[252] *E.g.,* Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[253] *See, e.g.,* Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951 (2003); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553; Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm,* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes,* 5 LAW & PHIL. 1 (1986); Bebhimm Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143 (1995); Sanford H. Kadish,

grading of criminal attempts reflected in the scholarly literature, which seems to provide relatively clear support for the common law, objectivist approach: that of the people.[254]

More specifically, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor.[255] For example, in one well-known study, researchers found that the failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades."[256] This substantial "no-harm discount" was reflected where study participants were asked to compare the deserved punishment for two actors who had both done everything necessary from their end to consummate the offense, but where one was, due to circumstances outside of his control, unable to cause the intended harm.[257] And when study participants were presented with a scenario involving an actor who was stopped before he was able to carry out his criminal plans, the reduction in liability appears to have been even larger.[258]

Strong public support for the common law, objectivist approach to grading criminal attempts likely explains why both the drafters of Model Penal Code and most of the state legislatures that pursued their subjectivist approach to grading attempts ultimately decided to exempt the most serious offenses from a principle of equal punishment.[259] As one commentator has observed: "The instances where the Model Penal Code drafters have elected to compromise on their view that results ought to be irrelevant are typically instances, like homicide or causing catastrophe, where their unpopular view of results would be highlighted and most likely to cause public stir."[260]

The RCC approach to grading criminal attempts is consistent with the above considerations. RCC § 301(c)(1) codifies a general principle of proportionate punishment discounting that is consistent with the common law, objectivist approach reflected in a strong majority of jurisdictions. And RCC § 301(c)(2) recognizes the possibility of individual exceptions to this principle, which, again, finds support in majority legislative practice.

Relation to National Legal Trends. Subsection 301(c) is in accordance with American legal trends. Consistent with RCC § 301(c)(1), a strong majority of jurisdictions apply a generally applicable proportionate penalty discount to grade criminal attempts.

The Criminal Law and the Luck of the Draw, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[254] *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, 430 (1998) (finding that public opinion surveys generally indicate that members of the public are "objectivist-grading subjectivists."); Dressler, *supra* note 101, at § 27.04 n.54 (citing *id.* and explaining that "people tend to be subjectivist (they focus on an actor's state of mind) in determining what the minimum criteria should be for holding an actor criminally responsible for her inchoate conduct, but once it is determined that punishment is appropriate and the only issue is how much punishment to inflict, they tend to become objectivist (they focus on resulting harm) and favor the common law lesser-punishment result.").

[255] *See, e.g.,* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995); Robinson & Darley, *supra* note 134, at 427-30.

[256] Robinson & Darley, *supra* note 134, at 428.

[257] *See id.*

[258] *See id.* at 429.

[259] *See* Robinson, *supra* note 120, at 379-85.

[260] *Id.*

And regardless of which attempt grading principle a given jurisdiction adopts, nearly all of them recognize statutory exceptions consistent with RCC § 301(c)(2).

The historical development of the punishment of attempts, like every other area of attempt policy, can be understood through the competing objectivist and subjectivist perspectives on criminal liability.[261] At the heart of the dispute between these two theories is whether the criminal law—both in determining guilt and calibrating punishment—ought to primarily focus on the dangerousness of an act, or, alternatively, the dangerousness of an actor.[262]

On the objectivist understanding of criminal liability, causing (or risking) social harm is the gravamen of a criminal offense.[263] It therefore follows that greater punishment should be imposed where the harm actually occurs and less punishment when—as is the case with an attempt—it does not.[264] From the objectivist perspective, result-based grading is a fundamental component of any just penal system.[265]

The common law approach to grading criminal attempts reflects this objectivist perspective. In the early years of the common law, any attempt "was a misdemeanor, regardless of the nature or seriousness of the offense that the person sought to commit."[266] In later years, legislatures began to apply more serious penalties to criminal attempts, though these penalties were distributed in varying, and frequently haphazard, ways.[267] For the most part, though, these penalties were still significantly less severe than those governing the completed offense.[268] There was, however, one notable exception: "Assault With Intent" to offenses (AWIs), which were "functionally analogous to specific applications of the law of attempt, though generally requiring closer proximity to actual

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[261] *See generally, e.g.,* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978); Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173 (2011); Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725 (1988); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L REV. 363 (2004).

[262] FLETCHER, *supra* note 99, at 173-174.

[263] *Id.* at 171; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.05 (6th ed. 2012).

[264] FLETCHER, *supra* note 99, at 173-174.

[265] *See generally* Ashworth, *supra* note 99, at 725; Garvey, *supra* note 99, at 173.

[266] DRESSLER, *supra* note 101, at § 27.05.

[267] Consider, for example, the observations of the Model Penal Code drafters:

> [Common law attempt penalty] statutes fitted into a number of identifiable patterns . . . One common provision set specific maximum penalties, ranging from 10 to 50 years, for attempts to commit crimes punishable by death or life imprisonment, and fixed the penalty for all other attempts at one half of the maximum for the completed crime. Another common provision established a number of categories according to the nature or severity of the completed crime, specifying a different range of penalties, definite prison terms and fines, for attempts to commit crimes encompassed within each category. Closely related was the now common solution in which attempt is graded one class below the object offense. There were also a number of states that used a combination of these approaches. Some jurisdictions, on the other hand, provided a fixed maximum penalty for all attempts encompassed by the general attempt provision. A few . . . authorized a penalty for the attempt that was as great as the penalty for the completed crime.

MPC § 5.05, cmt. at 485.

[268] DRESSLER, *supra* note 101, at § 27.05.

completion of the offense and carrying heavier penalties."[269] But even accounting for AWIs, the common law approach to grading attempts was one that viewed the realization of intended harm as material to evaluating the seriousness of an offense.[270]

This objectivist view of attempt liability is to be contrasted with a subjectivist perspective, under which an actor's culpable decision-making—that is, his or her intention to engage in or risk harmful or wrongful activity—is considered to be the gravamen of an offense.[271] If, as subjectivism posits, an actor's dangerous decisionmaking ought to be the focus of criminal laws, then there is no reason to distinguish between an actor who consummates an intended harm and an actor (such as a criminal attempter) who does not—both are equally dangerous, and, therefore, both ought to receive the same punishment.[272]

This subjectivist perspective pervades the work of the Model Penal Code, the drafters of which explicitly sought to replace the common law's objectivist approach to grading with one that affords the actual occurrence of the requisite harm or evil implicated by an offense minimal, if any, significance.[273] Illustrative of the Code's commitment to subjectivism is the general principle of equal punishment reflected in Model Penal Code § 5.05(1), which grades most criminal attempts as "crimes of the same grade and degree as the most serious offense which is attempted."

Premised on the subjectivist view that "sentencing depends on the anti-social disposition of the actor and the demonstrated need for a corrective sanction," the Model Penal Code approach to grading criminal attempts was intended to render results largerly immaterial insofar at the maximum statutorily authorized punishment is concerned.[274] Importantly, though, the Model Penal Code does not equalize the sanction for all attempts. Rather, the general rule stated in Model Penal Code § 5.05(1) is also subject to a narrow, but significant, exception: "[An] attempt . . . to commit a [capital crime or a] felony of the first degree is a felony of the second degree." This carve out subjects attempts to commit the most serious crimes—for example, murder and aggravated assault—to a principle of proportionate penalty discounting.[275]

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[269] Model Penal Code § 211.1 cmt. at 181-82. AWIs prohibit the commission of a simple assault accompanied by an intent to commit some further, typically more serious, criminal offense. Illustrative examples include assault with intent to commit murder, assault with intent to commit rape, and assault with intent to commit mayhem, each of which require proof of a simple assault in addition to the respective inchoate mental states of intending to commit murder, rape, and mayhem. Offenses of this nature were created to "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." *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

[270] *See* MPC § 211.1 cmt. at 181-82.

[271] *See* DRESSLER, *supra* note 101, at § 27.05 ("Subjectivists assert that, in determining guilt and calibrating punishment, the criminal law in general, and attempt law in particular, should focus on an actor's subjective intentions (her mens rea)—her choice to commit a crime—which simultaneously bespeak her dangerousness and bad character (or, at least, her morally culpable choice-making), rather than focus on the external conduct (the actus reus), which may or may not result in injury on a particular occasion.").

[272] *See* DRESSLER, *supra* note 101, at § 27.03 ("[A]pplying subjectivist theories, anyone who attempts to commit a crime is dangerous. Whether or not she succeeds in her criminal venture, she is likely to represent an ongoing threat to the community.").

[273] MPC § 211.1 cmt. at 181-82. DRESSLER, *supra* note 101, at § 27.05 ("[T]he criminal attempt provisions of the Model Penal Code are largely based on subjectivist conceptions of inchoate liability, whereas the common law of attempts includes many strands of objectivist thought, as well as some subjectivism.").

[274] Model Penal Code § 5.05 cmt. at 490.

[275] Here's how the drafters of the Model Penal Code justified this collective attempt grading framework:

One other aspect of the Model Penal Code's broadly (though not entirely) subjectivist approach to grading attempts bears comment: the elimination of AWI offenses, which were frequently employed at common law. The drafters' decision to omit AWI offenses from the Code's Special Part was based on their view that the "modern grading of attempt according to the gravity of the underlying offense [renders] laws of this type unnecessary."[276]

The Model Penal Code approach to grading attempts has, in some respects, been quite influential. For example, since completion of the Code, many state legislatures have applied more uniform grading practices to attempts, while, at the same time, jettisoning their AWI offenses.[277] Importantly, however, the Code's most significant policy proscription—the subjectivist recommendation of equalizing attempt penalties—has not been hugely influential, either inside or outside of reform jurisdictions. Rather, the vast majority of American criminal codes continue to reflect the common law, objectivist approach to grading attempts.[278]

For example, the criminal codes in 36 jurisdictions contain general attempt penalty provisions punishing most attempts less severely than completed offenses.[279] In contrast,

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> 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. It is only when and insofar as the severity of sentence is designed for general deterrent purposes that a distinction on this ground is likely to have reasonable force. It is doubtful, however, that the threat of punishment for the inchoate crime can add significantly to the net deterrent efficacy of the sanction threatened for the substantive offense that is the actor's object, which he, by hypothesis, ignores. Hence, there is basis for economizing in use of the heaviest and most afflictive sanctions by removing them from the inchoate crimes. The sentencing provisions for second degree felonies, including the provision for extended terms, should certainly suffice to meet whatever danger is presented by the actor.

Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 1028–29 (1961).

[276] Model Penal Code § 211.1 cmt. at 181-82.

[277] As one commentator observes, "virtually all modern codes" have eliminated AWI offenses based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime." LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 16.2; *but see* N.M. Stat. Ann. § 30-3-3 ("Assault with intent to commit a violent felony consists of any person assaulting another with intent to kill or commit any murder, mayhem, criminal sexual penetration in the first, second or third degree, robbery or burglary."); Nev. Rev. Stat. § 200.400 ("A person who is convicted of battery with the intent to commit mayhem, robbery or grand larceny is guilty of a category B felony . . . A person who is convicted of battery with the intent to kill is guilty of a category B felony . . . ."); Mich. Comp. Laws § 750.83 ("Assault with intent to commit murder—Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years."). For various jurisdictions that have not modernized their codes and still retain such offenses, see MPC § 211.1 cmt. at 182 n.39 (collecting statutes).

[278] *See generally* DRESSLER, *supra* note 101, at § 27.05 ("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.").

[279] *See* Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit.

only 14 jurisdictions appear to have adopted general attempt penalty provisions equalizing the sanction for most criminal attempts,[280] though it should be noted that even where this legislative practice is followed, it's questionable whether the actual sentences imposed for attempts are actually equivalent to those for completed offenses.[281]

Similarly reflective of the Code's relative lack of influence over state level attempt grading policies is the fact that a strong majority of the "modern American codes that are highly influenced by the Model Penal Code" nevertheless adopt an objectivist approach to grading attempts.[282] For example, as one analysis of legislative trends in reform jurisdictions observes: whereas "[n]early two-thirds of American jurisdictions have adopted [MPC-based] codes," fewer "than 30% of these have adopted the Code's [attempt] grading provision or something akin to it."[283]

It's important to point out that within these majority and minority legislative practices, "[c]onsiderable variation is to be found . . . concerning the authorized penalties for attempt."[284] Most significant is that among those criminal codes generally embracing a principle of proportionate punishment discounting, the nature of that discount varies materially.[285] For example, many of these jurisdictions grade attempts at a set number of

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17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301; Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664; Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42; Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6; Mich. Comp. Laws Ann. § 750.92; Vt. Stat. Ann. tit. 13, § 9; Nev. Rev. Stat. Ann. § 193.330; P.R. Laws Ann. tit. 33, § 3122; D.C. Code § 22-1803. Note that "Rhode Island defines no attempt offenses at all in its code." Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 956 (2007)

[280] Del. Code Ann. tit. 11, § 531; Haw. Rev. Stat. § 705-502; Mont. Code Ann. § 45-4-103; S.C. Code Ann. § 16-1-80; Md. Code Ann., Crim. Law § 1-201; Conn. Gen. Stat. Ann. § 53a-51; N.D. Cent. Code Ann. § 12.1-06-01; Ind. Code Ann. § 35-41-5-1; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-4; Wyo. Stat. § 6-1-304; Pa. Cons. Stat. Ann. tit. 18, § 905; Wyo. Stat. § 6-1-304; Miss. Code. Ann. § 97-1-7.

[281] "It has been noted," for example, "that 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 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)).

[282] Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 381 (2003).

[283] 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).

[284] LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[285] This is due, in part, to the fact that the punishment differential between classes varies. For an illustrative example, consider that while Oregon, Colorado, and Arizona all apply a one-grade discount to criminal attempts, the value of that discount varies both between and among jurisdictions.

For example, Oregon's approach treats attempts as a: (1) class A (20 year) felony if the offense attempted is murder or treason (punishable by death); (2) class B (10 year) felony if the offense attempted is a class A (20 year) felony; (3) class C (5 year) felony if the offense attempted is a class B (10 year) felony; (4) class A (1 year) misdemeanor if the offense attempted is a class C (5 year) felony or an unclassified felony; (5) class B (6 month) misdemeanor if the offense attempted is a class A (1 year) misdemeanor; and (6) class C (30 day) misdemeanor if the offense attempted is a class B (6 month) misdemeanor. Or. Rev. Stat. Ann. § 161.405.

penalty classes—usually one but occasionally two[286]—below the class affixed to the completed offense.[287] In contrast, a substantial number of these jurisdictions either explicitly punish attempts at half the amount of the target offense,[288] or, in the alternative, incorporate some combination of grade lowering and halving of statutory maxima.[289]

Another notable area of variance within American legislative attempt grading practices relates to the recognition of exceptions. A strong majority of American criminal codes explicitly recognize statutory exceptions to their generally applicable grading rules (regardless of rules they actually endorse).[290] But at the same time, the contours of these exceptions vary substantially. For example, numerous criminal codes exempt varying categories of offenses from their generally applicable grading rules—and this is so, moreover, in jurisdictions that broadly endorse a principle of proportionate punishment discounting[291] as well as those that endorse one of equal punishment.[292] Likewise, an even larger number of American criminal codes exempt varying individual offenses from their

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Compare this with Colorado's approach, under which a criminal attempt to commit: (1) a class 1 felony (punishable by death) is a class 2 (24 year) felony; (2) a class 2 (24 year) felony is a class 3 (12 year) felony; (3) a class 3 (12 year) felony is a class 4 (6 year) felony; (4) a class 4 (6 year) felony is a class 5 (3 year) felony; (5) a class 5 (3 year) or 6 (1.5 year) felony is a class 6 (1.5 year) felony; (6) a class 1 (1.5 year) misdemeanor is a class 2 (1 year) misdemeanor; (7) a misdemeanor other than a class 1 (1.5 year) misdemeanor is a class 3 (6 month); and (8) a petty offense is a crime of the same class as the offense itself.

Now compare both of these approaches with Arizona's approach—reflected in its maximum statutory guidelines applicable to first time felony offenders—under which a criminal attempt to commit: (1) a class 1 (20) felony is a class 2 (10 year) felony; (2) a class 2 (10 year) felony is a class 3 (7 year) felony; (3) a class 3 (7 year) felony is a class 4 (3 year) felony; (4) a class 4 (3 year) felony is a class 5 (2 year) felony; and a class 5 felony (2 year) is a class 6 (1.5) felony. Ariz. Rev. Stat. Ann. § 13-1001.

[286] States vary widely in the number of penalty classes they use, with most having fewer than those in the RCC. *See* COMMENTARY TO RCC § 801. In states with fewer classes, the difference in penalties between classes is generally greater, such that a downward adjustment of just one class for an attempt penalty may amount to a fifty percent reduction in the maximum imprisonment exposure.

[287] Tex. Penal Code Ann. § 15.01; Neb. Rev. Stat. § 28-201; N.M. Stat. Ann. § 30-28-1; Nev. Rev. Stat. Ann. § 193.330; Ala. Code § 13A-4-2; Colo. Rev. Stat. Ann. § 18-2-101; Ky. Rev. Stat. Ann. § 506.010; Alaska Stat. § 11.31.100; Ariz. Rev. Stat. Ann. § 13-1001; Fla. Stat. Ann. § 777.04; Ill. Comp. Stat. Ann. ch. 720, § 5/8-4; Me. Rev. Stat. tit. 17-A, § 152; Mo. Ann. Stat. § 564.011; N.Y. Penal Law § 110.05; N.C. Gen. Stat. Ann. § 14-2.5; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.405; Tenn. Code Ann. § 39-12-107; Utah Code Ann. § 76-4-102; Wash. Rev. Code § 9A.28.020; Kan. Stat. Ann. § 21-5301.

[288] *See* Minn. Stat. Ann. § 609.17(4); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Wis. Stat. Ann. § 939; Ga. Code Ann. § 16-4-6; Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[289] Idaho Code Ann. § 18-306; S.D. Codified Laws § 22-4-1; Va. Code Ann. § 18.2-26; W. Va. Code Ann. § 61-11-8; La. Stat. Ann. § 14:27; Mass. Gen. Laws Ann. ch. 274, § 6.

[290] Among jurisdictions that apply a principle of equal punishment to grading attempts, only about five appear to apply it unequivocally, without exception. Robinson, *supra* note 121, at 320 n.67.

[291] *E.g.,* N.Y. Penal Law § 110.05 (exempting attempts to commit some Class A-I felonies and all class A-II felonies from standard attempt penalty discount); Minn. Stat. Ann. § 609.17(4) (applying different attempt penalty discount to offenses subject to life imprisonment); Ga. Code Ann. § 16-4-6 (applying different attempt penalty discount to offenses subject to life imprisonment or death); Okla. Stat. Ann. tit. 21, § 42 (exempting attempts to commit offenses with a statutory maximum of four years or below from standard attempt penalty discount).

[292] *E.g.,* Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

generally applicable grading rules—which, again, is reflected in jurisdictions that broadly endorse a principle of proportionate punishment discounting [293] as well as those that endorse one of equal punishment.[294]

Statutory variances aside, it is nevertheless clear that American legislative practice, when viewed as a whole, clearly supports the common law, objectivist approach to grading attempts. Less clear, however, is the position supported by expert opinion: there exists a substantial amount of legal commentary on the relevance of results to punishment, which reflects an ongoing and persistent amount of scholarly disagreement over the appropriate grading of criminal attempts.[295] At the same time, there is another perspective on the grading of criminal attempts reflected in the scholarly literature, which seems to provide relatively clear support for the common law, objectivist approach: that of the people.[296]

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[293] *E.g.*, Alaska Stat. § 11.31.100 (exempting attempted murder from standard attempt penalty discount); Ariz. Rev. Stat. Ann. § 13-1001 (exempting attempted murder from standard attempt penalty discount); Fla. Stat. Ann. § 777.04 (applying standard attempt penalty discount "except as otherwise provided"); Ill. Comp. Stat. Ann. ch. 720, § 5/8-4 (exempting attempted murder from standard attempt penalty discount); Me. Rev. Stat. tit. 17-A, § 152 (exempting attempted murder from standard attempt penalty discount); Mo. Ann. Stat. § 564.011 (applying standard attempt penalty discount "unless otherwise provided); N.C. Gen. Stat. Ann. § 14-2.5 (applying standard attempt penalty discount "[u]nless a different classification is expressly stated"); Ohio Rev. Code Ann. § 2923.02 (applying standard attempt penalty discount except for attempts to commit various enumerated serious offenses); Or. Rev. Stat. § 161.405 (exempting attempted murder or treason from standard attempt penalty discount); Utah Code Ann. § 76-4-102 (exempting various enumerated serious felonies from standard attempt penalty discount); Wash. Rev. Code § 9A.28.020 (exempting various enumerated serious felonies from standard attempt penalty discount); Cal. Penal Code § 664 (exempting first-degree murder from standard attempt penalty discount); Kan. Stat. Ann. § 21-5301(c)(exempting enumerated list of offenses from standard attempt penalty discount); Wis. Stat. Ann. § 939.32(1) (exempting enumerated list of offenses from standard attempt penalty discount); *see also* Tenn. Code Ann. § 39-12-107 (no attempts to commit class c misdemeanor).

[294] *E.g.,* Conn. Gen. Stat. Ann. § 53a-51 (exempting class A felonies from attempt penalty equalization); N.D. Cent. Code Ann. § 12.1-06-01 (exempting class A and AA felonies from attempt penalty equalization); N.J. Stat. Ann. § 2C:5-4 (exempting most crimes of the first degree from attempt penalty equalization); Wyo. Stat. § 6-1-304 (exempting capital crimes from attempt penalty equalization).

[295] *See, e.g.,* Theodore Y. Blumoff, *A Jurisprudence for Punishing Attempts Asymmetrically*, 6 BUFF. CRIM. L. REV. 951 (2003); Bjorn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553; Russell Christopher, *Does Attempted Murder Deserve Greater Punishment than Murder? Moral Luck and the Duty to Prevent Harm,* 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 419 (2004); Michael Davis, *Why Attempts Deserve Less Punishment Than Complete Crimes,* 5 LAW & PHIL. 1 (1986); Bebhimm Donnelly, *Sentencing and Consequences: A Divergence Between Blameworthiness and Liability to Punishment*, 10 NEW CRIM. L. REV. 392 (2007); Joel Feinberg, *Equal Punishment for Failed Attempts: Some Bad But Instructive Arguments Against It*, 37 ARIZ. L. REV. 117 (1995); Marcelo Ferrante, *Deterrence and Crime Results*, 10 NEW CRIM. L. REV. 1 (2007); Barbara Herman, *Feinberg on Luck and Failed Attempts*, 37 ARIZ. L. REV. 143 (1995); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw,* 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); LAFAVE, *supra* note 91, at 2 SUBST. CRIM. L. § 11.5.

[296] *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, 430 (1998) (finding that public opinion surveys generally indicate that members of the public are "objectivist-grading subjectivists."); Dressler, *supra* note 101, at § 27.04 n.54 (citing *id.* and explaining that "people tend to be subjectivist (they focus on an actor's state of mind) in determining what the minimum criteria should be for holding an actor criminally responsible for her inchoate conduct, but once it is determined that punishment is appropriate and the only issue is how much punishment to inflict, they tend to become objectivist (they focus on resulting harm) and favor the common law lesser-punishment result.").

More specifically, public opinion surveys seem to consistently find that lay judgments of relative blameworthiness view the consummation of results as an important and significant grading factor.[297] For example, in one well-known study, researchers found that the failure to consummate an offense generates, at minimum, "a reduction in liability of about 1.7 grades."[298] This substantial "no-harm discount" was reflected where study participants were asked to compare the deserved punishment for two actors who had both done everything necessary from their end to consummate the offense, but where one was, due to circumstances outside of his control, unable to cause the intended harm.[299] And when study participants were presented with a scenario involving an actor who was stopped before he was able to carry out his criminal plans, the reduction in liability appears to have been even larger.[300]

Strong public support for the common law, objectivist approach to grading criminal attempts likely explains why both the drafters of Model Penal Code and most of the state legislatures that pursued their subjectivist approach to grading attempts ultimately decided to exempt the most serious offenses from a principle of equal punishment.[301] As one commentator has observed: "The instances where the Model Penal Code drafters have elected to compromise on their view that results ought to be irrelevant are typically instances, like homicide or causing catastrophe, where their unpopular view of results would be highlighted and most likely to cause public stir."[302]

The RCC approach to grading criminal attempts is consistent with the above considerations. RCC § 301(c)(1) codifies a general principle of proportionate punishment discounting that is consistent with the common law, objectivist approach reflected in a strong majority of jurisdictions. And RCC § 301(c)(2) recognizes the possibility of individual exceptions to this principle, which, again, finds support in majority legislative practice.

RCC § 22E-302. Solicitation.

Relation to National Legal Trends. RCC §§ 302(a), (b), and (c) are in part consistent with, and in part depart from, national legal trends.

Many of the substantive policies incorporated into RCC §§ 302(a), (b) and (c)—for example, those governing the conduct requirement, the requirement of purpose as to conduct, and the general rejection of an impossibility defense—reflect majority or prevailing national trends governing the law of solicitation. The most notable exception is limiting general solicitation liability to crimes of violence under RCC § 302(a)(3), which reflects a minority trend. Other policy recommendations—for example, the principle of intent elevation applicable to results and circumstances—address issues upon which American criminal law has largely been silent in the solicitation context.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to criminal solicitations is in accordance with widespread, modern

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[297] *See, e.g.,* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, & BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 14-28, 157-97 (1995); Robinson & Darley, *supra* note 134, at 427-30.
[298] Robinson & Darley, *supra* note 134, at 428.
[299] *See id.*
[300] *See id.* at 429.
[301] *See* Robinson, *supra* note 120, at 379-85.
[302] *Id.*

legislative practice. However, the manner in which RCC §§ 302(a), (b), and (c) codify these requirements departs from modern legislative practice in a few notable ways.

A more detailed analysis of national legal trends and their relationship to RCC §§ 302(a), (b), and (c) is provided below. It is organized according to five main topics: (1) the conduct requirement; (2) the culpable mental state requirement; (3) impossibility; (4) target offenses; and (5) codification practices.

RCC § 302(a): Relation to National Legal Trends on Conduct Requirement. The "essence" of the general inchoate offense of solicitation is asking another person to commit a crime.[303] Over the years, however, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation."[304] Variances aside, though, all American legal authorities seem to agree that commanding,[305] requesting,[306] or, more broadly, attempting to persuade[307] another to commit a crime will suffice for purposes of general solicitation liability.[308]

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[303] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (Westlaw 2018) ("[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."); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); ("Solicitation . . . is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.").

[304] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[305] *See, e.g.,* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Colo. Rev. Stat. Ann. § 18-2-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; N.D. Cent. Code § 12.1-06-03; Or. Rev. Stat. § 161.435; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.

[306] *See, e.g.,* DRESSLER, *supra* note 45, at § 28.01; LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Kan. Stat. Ann. § 21-5303; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03.

[307] *See, e.g., State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (quoting Robbins, *supra* note 43, at 29); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Va. § 18.2-29; Colo. Rev. Stat. § 18-2-301(1); Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; *see also* Me. tit. 17-A, § 153(1) (causing another to commit crime); Ore. § 161.435(1) (same).

[308] More controversial is whether merely "encouraging" another to commit an offense provides an adequate basis for solicitation liability. *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985) ("Encourage suggests giving support to a course of action to which another is already inclined."). The drafters of the Model Penal Code endorsed this approach; under Model Penal Code § 5.02(1) an actor who "commands, *encourages*, or requests" another person to commit a crime may be convicted of solicitation. As the commentary accompanying the Model Penal Code explains:

> "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. Encouragement also covers

One important corollary to this understanding of the conduct requirement of a criminal solicitation is that a solicitation is complete the instant the actor utters the communication—proof that the target of a solicitation was completed is not necessary.[309] In this sense, a criminal solicitation is like the other general inchoate offenses of attempt and conspiracy, neither of which require proof of completion either. Unlike a criminal attempt or conspiracy, however, a criminal solicitation does not require proof that any of the relevant parties (i.e., solicitor or solicitee) performed any conduct (i.e., substantial step/overt act) in furtherance of the proposal.[310]

Another important corollary to this understanding of the conduct requirement of a criminal solicitation is that agreement or acceptance by the solicitee is immaterial for purposes of liability. In contrast to a bilateral understanding of conspiracy, for example, it does not matter that the solicitee rejects the proposal, 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.[311] (Note, however, that a "solicitee's acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation."[312]) In this sense, a criminal solicitation constitutes an "attempted conspiracy,"[313] and, as such, is "the most inchoate of the anticipatory offenses."[314]

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forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request.

Model Penal Code § 5.02(1) cmt. at 372. In contrast, the drafters of the proposed Federal Criminal Code "rejected" the term "encourages," instead recommending use of the phrase "otherwise attempts to persuade," on the basis that the former could provide for criminal liability in "equivocal situations too close to casual remarks or even to free speech." *See* 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970). As a matter of legislative practice, there is support for both positions. *See* Model Penal Code § 5.02(1) cmt. at 372 (collecting authorities).

[309] DRESSLER, *supra* note 45, at § 28.01 (citing *People v. Ruppenthal*, 771 N.E.2d 1002, 1008 (Ill. App. Ct. 2002)). Relatedly, "[a] solicitation that is made subject to a condition is criminal, even if the condition is never fulfilled." *People v. Nelson*, 240 Cal. App. 4th 488, 496–99 (2015) ("Asking a hit man if you can have a two-for-one deal is, in essence, offering to pay him to commit murder, on the condition that he agree to do so for a discount price. The hit man may decline, but the crime of solicitation has nevertheless been committed.").

[310] *See, e.g., People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955).

[311] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; DRESSLER, *supra* note 45, at § 28.01. Note that if the party solicited acts on the solicitor's suggestion and goes far enough to incur guilt for a more serious offense, then the solicitor is also guilty of the more serious offense, rather than the solicitation. *See State v. Jones*, 83 N.C. 605, 607 (1881). And if the party solicited goes far enough to incur liability for attempt, then the solicitor is also guilty of attempt. *Id.* at 606-07; *Uhl v. Commonwealth*, 47 Va. 706, 709-11 (1849). And if the solicited party consummates the object crime, then both the and the solicitor are guilty of the completed crime. *People v. Harper*, 25 Cal. 2d 862, 877 (1945); *State v. Primus*, 226 N.C. 671, 674-75 (1946).

[312] *Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (collecting cases from other jurisdictions).

[313] *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. For example, if X asks Y to agree to engage in or aid the planning or commission of criminal conduct, and Y agrees, then a criminal conspiracy has been formed. But if Y doesn't agree, then there's no conspiracy between X and Y. Nevertheless, X has solicited Y to commit a criminal offense. DRESSLER, *supra* note 45, at § 28.01.

[314] LAFAVE, *supra* note 43, 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; *Gervin v. State*, 371 S.W.2d 449, 451 (Tenn. 1963). Here's a useful practical illustration:

One important issue relevant to the conduct requirement of a criminal solicitation relates to the nature of the communication implicated by the defendant's attempted influence. Generally speaking, it is well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct," while proof of a "quid pro quo" between the solicitor and the party solicited is not necessary.[315] Less clear, however, is just how specific that communication must be given the free speech interests implicated by solicitation liability.[316]

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of solicitation has historically been murky.[317] Most recently, in *United States v. Williams*, the U.S. Supreme Court clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[318] But it also reaffirmed the crucial yet nevertheless ambiguous distinction "between a proposal to engage in illegal activity and the abstract advocacy of illegality," the latter of which is entitled to constitutional protection.[319]

> 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 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 43, at 2 SUBST. CRIM. L. § 11.1.

[315] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., 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)," and "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo.") (citing *In State ex rel Juv. Dept. v. Krieger*, 177 Or. App. 156, 158–59 (2001)).

[316] DRESSLER, *supra* note 45, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645).

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

[318] *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)).

[319] *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)).

Constitutional considerations aside, there "remains a legislative question" concerning whether and to what extent solicitation liability should be curtailed to avoid chilling speech."[320] "The main problem," as the drafters of the Model Penal Code phrase it, is how to prevent

> [L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.[321]

In light of these constitutional and policy considerations, the contemporary approach to solicitation liability, reflected in both case law and legislation, is to require proof of the utterance of a communication that, when viewed "in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor's object to incite."[322]

This standard is relatively broad. For example, it does not require specificity as to "the details (time, place, manner) of the conduct that is the subject of the solicitation."[323] Nor does it require that "the act of solicitation be a personal communication to a particular individual."[324] But it does bring with it a few limitations. For example, "general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation."[325] Nor does criminal liability extend to "a situation where the defendant makes a general solicitation (however reprehensible) to a large indefinable group to commit a crime."[326] Even still, there can be little question that the conduct requirement of solicitation is broad indeed.

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

[321] *Id.*

[322] *Id.*; *see, e.g., Johnson*, 202 Or. App. at 483. This standard is articulated by modern criminal codes in a variety of ways. For example, the Model Penal Code requires that the defendant have solicited "specific conduct." Model Penal Code § 5.02(1). This "specific conduct" approach has been adopted by a number of reform jurisdictions; however, many other modern criminal codes express the same kind of specificity requirement through language requiring the solicitation of conduct constituting a "particular felony" or a "particular crime." *See* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting authorities). Yet another set of statutory formulations adopted by reform jurisdictions require the solicitation of "conduct constituting" a crime, which, in practical effect, "require as great a degree of specificity of the conduct solicited as does the [other approaches]." *Id.*

[323] *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 ("It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed.").

[324] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient).

[325] Commentary on Haw. Rev. Stat. Ann. § 705-510.

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

This breadth of coverage is bolstered by two additional principles of liability. First, and perhaps most important, is that "solicit[ing] another to aid and abet the commission of a crime," no less than soliciting that person to directly commit a crime, can provide the basis for solicitation liability.[327] Under this accessorial approach to solicitation, reflected in both contemporary national legislation and case law, 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."[328]

The second principle of liability addresses the issue of an uncommunicated solicitation, which arises where "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."[329] In these kinds of situations, the general rule, reflected in both contemporary national legislation and case law, is that "[t]he act is nonetheless criminal, although it may be that the solicitor must be prosecuted for an attempt to solicit on such facts."[330]

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[327] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In this sense, solicitation liability runs parallel with conspiracy liability, in which context agreements to aid in the planning or commission of a crime provide a basis for a conspiracy conviction. *See, e.g., Salinas v. United States*, 522 U.S. 52, 65 (1997); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1134 (1975); Model Penal Code § 5.03(1)(b).

[328] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(1) that "[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*." A plurality of modern codes have adopted this "complicity in its commission" approach or something like it. *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030; Kan. Stat. Ann. § 21-5303; N.D. Cent. Code § 12.1-06-03. For relevant case law, see, for example, *Meyer v. State*, 47 Md.App. 679 (1981); *People v. Nelson*, 240 Cal.App.4th 488 (2015); *Commonwealth v. Wolcott*, 77 Mass.App. 457 (2010); *People v. Bloom*, 133 N.Y.S. 708 (1912); *State v. Furr*, 292 N.C. 711 (1977); *Moss v. State*, 888 P.2d 509 (Okl. Cr. App. 1994); *State v. Yee,* 160 Wis.2d 15 (1990); *Ganesan v. State*, 45 S.W.3d 197, 201 (Tex. App. 2001).

[329] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[330] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(4) that "[i]t is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." A few codes have adopted this language. *See, e.g.,* Haw. Rev. Stat. § 705-510; Kan. Stat. Ann. § 21-5303; Utah Code Ann. §§ 76-4-203. More common, though, is the adoption of statutory language that would seem to permit a conviction under such circumstances by prohibiting a defendant's "attempt" to engage in one or more forms of influence—e.g., attempts to cause, persuade, induce, promote, or request another to commit a crime. *See, e.g.,* Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.Y. Penal Law § 100.00; Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; Va. Code Ann. § 18.2-29; Me. Rev. Stat. Ann. tit. 17-A, § 153 Tex. Penal Code Ann. § 15.03; N.M. Stat. Ann. § 30-28-3; Tenn. Code Ann. § 39-12-102. For relevant case law interpreting these kinds of statutes, compare *People v. Lubow*, 29 N.Y.2d 58, 66–67 (1971) (reference to "attempts" embraces uncommunicated solicitations); *with State v. Cotton,* 1990-NMCA-025, ¶ 23, 109 N.M. 769, 773 (reference to "attempts" does not embrace uncommunicated solicitations). And for case law indicating that attempted solicitation is the appropriate charge where an uncommunicated solicitation is at issue, see, for example, *Cotton*, 109 N.M. at 773; *People v. Boyce*, 339 Ill.Dec. 585 (2015); *State v. Andujar*, 899 A.2d 1209 (R.I. 2006); *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002); *Ford v. State*, 127 Nev. 608 (2011).

Consistent with national legal trends outlined above, RCC § 302 codifies the following policies relevant to the conduct requirement of solicitation. Subsection (a)(1) requires proof of one of three alternative forms of attempted influence: (1) commanding, (2) requesting, or (3) trying to persuade another person to commit an offense. Thereafter, RCC § 302(a)(2) clarifies that solicitations to aid (i.e., assist), no less than solicitations to directly commit, an offense constitute a sufficient basis for general solicitation liability. And it also establishes that the request, command, or persuasion be to engage in or facilitate "conduct, which, if carried out, will constitute" a criminal offense. Finally, RCC § 302(c) clarifies that actual communication is not necessary to satisfy the conduct requirement of solicitation, provided that the person has done everything he or she plans to do to effect the communication.

RCC §§ 302(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. It is often said that the *mens rea* of a criminal solicitation is the intent to cause another to commit a crime.[331] Upon closer analysis, however, this kind of general statement fails to "adequately reflect the mental element" of solicitation[332]—a topic that is "particularly challenging" by any standard.[333] The relevant complexities follow the same pattern as those surrounding the general inchoate offense of conspiracy.

Ordinarily, a clear element analysis of a consummated crime entails consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[334] The same is also true of solicitation and conspiracy, which criminalize steps towards completion of a particular crime. At the same time, the inchoate and multi-participant nature of both solicitation and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (committed by someone else) that, if carried out, would consummate the target offense.[335] For this reason, it is often said that offenses such as solicitation and conspiracy incorporate "dual intent" requirements.[336]

In the context of solicitation, the first intent requirement relates to the solicitor's culpable mental state with respect to future conduct: generally speaking, the solicitor must "intend," by his or her request, to promote or facilitate conduct planned to culminate in an offense.[337] The second intent requirement, in contrast, relates to the solicitor's culpable mental state with respect to the results and/or circumstance elements of the target offense: generally speaking, the solicitor must "intend," by his or her request, to bring them about.[338]

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[331] *See, e.g., Kimbrough v. State*, 544 So. 2d 177, 179 (Ala. Crim. App. 1989); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007).
[332] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.
[333] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).
[334] *Id.*
[335] *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).
[336] For discussion of the dual intent requirement in the context of solicitation, see, for example, DRESSLER, *supra* note 45, at § 28.01; *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000). For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).
[337] Robinson, *supra* note 75, at 864.
[338] *Id.*

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

Resolution of these questions is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business which facilitate criminal acts may be subjected to criminal liability.[339] For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to sell a room to a man who is with an underage woman, knowing that it'll be used for sex. In these kinds of situations, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[340] What remains to be determined is whether this kind of culpable mental state as to the solicitee's future conduct constitutes a sufficient basis for a solicitation conviction.

There are, generally speaking, two different approaches one could take to the issue. From the perspective of a "true purpose" view, solicitation liability is only appropriate upon proof that the solicitor acted with a *conscious desire* to promote or facilitate criminal conduct by another. From the perspective of a knowledge view, in contrast, *mere awareness* that the solicitor is promoting or facilitating the commission of a crime by another is considered to be sufficient, even absent a true purpose to advance the criminal end. The choice between these two approaches raises conflicting policy considerations, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[341]

Solicitation's second intent requirement, in contrast, revolves around a broader set of policy issues, which are a product of the various possibilities presented by an element analysis of the results and/or circumstances of the target of a solicitation. Consider first the relationship between a solicitor's state of mind and the result elements of the target offense. A solicitor may purposely request another to cause a result, as would be the case where D1, a passenger, solicits D2, a driver, to kill V, a nearby driver, by ramming D2's car into V's while on the highway. At the same time, a solicitor may also knowingly, recklessly, or even negligently request another to cause a result.

For example, D1 ask D2 to drive extremely fast through a school zone for the purpose of getting to a sports event on time. If D1 is practically certain that a teacher in the crosswalk will be killed, then D1 has knowingly solicited D2 to kill that teacher. If, in contrast, D1 is merely aware of a substantial risk that the teacher will be killed, then D1 has recklessly solicited D2 to kill that teacher. And if D1 is not aware of a substantial risk that asking D2 to speed will result in the death of the teacher, but nevertheless should have been aware of this possibility, then D1 has negligently solicited D2 to kill that teacher.

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[339] *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1192 (1997).
[340] DRESSLER, *supra* note 45, at § 28.01.
[341] Model Penal Code § 5.03 cmt. at 403.

An identical analysis applies to circumstances. Imagine, for example, that D1 asks D2, an adult male, to engage in a sexual encounter with V, a minor. If D1 desires D2 to have sex with V *because of V's young age*, then D1 has purposely solicited sex with a minor. If, in contrast, D1 is practically certain that V is underage, then D1 has knowingly solicited D2 to have sex with a minor. And if D1 is aware of a substantial risk that V is underage, then D1 has recklessly solicited D2 to have sex with a minor. Finally, if D1 is not aware, yet should have been aware, of a substantial risk that V is underage then D1 has negligently solicited D2 to have sex with a minor.

That a solicitor can act purposely, knowingly, recklessly, or negligently as to results and circumstances is not to say that all of these culpable mental states provide a justifiable basis for a criminal conviction. Given that solicitation is a general inchoate offense that applies to particular crimes, there is little doubt that the solicitor must possess, at minimum, the culpable mental state requirement applicable to the results and circumstances of the target offense.[342] But what about where the culpable mental state requirement applicable to the results and circumstances of the target offense is comprised of a non-intentional mental state (e.g., recklessness or negligence), or none at all (i.e., strict liability)? In that case, one can ask: is proof of the culpable mental state required by the target offense enough, or, alternatively, must a more demanding, intentional culpable mental state nevertheless be proven?

There are, generally speaking, two different approaches one might take to the issue. The first is one of culpable mental state equivocation, which dictates that whatever culpable mental state requirement applies to the results and circumstances of the target offense will also suffice to establish a criminal solicitation. The second, and contrasting approach, is one of culpable mental state elevation, under which proof of either a practically certain belief or conscious desire as to the results and circumstances of the target offense is necessary—even if proof of a non-intentional mental state will suffice to secure a conviction for the completed offense.

Resolution of the above policy issues is unclear under the common law approach to solicitation, which simply viewed the *mens rea* of the offense as one of "specific intent."[343] This kind of monolithic conceptualization, rooted in "offense analysis," is fundamentally ambiguous given that it fails to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[344] In contrast, the more recent "element analysis" developed by the drafters of the Model Penal Code provides the basis for applying a clearer and more conceptually sound approach to addressing the culpable mental state requirement of solicitation. Surprisingly, however, the general solicitation provision the Model Penal Code's drafters developed fails to utilize these tools.

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[342] *See, e.g., Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 ("[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.").

[343] *See, e.g., People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998) ("The mens rea of solicitation is a specific intent to have someone commit a completed crime."); DRESSLER, *supra* note 45, at § 28.01 ("Common law solicitation is a specific-intent crime.").

[344] Wechsler et al., *supra* note 73, at 967.

More specifically, the Model Penal Code's general solicitation provision, § 5.02(1), codifies a broad purpose requirement—similarly employed in the Code's general definitions of conspiracy[345] and complicity[346]—under which the requisite request must be accompanied by "the purpose of promoting or facilitating the commission of the crime."[347] When viewed in light of the accompanying explanatory note and commentary, it is clear that the drafters intended for this purpose requirement to apply to the "specific conduct that would constitute the crime."[348] Which is to say, the Model Penal Code endorses the purpose approach to the first *mens rea* policy issue, discussed above. Less clear, however, is how the Model Penal Code's undifferentiated reference to a "purpose of promoting or facilitating the commission of the *crime*" was intended to translate into culpability principles applicable to the results and circumstances of the target offense. Indeed, the commentary accompanying the relevant provision of the Model Penal Code explicitly states that this "matter"—i.e., whether to apply a principle of culpable mental state equivocation or elevation—"is deliberately left open."[349]

The Model Penal Code's endorsement of a true purpose view with respect to conduct has been widely adopted in reform jurisdictions. Since publication of the Model Penal Code in 1962, "[v]irtually all of the more recently enacted solicitation statutes" appear to have endorsed the position that a conscious desire to promote or facilitate

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[345] Model Penal Code § 5.03.
[346] Model Penal Code § 2.06.
[347] Model Penal Code § 5.02(1).
[348] Model Penal Code § 5.02(1): Explanatory Note (stating that "[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 . . . "). The accompanying commentary to 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.
[349] Model Penal Code § 5.03(1) cmt. at 371 n.23. As the drafters observed:

> 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.

Id. at 371.

criminal conduct is necessary.[350] At the same time, however, none of these statutes appear to clarify whether and to what extent the results and circumstances of the target offense must be elevated when charged as a solicitation. The underlying policy issues likewise remain unresolved in the courts, where "[c]ase law is almost nonexistent."[351] Legal commentary on these issues is also sparse, though, to the extent it exists, it appears to favor application of a principle of culpable mental state elevation with respect to both results and circumstances.[352]

In the absence of much legal authority on these issues in the context of solicitation, perhaps the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy liability. There is, after all, very little (if any) difference between the *mens rea* of these two offenses. And the question of whether and to what

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[350] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Modern criminal codes express this point in varying ways. For example, some state that "the solicitor must intend that an offense be committed." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Cal. Penal Code § 653f; Colo. Rev. Stat. Ann. § 18-2-301; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Wis. Stat. Ann. § 939.30; Wyo. Stat. § 6-1-302). Others state that "the solicitor must intend to promote or facilitate [the target offense's] commission." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030)). Yet another approach is to state that the solicitor "must intend that the person solicited engage in criminal conduct." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435). Although there's little case law interpreting these statutes, "the acts of commanding or requesting another to engage in conduct which is criminal would seem of necessity to require an accompanying intent that such conduct occur." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[351] Alexander & Kessler, *supra* note 79, at 1166; *see, e.g.,* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In what is perhaps the only published case directly addressing the relationship between the culpable mental state requirement of a solicitation and that governing the target offense, *Com. v. Hacker*, the Pennsylvania Supreme Court held that solicitation of sex with a minor, like the target offense of sex with a minor, is a matter of strict liability with respect to the circumstance of age—at least where the victim is in the physical presence of the solicitor. 609 Pa. 108, 113, 15 A.3d 333, 336 (2011). This effective principle of culpable mental state equivocation as to circumstances is to be contrasted, however, with the decisions of at least two other state courts applying a principle of culpable mental state elevation to the circumstance of age in statutory rape where the government proceeds on a complicity theory. *See State v. Bowman*, 188 N.C. App. 635, 650 (2008) ("[W]hen the government proceeds on a complicity theory of liability, it must prove that the defendant "acted with knowledge that the [victims] were under the age of [consent.]") (citing *People v. Wood*, 56 Cal.App. 431 (1922); *see also Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014) (to hold someone criminally responsible as an accomplice the government must prove "a state of mind extending to the entire crime," i.e., "the intent must go to the specific and entire crime charged") (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)). These cases are particularly relevant because solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *See, e.g.,* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on N.Y. Penal Law § 100.00.

[352] *See* LAFAVE, *supra* note 43, 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."); Alexander & Kessler, *supra* note 79, at 1166 (arguing that, with respect to circumstances, "there are strong reasons in favor of asymmetry between the target crime and its solicitation," including that: (1) "D1 may lack D2's knowledge base"; and (2) D1 may be "removed in time and space from the target crime").

extent the results and circumstances of the target of a conspiracy should be elevated raises the same policy issues as those raised when the question is asked in the solicitation context. Therefore, these legal authorities can provide meaningful direction.[353] And, as the commentary to the CCRC's general conspiracy provision, RCC § 303(1), explores in significant detail, relevant legislation, case law, and commentary in the conspiracy context support applying dual principles of intent elevation to the results and circumstances.[354]

Consistent with the above analysis of national legal trends, the RCC approach to the culpable mental state requirement governing a criminal solicitation incorporates the same four substantive policies applicable to the RCC approach governing the culpable mental state requirement of a criminal conspiracy.

First, the prefatory clause of RCC § 302(a) establishes that the culpability required for the general inchoate offense of criminal solicitation is, at minimum, that required by the target offense. Second, RCC § 302(a)(1) endorses the purpose view of solicitation, under which proof that the solicitor consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of solicitation liability. Both of these policies are consistent with national legal trends applicable to the general inchoate crime of solicitation (in addition to those applicable in the context of conspiracy liability).

Third, RCC § 302(b) applies a principle of intent elevation to the results of a solicitation, under which the solicitor must, in making the request, intend to cause any result required by the target offense. Similarly, and fourth, RCC § 302(b) applies the same principle of intent elevation to the circumstances of a solicitation, under which the solicitor must, in making the request, intend to bring about any circumstance required by the target offense. Both of these policies are consistent with national legal trends applicable to the general inchoate crime of conspiracy.

RCC § 302(a)(1): Relation to National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target of the general inchoate offense for which the defendant is being prosecuted could not have been completed?[355] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[356]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket, believing it to contain valuable items, only to discover that it is empty;[357] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't;[358] (3) a participant in a sting operation who receives property

[353] *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.").

[354] *See* First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Conspiracy, at 32-40 (December 11, 2017).

[355] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.

[356] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.

[357] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).

[358] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).

believing it to be stolen, only to discover that it isn't;[359] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is not contraband.[360]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including solicitation.[361] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for solicitation prosecutions: (1) D1 asks D2 to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; (2) D1 asks D2 to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation; (3) D1 asks D2 to purchase property on the black market, believing it to be stolen, when, in fact, it isn't stolen but part of a sting operation; and (4) D1 asks D2 to sell what he believes to be a controlled substance, when in fact that substance is innocent.

In addition, solicitation prosecutions also raise the possibility of distinctive forms of impossibility beyond those that arise in the context of attempt prosecutions given the involvement of another party. In one relevant situation, the impossibility is a product of the fact that the solicitee is *unable* to engage in the target of the solicitation—such as, for example, when D1 sends a letter to a well-regarded hit man, D2, soliciting the murder of V, only to discover that D2 is in a coma due to a near-fatal car accident. In another situation, the impossibility is a product of the fact that the solicitee is *unwilling* to commit the target offense—such as, for example, when D1 asks D2 to commit a murder for hire, only to discover that D2 is an undercover officer merely posing as a willing participant in a criminal offense.

Conceptually speaking, impossibility issues arising in the solicitation context can be divided into the same four categories that exist in the attempt context.[362] The first is *pure factual impossibility*, which arises when the object of a solicitation cannot be consummated because of circumstances beyond the parties' control (e.g., police interference).[363] 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).[364] The third category is *hybrid impossibility*, which arises where the object of a solicitation 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 (e.g., soliciting an undercover officer posing as a child to engage in sexual acts).[365] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought" to be achieved by a solicitation (e.g., soliciting a murder by means of witchraft).[366]

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[359] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[360] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[361] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1
[362] This general framework and breakdown is drawn from DRESSLER, *supra* note 45, at § 27.07.
[363] *Id.*
[364] *Id.*
[365] *Id.*
[366] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.,* Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

Notwithstanding the factual and conceptual symmetries between impossible attempts and impossible solicitations, the law of impossibility is relatively underdeveloped in the context of solicitation liability.[367] 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 characterizes attempt jurisprudence.[368] 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.[369]

The Model Penal Code, in contrast, applies a more nuanced approach to dealing with such issues. By viewing a solicitation to attempt the commission of a crime as a solicitation to commit that crime, it effectively carries over Code's general abolition of impossibility claims in the attempt context to the solicitation context.[370] Here's how this incorporation-based approach operates.

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[371] By broadly recognizing that an "actor can

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[367] *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).

[368] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5.

[369] *United States v. Williams*, 553 U.S. 285, 300 (2008). Or, as it is sometimes phrased by courts, "[i]t is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited." *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) (quoting LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1); *see Com. v. Jacobs*, 91 Mass. 274, 275 (1864) (no defense that defendant solicited another, who was physically unfit for military service, to leave state for purpose of entering military service elsewhere); *Benson v. Superior Court of Los Angeles Cty.*, 57 Cal. 2d 240, 243–44 (1962) (no defense that defendant solicited undercover agent to commit perjury in anticipated child custody proceedings). For relevant case law, see *Wright v. Gates*, 240 Ariz. 525 (2016); *Ford v. State*, 127 Nev. 608 (2011); *Saienni v. State*, 346 A.2d 152 (Del. 1975); *Luzarraga v. State*, 575 So.2d 731 (Fla. App. 1991); *People v. Breton*, 237 Ill.App.3d 355 (1992); *Meyer v. State*, 47 Md.App. 679 (1981); *Colbert v. Commonwealth*, 47 Va.App. 390 (2006). *See also People v. Thousand*, 465 Mich. 149, 168 (2001) ("[W]e are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.").

[370] Model Penal Code § 5.03 cmt. at 421. Note that the Model Penal Code similarly extends the same treatment of inherent impossibility afforded in attempt prosecutions to solicitation prosecutions by authorizing the court to account for the relevant issues at sentencing. Model Penal Code § 5.01 cmt. at 318. The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt, solicitation, or conspiracy, is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal. Model Penal Code § 5.05(2). First, the court may "impose sentence for a crime of lower grade or degree." *Id.* Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution." *Id.*

Generally speaking, this kind of "safety valve is extremely desirable in the inchoate crime area, which, by definition, involves threats of infinitely varying intensity." Buscemi, *supra* note 67, at 1187. In the solicitation context, however, such a provision will specifically "help avoid the injustice which might be created by the MPC's non-recognition of impossibility as a defense to a [solicitation] indictment." *Id.* at 1187; *see also* Alexander & Kessler, *supra* note 79, at 1193 ("Currently, garden-variety criminal solicitation is arguably subject to the requirement of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that the soliciting speech be directed to inciting and likely to incite the audience to imminent lawless acts").

[371] Model Penal Code § 5.01(1)(c).

be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[372]

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the solicitation context. "It would be awkward, however, to incorporate the impossibility language of attempt into other inchoate offenses."[373] With that in mind, the Model Penal Code instead "treats [solicitation] to attempt the commission of a crime as a [solicitation] to commit that crime."[374]

More specifically, Model Penal Code § 5.02(1) states that a person is guilty of an offense 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* . . . ." Inclusion of the term "attempt" in this formulation addresses the fact that

> 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.[375]

In practical effect, then, the Model Penal Code's general solicitation provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[376]

Since completion of the Model Penal Code, a handful of modern criminal codes have imported this legislative solution to impossibility.[377] But while many reform solicitation statutes "do not deal with the point explicitly," most "would undoubtedly be interpreted to reach the same result."[378] Which is to say, they can be read to

> cover one who solicits another to engage in conduct that, because of factors unknown to the defendant or the actor, is factually or legally impossible of

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

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

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 73, at 579.
[373] ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85.
[374] Model Penal Code § 5.03 cmt. at 421.
[375] Model Penal Code § 5.02 cmt. at 373-74.
[376] Model Penal Code § 5.01 cmt. at 297.
[377] *See, e.g.*, Ark. Code § 5-3-301; Or. Rev. Stat. § 161.435; Del. Code Ann. tit. 11, § 501; Ky. Rev. Stat. § 506.030; *see also* Model Penal Code § 5.02 cmt. at 374 n. 31 (collecting citations).
[378] Model Penal Code § 5.02 cmt. at 374 n.31.

being criminal, since it is the ultimate goal of the solicitation that determines the solicitor's liability.[379]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of solicitation prosecutions. RCC § 302(a)(2) accomplishes this by establishing that a request to bring about conduct that, if carried out, would constitute an "attempt" will also suffice for solicitation liability. The reference to an attempt is intended to incorporate the same approach applicable to impossibility in the latter context, which, pursuant to RCC § 301(a)(1), necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[380]

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Target Offenses. The general inchoate offense of solicitation is a relatively recent development in American criminal law, subject to significant variance insofar as its breadth of coverage is concerned.[381]

Solicitation was first recognized as a common law offense in the United States during the early nineteenth century.[382] In the ensuing years, some, but not all, American judiciaries endorsed general solicitation liability by way of common law.[383] And, among those courts that did opt to judicially recognize the offense, there existed disagreement

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[379] *Id.*; *see also* Model Penal Code § 5.04(a)-(b) ("[I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that . . . he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or . . . the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.").

[380] RCC § 302(a) likewise imports the same approach to recognizing inherent impossibility employed in RCC § 301(a). More specifically, where the solicitor's perspective of the situation is relied upon, the government must prove that the requested course of conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement precludes convictions for inherently impossible solicitations.

One other kind of impossibility addressed by RCC § 302 is "what might be called an impossible solicitation or conspiracy of a possible offense." ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85. In this situation, the impossibility does not arise not from the nature of the ultimate object offense, but rather, from the particular defendant's actions constituting the solicitation. *Id.* For example, the defendant's scheme for the planned killing of the intended victim may be entirely feasible, but nevertheless impossible because he whispers it through a door with no one behind it. *Id.* In such a situation, liability clearly attaches under RCC § 302(a)(1) because the defendant "tr[ied]" to persuade another person to commit a crime. And it also clearly attaches under RCC § 302(c) because the "defendant does everything he or she plans to do to effect the communication."

[381] Robbins, *supra* note 43, at 116.

[382] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Prior to the nineteenth century, the English common-law courts held indictable two specific forms of solicitation: importuning another to commit either a forgery for use in a trial or perjury, *Rex v. Johnson*, 89 Eng. Rep. 753, 753, 756, 2 Show. K.B. 1, 1, 3-4 (1679), and offering a bribe to a public official. *Rex v. Vaughan*, 98 Eng. Rep. 308, 310-11, 4 Burr. 2494, 2499 (1769). Not until the case of *Rex v. Higgins*, 102 Eng. Rep. 269, 2 East 5 (1801), did the English courts recognize solicitation as a distinct substantive offense. Robbins, *supra* note 43, at 116.

[383] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.,* Commentary on Ala. Code § 13A-4-1 ("In Alabama, until 1967, there was doubt as to whether the crime of solicitation even existed, as there was no statute nor case law on the subject.").

concerning the target offenses to which general solicitation liability ought to apply.[384] For example, some courts held that general solicitation liability appropriately applies to all forms of criminal conduct, without regard to the nature of the offense solicited.[385] Others, in contrast, resisted this conclusion, curtailing the scope of criminal liability on the basis that the solicitation of some forms of criminal conduct was simply "unworthy of serious censure."[386] Then, during the first half of the twentieth century, some legislatures abrogated general solicitation liability altogether in the course of abolishing common law crimes.[387]

It was with this backdrop in mind that the drafters of the Model Penal Code developed the Code's general solicitation provision, § 5.02, which unequivocally establishes that a person may be held criminally liable for "solicit[ing] to commit a crime."[388] This language serves two basic goals. First, it provides clear legislative recognition that the general inchoate offense of solicitation exists, "thereby remedying the omission that exist[ed] in those jurisdictions where common law crimes have been abolished."[389] Second, it "makes criminal the solicitation to commit *any offense*, thereby closing the gaps in common law coverage."[390]

As it relates to the first goal, general legislative recognition of solicitation liability, Model Penal Code § 5.02 has been quite influential. The contemporary legislative approach, reflected in a strong majority of American criminal codes, is to adopt a general solicitation statute that clearly specifies the target offenses to which solicitation liability applies.[391] Legislative adoption of general solicitation statutes of this nature is also a standard practice in states that have undertaken comprehensive code reform projects,[392] though it should be noted that "[e]ven in those jurisdictions with modern recodifications it is not uncommon for there to be no statute making solicitation a crime."[393] And, in those reform jurisdictions that have declined to adopt a general solicitation statute but abolished all common law crimes, general solicitation liability does not exist at all.[394]

As it relates to the second goal of the Code's drafters, extending general solicitation liability to all crimes, the Model Penal Code approach has been less influential. Generally

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[384] *See, e.g.*, Robbins, *supra* note 43, at 116; *Meyer v. State*, 425 A.2d 664, 668 n.5 (Md. 1981); Commentary on Ala. Code § 13A-4-1.
[385] Model Penal Code § 5.02 cmt. at 367.
[386] *Id.*; *see, e.g., Com. v. Barsell*, 424 Mass. 737, 738-42 (1997); Robbins, *supra* note 43, at 116.
[387] Model Penal Code § 5.02 cmt. at 367.
[388] Model Penal Code § 5.02(1); *see* Model Penal Code § 5.02 cmt. at 367 ("General statutory provisions punishing solicitations were not common before the Model Penal Code.").
[389] Model Penal Code § 5.02 cmt. at 367.
[390] *Id.*
[391] *See* Robbins, *supra* note 43, at 116 ("Thirty-three states and the United States currently catalogue solicitation as a general substantive crime.").
[392] *See, e.g.,* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030; Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; Utah Code Ann. § 76-4-203; Wyo. Stat. § 6-1-302
[393] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (listing Conn., Ind., Minn., Mo., Neb., N.J., Ohio and S.D.).
[394] *Id.*

speaking, there exists "considerable variation" concerning the breadth of coverage reflected in modern solicitation statutes.[395] A slim majority are consistent with Model Penal Code § 5.02(1) in that they criminalize solicitations to commit *any* crime.[396] But a strong plurality are materially narrower. Some state statutes, for example, cover only the solicitation of felonies,[397] or all felonies plus particular classes of misdemeanors.[398] And others only apply to particular classes of felonies,[399] such as, for example, the federal solicitation statute, which limits the scope of general solicitation liability to crimes of violence.[400]

The above disparities in the prevalence and scope of general solicitation liability reflect the controversial nature of the offense.[401] It has been asserted, 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."[402] The reason? "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."[403] On an even more basic level, however, concerns with general solicitation liability revolve around the "extremely inchoate nature of the crime," namely, it allows the penal system to punish conduct far back on the continuum of acts leading to a completed crime (i.e., "mere preparation" by attempt standards).[404] "Viewed solely as an inchoate offense," then, it has been argued that solicitation essentially "punish[es] evil intent alone."[405]

None of which is to say that there aren't sound justifications supporting general solicitation liability. It has been argued, for example, that solicitation liability appropriately accounts for the "special hazards posed by potential concerted criminal

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[395] *Id.*

[396] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030.

[397] *See* Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; R.I. Gen. Laws Ann. § 11-1-9; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.

[398] Iowa Code Ann. § 705.1; Or. Rev. Stat. § 161.435.

[399] Me. Rev. Stat. tit. 17-A, § 153; Tex. Penal Code Ann. § 15.03; Cal. Penal Code § 653f.

[400] 18 U.S.C.A. § 373 ("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States . . . ."); *see* S. Rep. No. 98–225, 98th Cong., 2d Sess. 308 (1984), *reprinted in*, 1984 U.S. Code Cong. & Admin. News 3182, 3487 ("The Committee believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that his act deserves criminal sanctions whether or not the crime of violence is actually committed."); *United States v. Korab*, 893 F.2d 212, 215 (9th Cir. 1989).

[401] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (noting that these variances reflect the absence of "a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses").

[402] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Davis*, 319 Mo. 1222, 1236 (1928) (White, J., concurring); Robbins, *supra* note 43, at 116; WORKING PAPERS, *supra* note 48, at 370.

[403] Robbins, *supra* note 43, at 116; *see, e.g.,* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11; Commentary on Haw. Rev. Stat. Ann. § 705-510; *People v. Werblow*, 241 N.Y. 55, 64-65 (1925).

[404] Robbins, *supra* note 43, at 116; *see, e.g.,* LAFAVE, *supra* NOTE 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on Haw. Rev. Stat. Ann. § 705-510.

[405] Robbins, *supra* note 43, at 116.

activity."[406] Indeed, few take issue with the existence of attempt liability, and "a solicitation is, if anything, more dangerous than a direct attempt, because it may give rise to the special hazard of cooperation among criminals."[407] Furthermore, "the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling."[408] And, as a matter of practice, "the imposition of liability for criminal solicitation has proved to be an important means by which the leadership of criminal movements may be suppressed."[409]

Efficacy aside, though, even those who support general 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 more pronounced in the solicitation context given that "the crime may be committed merely by speaking."[410] This problem, alongside the other issues raised above, perhaps explains why both the common law and contemporary legislative practice reflect a range of approaches to addressing the target offenses to which general solicitation liability attaches.

In sum, American legal authority supports recognition of general solicitation liability, but it does not provide clear direction concerning appropriate scope of coverage. At the very least, however, it does indicate that the District's current approach, of subjecting only crimes of violence to general solicitation liability, is a reasonable one, which effectively balances the competing policy considerations implicated by the topic. It is, therefore, the approach incorporated into the RCC pursuant to § 302(a)(3), which clarifies that only crimes of violence provide the basis for general solicitation liability.

RCC §§ 302(a), (b), & (c): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of solicitation is concerned.[411] Generally speaking, though, the Model Penal Code's general provision, § 5.02,[412] provides the basis for most contemporary reform efforts. The general

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[406] Model Penal Code § 5.02 cmt. at 365-66.
[407] *Id.*
[408] *Id.*; *see People v. Kauten*, 324 Ill. App. 3d 588, 592 (2001) (relying on similar reasoning to reject claim that punishment of solicitation more severely than conspiracy is unconstitutionally disproportionate).
[409] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.
[410] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. *See also* WORKING PAPERS, *supra* note 48, 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.").
[411] *See, e.g., Com. v. Barsell*, 424 Mass. 737, 740 (1997) ("As increasing numbers of States have chosen to codify their law on solicitation, a great variety of approaches to criminal solicitation have emerged.")
[412] The entirety of this provision reads as follows:

> (1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.

definition of solicitation incorporated into RCC §§ 303(a), (b), and (c) incorporates drafting techniques from the Model Penal Code while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy drafting decision reflected in the Model Penal Code's general definition of solicitation is the manner in which the culpable mental state requirement of solicitation is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.02(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to solicitation ambiguous.[413]

Illustrative is the prefatory clause of Model Penal Code § 5.02(1), which entails proof that the defendant make the requisite request "with the purpose of promoting or facilitating" the commission of the offense that is the object of the solicitation. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[414]

That the Model Penal Code fails to clarify the culpable mental state requirement (if any) applicable to each element of a solicitation appears, at least in part, to have been intentional. More specifically, the commentary to Model Penal Code § 5.02 explicitly states that the "matter" of whether the results and circumstances are subject to a principle of culpable mental state equivocation or elevation "is deliberately left open."[415] And this silence is consistent with the Code's approach to conspiracy, reflected in Model Penal Code § 5.03(1), which "does not attempt to [address the culpable mental state requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[416]

While consistent with the Model Penal Code's conspiracy provisions, however, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative

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> (2) Uncommunicated Solicitation. 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.
>
> (3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Model Penal Code § 5.02.

[413] *See also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 756 (1983) (setting forth similar critique of Model Penal Code approach to codifying conspiracy).

[414] *See id.*

[415] Model Penal Code § 5.02(1) cmt. at 371 n.23.

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

guidance concerning the culpable mental state requirement of solicitation.[417] Indeed, at least one court has observed that the law of solicitation "is an area that *must* be left to comprehensive legislation, rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues through] continued reliance on common law."[418] Comprehensive solicitation legislation also serves the interests of due process, however: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[419]

Since publication of the Model Penal Code, state legislatures have modestly improved upon the Code's treatment of solicitation's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that solicitation's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting a crime."[420] While helpful, however, no state statute has attempted to deal comprehensively with the state of mind required for the circumstance or result elements that comprise the target of a solicitation. Which is to say: there is no American criminal code that fully implements a statutory element analysis of solicitation's culpable mental state requirement.

The RCC approach to codifying the culpable mental state of solicitation, in contrast, strives to provide that clarification, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 302(a) establishes that the culpability requirement applicable to a criminal solicitation necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern attempt statutes.[421] It effectively communicates that solicitation liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[422]

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

[418] *Barsell*, 424 Mass. 737 at 741; *see also* Robinson & Grall, *supra* note 153, at 754 ("The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."). As one commentator frames the issue:

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

Wesson, *supra* note 93, at 209.

[419] Wesson, *supra* note 93, at 209.

[420] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435.

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

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

Next, RCC § 302(a)(1) clearly and directly articulates that solicitation's distinctive purpose requirement governs the conduct which constitutes the object of the command, request, or efforts at persuasion. This is achieved by expressly applying a culpable mental state of purpose to the conduct requirement of solicitation. More specifically, RCC § 302(a)(1) states that the solicitor must, *"[p]urposely" command, request, or try to persuade another to* . . . engage in or aid the planning or commission of [criminal] conduct."

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the solicitation.[423] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of solicitation, separates the purpose requirement from the conduct requirement.[424] The latter approach is unnecessarily verbose—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing solicitation.

Finally, RCC § 302(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[425] More specifically, RCC § 302(b) establishes that: "Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, that person must intend to bring about the results and circumstances required by that offense." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a solicitation is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of the solicitor is required as to the requisite elements under RCC § 302(b).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing a solicitation, which avoids the flaws and ambiguities reflected in Model Penal Code § 5.02(1).

One other drafting flaw reflected in the Model Penal Code approach to codifying solicitation liability, which is likewise addressed by the RCC, is the disposition of uncommunicated solicitations. The relevant general provision, Model Penal Code § 5.02(2), establishes that "[i]t 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." Generally speaking, this provision clarifies that the intended recipient of a solicitor's communication need not receive it. Left unclear,

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of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

[423] *See supra* note 90 (collecting statutory authorities).

[424] For example, Model Penal Code § 5.02(1) states, first, that a person must act "with the purpose of promoting or facilitating [] commission" of a crime, and, second, that he must "command[], encourage[] or request[] 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."

[425] *See* RCC § 302(b) ("Notwithstanding subsection (a), to be liable for solicitation, the person must at least intend to bring about any results and circumstances required by the target offense.")

however, is just how far along the defendant must be in actually effecting the requisite communication.

Consider, for example, 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. 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, which is to say 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 since he was unable to carry out the entirety of his criminal plans due to external interference.

With this distinction in mind, the requirement of "conduct [] designed to effect [] communication" stated in Model Penal Code's § 5.02(2) is ambiguous as to whether *only* complete attempts at communication provide the basis for general solicitation liability, or, alternatively, whether incomplete attempts will *also* suffice. (Assuming incomplete attempts suffice, moreover, the Code is furthermore silent on *just how much progress*—e.g., dangerous proximity versus substantial step—must be made in the development of criminal communications.)

Fortunately, the Model Penal Code commentary explicitly addresses this issue, explaining that proof of "the last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground."[426] Pursuant to this clarification, it is clear that the drafters only intended to extend general solicitation liability to *complete* attempts under Model Penal Code § 5.02(2). If true, however, then the preferable approach to doing so would be to explicitly communicate this point by statute, rather than through commentary, particularly given that this statutory language is subject to multiple readings.[427]

This is the approach reflected in the RCC. More specifically, RCC § 302(c) states that "[i]t is immaterial under subsection (a) that the intended recipient of a person's command, request, or efforts at persuasion never received such communication provided that the person has done everything he or she plans to do to effect the communication."[428]

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[426] Model Penal Code § 5.02 cmt. at 381.

[427] Many state solicitation statutes that omit a provision such as Model Penal Code § 5.02(2) instead provide that "attempts" to communicate provide a viable basis for solicitation liability. *See supra* note 70 (collecting statutory citations). Such an approach is equally, if not more, ambiguous, however, for the same reasons just noted. RCC § 302(c) avoids such problems by referencing "trying" to communicate rather than "attempting" to communicate.

[428] Three additional departures from the Model Penal Code approach to codification bear notice. First, RCC § 302(a) references "trying to persuade" in lieu of "encouragement" as utilized in Model Penal Code § 5.02(1). The rationale and legislative authorities in support of this revision are provided *supra* note 48. Second, RCC § 302(a)(3) references "aid[ing] [in] the planning or commission of conduct" to address the relationship between solicitation and accomplice liability in lieu of the Model Penal Code's reference to "complicity in its commission" in § 5.02(1). This revision more clearly expresses the relevant principle of accessorial liability, while also ensuring that the RCC's general definition of solicitation runs parallel with the RCC's general definition of conspiracy, which utilizes the same language. *See* RCC § 303(a) ("Purposely

RCC § 22E-303. Criminal Conspiracy.

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

Most of the substantive policies incorporated into RCC §§ 303(a) and (b)—namely, the purpose requirement governing conduct, the principle of intent elevation governing results and circumstances, the agreement requirement, the overt act requirement, and the exclusion of non-criminal objectives—reflect majority or prevailing legal trends governing the law of conspiracy.[429] The most notable exception is the plurality requirement codified by RCC § 303(a), which reflects a minority trend.

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

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

RCC § 303(a) (Prefatory Clause): Relation to National Legal Trends on Plurality Requirement. Within American criminal law, it is well established that the general inchoate offense of conspiracy is comprised of an intentional agreement to commit a criminal offense.[430] One fundamental issue at the heart of what this formulation actually means, however, is whether conspiracy is a *bilateral* or *unilateral* offense.

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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 . . . ."). Third, RCC § 302(a)(3) references "conduct, which, if carried out, will constitute that offense" in lieu of the phrase "*specific* conduct" as utilized in Model Penal Code § 5.02(1). This revision, it is submitted, more clearly describes the nature of the communication necessary to support solicitation liability. *See also* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting legislative authorities in support).

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

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

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

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

The bilateral approach to conspiracy incorporates a plurality principle under which proof of a subjective agreement between at least two parties who share a particular criminal objective is a necessary ingredient of conspiracy liability.[431] The unilateral approach to conspiracy, in contrast, rejects this kind of plurality principle, instead allowing for conspiracy liability to be applied to a person who him or herself agrees to commit a crime, provided that he or she believes another person has entered into that agreement.[432]

The difference between these two views of conspiracy liability is most significant in cases in which one person, committed to furthering a criminal enterprise, approaches another seeking to enlist his or her cooperation.[433] If the other party *seems* to agree, but secretly withholds agreement (perhaps even resolving to notify the authorities), the initiating person is guilty of conspiracy under a unilateral approach, but not under a bilateral approach.[434] The bilateral approach also rejects conspiracy liability where the only other party to an alleged conspiracy is mentally incapable of agreeing—whereas the unilateral approach would not.[435]

Historically speaking, conspiracy emerged as a bilateral offense.[436] In the eyes of the common law, the gist of a conspiracy is an agreement, and an agreement is generally understood to be a group act.[437] So unless two or more people are parties to an agreement, it does not make sense to speak of a conspiracy.[438] Typical older conspiracy statutes

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

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

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

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

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

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

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

[438] *Id.*

codified this bilateral approach by framing the offense in terms of an agreement between "two or more persons."[439]

In recent years, the trend among reform jurisdictions has been to replace the common law's bilateral approach with a unilateral approach. Rather than require that "two or more persons" agree, contemporary conspiracy provisions more frequently focus on whether one person "agrees with [another] person."[440] Which is to say: these provisions "focus inquiry on the culpability of the actor whose liability is in issue, rather than on that of the group of which [she] is alleged to be a part."[441] The basis for this shift is rooted in the Model Penal Code.

More specifically, the Model Penal Code's general conspiracy provision, § 5.03(1)(a), establishes that "[a] person is guilty of conspiracy *with another person or persons* to commit a crime if . . . *he* . . . *agrees with such other person or persons* that they or one or more of them will engage in conduct that constitutes such crime . . . ."[442] Under this approach, "[g]uilt as a conspirator is measured by the situation as the actor views it."[443] Which is to say: so long as the defendant "believe[s] that he is agreeing with another that they will engage in the criminal offense," that person may be subjected to conspiracy liability under Model Penal Code § 5.03(1)(a).[444]

Since completion of the Model Penal Code, many jurisdictions have opted to abandon the common law's plurality principle. It now appears, for example, that a "majority of states [] apply[] the unilateral theory to the crime of conspiracy."[445] However, the general conspiracy statutes in some jurisdictions continue to retain the classic bilateral

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

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

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

[442] Model Penal Code § 5.03.

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

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

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

phraseology ("two or more persons").[446] Other jurisdictions appear to adopt the Model Penal Code's unilateral phrasing ("one person agrees with another person"), yet their state appellate courts have nevertheless construed them to yield a bilateral approach.[447]

Driving this disparity of treatment are the competing considerations respectively implicated by the bilateral and unilateral approaches. As a matter of plain English, for example, the plurality principle has strong intuitive appeal. As noted above, early proponents of the bilateral approach to conspiracy emphasized the common sense notion of agreement, under which it is simply "impossible for a man to conspire with himself."[448] Even today, however, legal authorities point towards "dictionary definitions" of agreement as providing a relevant basis for preserving a bilateral approach.[449]

Those who support a unilateral approach to conspiracy, in contrast, argue that considerations of social policy ought to outweigh concerns of linguistic usage. For example, proponents of the unilateral approach argue that it is the policy that best serves the "subjectivist" goal of incapacitating dangerous offenders.[450] As one court phrases it: an actor "who fails to conspire because her 'partner in crime' is an undercover officer feigning agreement is no less personally dangerous or culpable than one whose colleague in fact possesses the specific intent to go through with the criminal plan."[451]

Proponents of the unilateral approach additionally argue that recognition of a plurality principle undermines the law enforcement purpose of conspiracy laws.[452] Illustrative is the situation of an undercover police officer who feigns willingness to agree with an unsuspecting criminal.[453] Under a bilateral approach, that officer might have to wait until the criminal engages in sufficient conduct in furtherance of the agreed-upon criminal objective to meet the standard for attempt liability in order to ensure the existence of a prosecutable offense.[454]

Contemporary proponents of a bilateral approach tend to find the above lines of reasoning to be less than entirely persuasive, however.[455] For one thing, the extent to which the bilateral approach specifically undermines the law enforcement purpose of conspiracy laws may be overstated since a defendant who encourages, requests, or commands an undercover officer to commit a crime may—even absent true agreement on that officer's part—be found guilty of solicitation.[456]

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

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

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

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

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

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

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

[453] *See id.*

[454] *See id.*

[455] *See id.*

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

More broadly, those who today support a plurality principle argue that it directly accords with the objectivist "special dangers in group criminality" rationale at the heart of conspiracy liability.[457] Here, for example, is how both state and federal courts have phrased it:

> 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.[458]

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

RCC § 303(a)(1): Relation to National Legal Trends on Agreement Requirement. The "essence"[459] of a conspiracy is the agreement.[460] It constitutes a necessary *actus reus* of the offense,[461] which is comprised of a "communion with a mind and will . . . on the part

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

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

Pacheco, 125 Wash. 2d at 157 (citing *United States v. Escobar de Bright*, 742 F.2d 1196, 1199 (9th Cir. 1984) and Note, *Developments in the Law—Criminal Conspiracy,* 72 HARV. L. REV. 920, 926 (1959)); *see, e.g.,* Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice,* 65 GEO. L.J. 925, 929–30 (1977); Dierdre A. Burgman, *Unilateral Conspiracy: Three Critical Perspectives,* 29 DEPAUL L. REV. 75, 93 (1979).

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

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

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

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

of each conspirator."[462] It also provides externalized evidence that the parties intended for a crime to be committed.[463]

In practice, the agreement requirement is viewed quite broadly by American legal authorities. For example, it is well established that the agreement at the heart of conspiracy liability need not be express.[464] Nor is "a physical act of communication of an agreement (e.g., a nod of the head or some verbal exchange) required."[465] Rather, proof of a mere tacit understanding can be sufficient to establish conspiracy liability.[466] And the requisite "agreement can exist although not all of the parties to it have knowledge of every detail of the arrangement, as long as each party is aware of its essential nature."[467]

One particularly important aspect of the agreement requirement reflected in American criminal law on conspiracy is its relationship with accessory liability. It is well established, for example, that the parties to a conspiracy need not themselves agree "to undertake all of the acts necessary for the crime's completion," let alone directly participate in the commission of an offense.[468] Rather, "[o]ne can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense."[469]

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

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

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

[463] 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.").

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

[465] *Id.*; *see United States v. James*, 528 F.2d 999, 1011 (5th Cir. 1976). Which is to say that "[t]here need not be an explicit offer and acceptance to engage in a criminal conspiracy; the agreement may be inferred from evidence of concert of action among people who work together to achieve a common end." Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U. L. REV. 371, 405 (2014); *see, e.g., Am. Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946); *United States v. Lopez*, 979 F.2d 1024, 1029 (5th Cir. 1992); *United States v. Hegwood*, 977 F.2d 492, 497 (9th Cir. 1992); *United States v. Simon*, 839 F.2d 1461, 1469 (11th Cir. 1988)).

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

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

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

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

> conspiracy. Agreeing to store drugs at one's house in support of the conspiracy may be sufficient.[470]

That planned participation as an accessory will provide the basis for conspiracy liability "if the requisite consensus is involved" is not only an established common law principle.[471] It also reflects the "contemporary understanding" of conspiracy liability.[472] The basis for the modern approach to the issue is rooted in the provisions of the Model Penal Code and the proposed Federal Criminal Code.[473]

The relevant Model Penal Code provision, § 5.03(1)(b), permits a person to be convicted of conspiracy if he or she "agrees to aid such other person or persons in the planning or commission of such crime . . ."[474] The commentary to this provision emphasizes that, pursuant to such language, the "actor need not agree 'to commit' the crime."[475] Rather, "so long as the purpose of the agreement is to facilitate commission of a crime," conspiracy liability is appropriate under circumstances where the planned participation is of an accessorial nature.[476]

The proposed Federal Criminal Code employs a similar approach, albeit articulated through different language. Under the relevant provision, § 1004(1), "[a] person is guilty of conspiracy if he agrees with one or more persons *to engage in or cause the performance of conduct* which, in fact, constitutes a crime or crimes . . . ."[477] By enabling conspiracy liability to rest upon causing another person to engage in conduct that constitutes a crime, this proposed Federal Criminal Code provision would explicitly enable planned accessorial participation to provide the basis for conspiracy liability.[478]

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[470] 136 S. Ct. 1423, 1430 (2016). Likewise, where "D1 agrees to provide D2 with a gun to be used to kill V, D1 is guilty of conspiracy to commit murder, although she did not agree to commit the offense herself." DRESSLER, *supra* note 61, at § 29.04 n.77

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

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

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

[474] Model Penal Code § 5.03(1)(b).

[475] Model Penal Code § 5.03(1)(b) cmt. at 409.

[476] *Id.*

[477] Proposed Federal Criminal Code § 1004(1).

[478] *Id.*; *see* Buscemi, *supra* note 161, at 1134. Here's an example:

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

Id. (emphasis added).

Numerous modern criminal codes explicitly codify one of these two formulations.[479] However, "[e]ven under statutes defining conspiracy simply as an agreement *to commit* a crime," courts routinely conclude that planned participation as an accessory provides an appropriate basis for conspiracy liability—notwithstanding the absence of an explicit legislative hook.[480]

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

RCC §§ 303(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. Understanding conspiracy's culpable mental state requirement is particularly crucial to denoting the contours of criminal liability given that this frequently charged offense is "predominantly mental in composition."[481] Complicating this understanding, however, is the fact that there has "always existed considerable confusion and uncertainty about precisely what mental state is required for this crime."[482] That American legal authorities have long struggled to address the culpable mental state requirement governing conspiracy is not surprising, however: it is a "particularly challenging" topic by any standard.[483]

Historically speaking, the treatment of the culpable mental state requirement of conspiracy in American criminal law has evolved in a manner similar to that of the culpable mental state requirement governing complicity. At common law, for example, both conspiracy and complicity were viewed through the lens of offense analysis, under which each was understood to entail proof of a "specific intent." That is, whereas conspiracy liability entailed proof of a "specific intent" to commit an agreed-upon offense,[484] complicity required proof of a "specific intent" to aid another in the commission of an offense.[485] More recently, however, American legal authorities have come to realize that both of these *mens rea* formulations are fundamentally ambiguous. The reason? They fail to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[486]

Ordinarily, a clear element analysis of a consummated crime entails a consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[487] The same is also true of complicity and conspiracy, which respectively criminalize steps towards completion of a particular crime (respectively, aiding or agreeing to commit/aid an

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[479] *Compare, e.g.,* N.J. Stat. Ann. § 2C:5-2; 18 Pa. Stat. and Cons. Stat. Ann. § 903 *with* N.D. Cent. Code Ann. § 12.1-06-04; Wash. Rev. Code Ann. § 9A.28.040; N.Y. Penal Law § 105.17; Ala. Code § 13A-4-3 Or. Rev. Stat. Ann. § 161.450 ; Me. Rev. Stat. tit. 17-A, § 151.

[480] Buscemi, *supra* note 161, at 1134; *see supra* notes 155-60.

[481] Albert Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 632 (1941).

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

[483] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).

[484] *See, e.g.,* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2; *People v. Swain*, 12 Cal. 4th 593, 600 (1996).

[485] *Swain*, 12 Cal.4th at 602; *People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998).

[486] Wechsler et al., *supra* note 171, at 967.

[487] *Id.*

offense). At the same time, the inchoate and multi-participant nature of both complicity and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (often committed by someone else) that, if carried out, would consummate the target offense.[488]

For this reason, it is frequently said that both complicity and conspiracy incorporate "dual intent[]" requirements.[489] In the context of conspiracy, for example, the first intent requirement relates to the parties' culpable mental state with respect to future conduct: generally speaking, the parties must "intend," by their agreement, to promote or facilitate conduct planned to culminate in an offense.[490] The second intent requirement, in contrast, relates to the parties' culpable mental state with respect to the results and/or circumstance elements of the target offense: generally speaking, the parties must "intend," by their agreement, to bring them about.[491]

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

Resolution of this question is "crucial to the resolution of the difficult problems presented when a charge of conspiracy is leveled against a person whose relationship to a criminal plan is essentially peripheral."[492] Illustrative situations include: (1) whether the operator of a telephone answering service may be convicted of conspiracy for agreeing to provide telephone messages to known prostitutes;[493] or (2) whether a drug wholesaler may be convicted of conspiracy for agreeing to sell large quantities of legal drugs to a buyer who the wholesaler knows will use them for unlawful purposes.[494]

In these kinds of cases, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[495] What remains to be determined is whether this culpable mental state provides a sufficient basis for a conspiracy conviction. Conflicting policy considerations are implicated in the

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[488] *See, e.g.,* Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).
[489] For discussion of the dual intent requirement in the context of complicity, see *State v. Foster*, 202 Conn. 520, 526 (1987). For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *see also* Harno, *supra* note 169, at 631; *United States v. Alvarez*, 610 F.2d 1250, 1255 (5th Cir. 1980); *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).
[490] Robinson, *supra* note 176, at 864.
[491] *Id.*
[492] Model Penal Code § 5.03 cmt. at 403.
[493] *See People v. Lauria*, 251 Cal. App. 2d 471 (Ct. App. 1967).
[494] *See Direct Sales Co. v. United States*, 319 U.S. 703 (1943).
[495] DRESSLER, *supra* note 61, at § 27.07. Typical also "is the case of the person who sells sugar to the producers of illicit whiskey," since he or she "may have little interest in the success of the distilling operation and be motivated mainly by the desire to make the normal profit from an otherwise lawful sale." Wechsler et al., *supra* note 171, at 1030. "To be criminally liable, of course," this actor "must at least have knowledge of the use to which the materials are being put"; however, "the difficult issue presented is whether knowingly facilitating the commission of a crime ought to be sufficient, absent a true purpose to advance the criminal end." *Id.*

resolution of this question, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[496]

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

> [C]onspiracy laws should be reserved for those with criminal motivations, rather than seek to sweep within the drag-net of conspiracy all those who have been associated in any degree whatever with the main offenders . . . [T]he law should not be broadened to punish those whose primary motive is to conduct an otherwise lawful business in a profitable manner. Indeed, in extending liability to merchants who know harm will occur from their activities, there is a risk that merchants who only suspect their customers' criminal intentions (thus, are merely reckless in regard to their customers' plans) will also be prosecuted, thereby seriously undermining lawful commerce.[497]

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

> [S]ociety has a compelling interest in deterring people from furnishing their wares and skills to those whom they know are practically certain to use them unlawfully. Free enterprise should not immunize an actor from criminal responsibility in such circumstances; unmitigated desire for profits or simple moral indifference should not be rewarded at the expense of crime prevention.[498]

Although case law from the mid-twentieth century appears to reflect both some disagreement[499] and ambiguity[500] on the choice between these two positions, it appears that

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

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

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

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

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

contemporary American criminal law has embraced the true purpose view.[501] The basis for this resolution of the issue is the work of the Model Penal Code.

Having considered the consequences of holding criminally liable those who knowingly provide goods or services to criminal schemes—whether under a conspiracy theory (based on agreement) or a complicity theory (based on assistance)—the Model Penal Code drafters ultimately opted against it, siding "in the complicity provisions of the Code[] in favor of requiring a purpose to advance the criminal end."[502] The Model Penal Code drafters thereafter deemed "the case" for this resolution to be an "even stronger one" in the context of conspiracy, thereby making "the same purpose requirement that governs complicity essential for conspiracy."[503]

More specifically, the Model Penal Code's general definition of conspiracy, § 5.03(1), like its general definition of complicity, § 2.06(3), requires proof that the requisite agreement was accompanied by "the purpose of promoting or facilitating the commission of the crime."[504] The relevant explanatory note to this provision states that "[t]he purpose requirement is meant to extend to [the] conduct elements of the offense that is the object of the conspiracy."[505] And the accompanying commentary explicitly states that this general requirement of purpose is intended to clarify that, among other issues, "[a] conspiracy does not exist if a provider of goods or services is aware of, but fails to share, another person's criminal purpose."[506]

Since publication of the Model Penal Code in 1962, the drafters' recommended embrace of the true purpose view appears to have been widely accepted. For example, "most of the modern codes specifically state that [a conscious desire] to commit a crime is required" by their general conspiracy offense.[507] Even outside of reform jurisdictions, however, "all the states which have demonstrated their intention to enact a relatively thorough codification of the conspiracy offense" seem to endorse the true purpose view.[508] The true purpose view also finds support in contemporary case law, which establishes that

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[501] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2.
[502] Model Penal Code § 5.03 cmt. at 406.
[503] *Id.*
[504] Model Penal Code § 5.03(1).
[505] Model Penal Code § 5.03(1) (explanatory note)
[506] Model Penal Code § 5.03(1) cmt. at 404. *See also id.* (noting that this formulation "should also dispel the ambiguity inherent in many judicial formulations that predicate conspiracy on merely 'joining' or 'adhering' to a criminal organization or speak of an 'implied agreement' with the conspirators by aiding them 'knowing in a general way their purpose to break the law'").
[507] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 n.111. *See, e.g.*, Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1003; Ark. Code Ann. § 5-3-401; Colo. Rev. Stat. Ann. § 18-2-201; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 511; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-520; Ill. Comp. Stat. Ann. ch. 720, § 5/8-2; Ind. Code Ann. § 35-41-5-2; Ky. Rev. Stat. Ann. § 506.040; Me. Rev. Stat. Ann. tit. 17-A, § 151; Mo. Ann. Stat. § 564.016; Mont. Code Ann. § 45-4-102; Neb. Rev. Stat. § 28-202; N.H Rev. Stat. Ann. § 629:3; N.J. Stat. Ann. § 2C:5-2; N.M. Stat. Ann. § 30-28-2; N.Y. Penal Law § 105.00; Ohio Rev. Code Ann. § 2923.01; Or. Rev. Stat. § 161.450; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-103; Tex. Penal Code Ann. § 15.02; Utah Code Ann. § 76-4-201; Wash. Rev. Code § 9A.28.040; W. Va. Code § 61-10-31; Wis. Stat. Ann. § 939.31. Note, however, that "at least two states have adopted criminal facilitation statutes that clearly and unequivocally eliminate the requirement that the defendant share the co-conspirator's [purpose] to commit a crime." *State v. Maldonado*, 137 N.M. 699, 703 n.2 (citing Ky. Rev. Stat. Ann. § 506.080; N.Y. Penal Law, §§ 115.00 to 115.08).
[508] Buscemi, *supra* note 161, at 1145–48; *see, e.g.,* W. Va. Code § 61-10-31; La. Rev. Stat. Ann. § 14:26

"knowing aid is not [a] sufficient" basis for liability.[509] Likewise, legal commentary similarly appears to support the true purpose view in the context of conspiracy liability.[510]

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

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

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

Insofar as the above issues are concerned, American legal authorities uniformly support two general principles. First, a "conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent" applicable to the objective elements of "the substantive offense itself."[511] And second, "the culpability

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

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

[511] *Ingram v. United States*, 360 U.S. 672, 678 (1959); G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under Rico*, 33 AM. CRIM. L. REV. 1345, 1535 (1996). Note also that other culpability requirements

required for conviction of conspiracy at times must be greater than is required for conviction of the object of the agreement."[512] What remains to be determined, however, is the scope of the latter principle. For example, *when* must the culpable mental state requirement governing conspiracy be greater than that of the target offense, and, to the extent that this kind of elevation is appropriate, *which* culpable mental states will satisfy it? On these questions, American criminal law has generally not been a model of clarity.

The most well-established rule in this area of law is as follows: "[T]here is no such thing as a conspiracy to commit a crime which is defined in terms of recklessly or negligently causing a result."[513] In practice, this rule does not preclude the government from charging conspiracies to commit target offenses comprised of results subject to a non-intentional culpable mental state. However, where "recklessness or negligence suffices for the actor's culpability with respect to a result element of a substantive crime, as, for example, when homicide through negligence is made criminal," proof of a higher culpable mental state is necessary to secure a conspiracy conviction.[514]

This rejection of reckless or negligent conspiracies (insofar as results are concerned) is deeply rooted, finding support in a broad range of common law and modern legal authorities. It seems implicit, for example, in the general statutory requirement of purpose—discussed *supra*—applicable to conspiracy liability originally proposed by the Model Penal Code and thereafter adopted by "most of the modern codes."[515] And indeed, state courts in reform jurisdictions routinely (but not always[516]) hold that a defendant cannot be charged with "conspir[ing] to commit a crime where the culpability is based upon the result of reckless [or negligent] conduct."[517] Outside reform jurisdictions the situation is much the same: "[n]umerous state courts" have exercised their common law authority to hold "that one cannot conspire to accomplish an unintended result."[518]

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governing the target offense are imported into a conspiracy charge. *See, e.g., United States v. Chagra*, 807 F.2d 398 (5th Cir. 1986) (conspiracy to commit second degree murder legally possible, as where prosecution proves that at the moment of conspiratorial agreement, the intent "was impulsive and with malice aforethought"); *United States v. Croft*, 124 F.3d 1109 (9th Cir. 1997) (discussing *id.*).

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

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

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

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

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

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

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

As for whether only a true purpose to cause a result—or, alternatively, a conscious desire *or* awareness/belief—will suffice, American legal authorities are less clear. Writing at the turn of the twentieth century, for example, one frequently cited law review article observes that "a person may be held to intend that which is the *anticipated consequence* of a particular action to which he agrees, when that action is unreasonable in view of that consequence; and thus his agreement to perform the unreasonable action is equivalent to an agreement to help accomplish its consequence."[519] This seems to indicate that either purpose or knowledge/intent as to a result is an appropriate basis to ground a conspiracy conviction.

More contemporary legal authorities seem to indicate, in contrast, that only a true purpose to cause a result will suffice. For example, the Model Penal Code drafters understood their general purpose requirement—"the purpose of promoting or facilitating" the commission of the crime—to entail a principle of culpable mental state elevation applicable to results under which "it would not be sufficient, as it is under the attempt provisions of the Code, if the actor only believed that the result would be produced but did not consciously plan or desire to produce it."[520]

The commentary to one modern criminal code, Hawaii, appears to endorse this principle of purpose elevation.[521] And it is also occasionally referenced by the courts in reform jurisdictions, though it should be noted that these references all seem to occur in the context of cases involving prosecutions involving recklessness or negligence, not knowledge.[522] Indeed, there appears to be a dearth of case law directly addressing the purpose vs. knowledge issue head-on in the context of results, i.e., decisions overturning a conspiracy conviction where the parties formed an agreement with the *conscious desire* of facilitating planned conduct, *believing* it would result it some prohibited harm, on the rationale that the parties *did not consciously desire* that harm to occur.

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

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

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

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

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

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

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

> [I]f two persons plan to destroy a building by detonating a bomb, though they know and believe that there are inhabitants in the building who will be killed by the explosion, they are nevertheless guilty only of a conspiracy to destroy the building and not of a conspiracy to kill the inhabitants.[523]

This "restrictive" outcome, some have argued, "is necessitated by the extremely preparatory behavior that may be involved in conspiracy."[524] Where, however, the actors' culpable knowledge or belief can be proven beyond a reasonable doubt, these mental states would seem to provide a legitimate basis for imposing liability for conspiracy to kill—just as they provide a legitimate basis for imposing liability for an attempt to kill.[525] Consistent with this perspective, others have argued in favor of allowing non-purposeful mental states (as to results) to ground both attempt and conspiracy convictions.[526]

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

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

Part of this complexity is a product of the fact that the relevant legal authorities are nearly all contained in case law. For example, whereas the commentary to Model Penal Code § 5.03(1) clarifies that the drafters intended for the relevant purpose requirement to apply to conduct and results, the commentary explicitly deems the relationship between a would-be conspirator's state of mind and the circumstances of the target offense to be an issue "best left to judicial resolution."[527] And since publication of the Model Penal Code, only one reform jurisdiction, Hawaii, appears to have legislatively addressed the issue, and even then the relevant principle—one of intent elevation—is communicated through

[523] Model Penal Code § 5.03 cmt. at 408.
[524] Commentary to Haw. Rev. Stat. Ann. § 705-520.
[525] *But see id.* ("While this result may seem unduly restrictive from the viewpoint of the completed crime, it is necessitated by the extremely preparatory behavior that may be involved in conspiracy.").
[526] *See* Robinson & Grall, *supra* note 44, at 755–57 (intent elevation for both); Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1174–75 (1997) (reckless elevation for both).
[527] Model Penal Code § 5.01 cmt. at 414.

commentary.[528] (English statutory law more explicitly codifies a principle of intent elevation for circumstances.[529])

Another part of this complexity, however, is distinguishing between and understanding relevant state and federal case law, the latter of which tends to revolve around a distinctive kind of circumstance element, namely, those that are jurisdictional.[530] More specifically, under federal law, culpable mental state issues concerning the circumstances of conspiracy most often present themselves in cases "in which some circumstance that affords a basis for federal jurisdiction, such as use of the mails or crossing state lines, is made an element of the crime."[531] Accordingly, the issue presented in these cases is whether a principle of culpable mental state elevation applies to a strict liability jurisdictional circumstance element of the target of a conspiracy.

The federal judicial response to this issue has been mixed. During the mid-twentieth century most of the relevant decisions "h[e]ld that, although knowledge of such circumstances is unnecessary for guilt of the substantive crime, it is necessary for guilt of conspiracy to commit that crime."[532] Since then, however, some (though not all)

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

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

(emphasis added).

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

> Where liability for any offence may be incurred without knowledge on the part of the person committing it of any particular fact or circumstance necessary for the commission of the offence, a person shall nevertheless not be guilty of conspiracy to commit that offence . . . unless he and at least one other party to the agreement intend or know that that fact or circumstance shall or will exist at the time when the conduct constituting the offence is to take place.

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

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

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

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

Most significant is the U.S. Court of Appeals for the Second Circuit's decision in *United States v. Crimmins*, 123 F.2d 271 (2d Cir. 1941). At issue in *Crimmins* was the defendant's conviction for conspiracy

subsequent federal cases appear to hold that when "knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense."[533]

The precise contours of federal case law on the culpable mental state requirement governing the circumstance element(s) of a conspiracy is much discussed; however, two basic points are relevant here. First, to the extent such case law supports a principle of culpable mental state equivocation, that principle only applies to "the attendant circumstance element of a crime" whose "primary purpose" is to "confer federal jurisdiction."[534] Second, none of the relevant federal cases are constitutionally based.[535] As a result, states remain free to determine the relationship between the culpable mental state requirement governing a conspiracy and that applicable to the circumstance(s) of the target offense themselves.[536]

There is not a lot of state case law on this issue; however, to the extent it exists, it supports a principle of intent elevation. Historically speaking, for example, a principle of intent elevation of this nature appears to have been implicit in the early state case law on

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to transport stolen securities in interstate commerce where he did not know the relevant securities were, in fact, connected to interstate commerce—the touchstone of federal jurisdiction. *Id.* at 273. Although such absence of knowledge would have been immaterial had the offense been completed, the Second Circuit regarded it as quite material to the conspiracy charge. To understand why, Judge Learned Hand, writing for the court, gave his famous traffic light analogy: "While one may . . . be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past." *Id.* From this, the *Crimmins* court ultimately concluded "that there can be no conspiracy to transport stolen securities in interstate commerce "unless it is understood to be a part of the project that they shall cross state lines." *Id.* at 273-74.

[533] *United States v. Feola*, 420 U.S. 671, 696 (1975); *see, e.g., United States v. Eisenberg*, 596 F.2d 522, 525 (2d Cir. 1979); *United States v. Rosa*, 17 F.3d 1531, 1544–45 (2d Cir. 1994); *United States v. Gurary*, 860 F.2d 521, 524 (2d Cir.1988); *United States v. Viruet*, 539 F.2d 295, 297 (2d Cir. 1976), *United States v. Green*, 523 F.2d 229, 233–34 (2d Cir. 1975). Most significant is the U.S. Supreme Court's decision in *United States v. Feola*, 420 U.S. 671 (1975). At issue in *Feola* was whether, under federal conspiracy law, proof of knowledge as to the strict liability circumstance element of the offense of assault of a federal officer—namely, whether the victim was a federal officer—is necessary. *See id.* The U.S. Supreme Court concluded that it was not, deeming conspiracy to commit assault against a federal officer to incorporate a principle of culpable mental state equivocation, under which the government need not prove that the parties to a conspiracy *understand* or are in any way *aware* that the victim of the intended assault is a federal officer. *Id.* Rather, the same strict liability rule applicable to the circumstance of assaulting a federal officer applies to a conspiracy to commit the same. *Id.*

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

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

[536] *Id.*

the corrupt motive doctrine.[537] More recently, however, this principle appears to have been explicitly endorsed by a handful of state appellate decisions.[538]

The most illustrative, and comprehensively reasoned, of these decisions is the Connecticut Supreme Court's recent opinion in *State v. Pond*.[539] The specific issue presented in *Pond* was whether an individual who plans and agrees to participate in "a simple, unarmed robbery," may thereafter be held criminally liable for "planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan."[540] The Connecticut Supreme Court ultimately answered this question in the negative, holding that "to be convicted of conspiracy, a defendant must specifically intend that every element of the planned offense be accomplished, even an element that itself carries no specific intent requirement."[541]

In support of employing this "higher *mens rea* requirement for conspiracies than for the underlying substantive offense," [542] the *Pond* court provides three different policy rationales:

> First, it stands to reason that the legislature would have imposed a higher intent requirement for conspiracy than for some substantive crimes because conspiracy, by its very nature, is predominantly mental in composition . . . . [J]ust as the legislature has imposed more stringent *actus reus* requirements for substantive offenses that are defined principally with respect to their conduct elements, so may it reasonably demand a greater showing of wrongful intent for an anticipatory, inchoate crime such as conspiracy, which predominantly criminalizes the wrongful scheme.
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> Second, on the most basic level, it makes sense to impose a specific intent requirement for conspiracy to commit robbery in the second degree, but not for robbery in the second degree, because one crime actually involves the display or threatened use of a purported weapon and the other does not . . . .
>
> It makes little sense . . . to say that, if an individual plans and agrees to participate in a simple, unarmed robbery, he then may be held criminally liable for planning or agreeing to an armed robbery, or one in which a purported weapon is displayed or its use threatened, when he had no such intention and agreed to no such plan . . . .
>
> [To hold otherwise] could lead to unintended and undesirable consequences . . . . The reason the law punishes conspiracies to commit

[537] *See* Alexander & Kessler, *supra* note 214, at 1160 (1997) (discussing *People v. Powell*, 63 N.Y. 88, 88 (1875); *Commonwealth v. Benesch*, 194 N.E. 905 (Mass. 1905); *Commonwealth v. Gormley*, 77 Pa. Super. 298 (1921)).
[538] *See infra* notes 232-35 and accompanying text.
[539] 315 Conn. at 468–89.
[540] *Id.* at 477.
[541] *Id.* at 453.
[542] *Id.* at 475.

> armed robberies more severely is to discourage would-be felons from planning this more dangerous class of crime. [However, applying a principle of culpable mental state equivocation] would eliminate any such disincentive.
>
> Third, [failure to endorse a principle of intent elevation] would create the potential for abuse . . . . To require less would permit the state to prosecute a person who conspires with a would-be pickpocket, shoplifter or library book bandit for conspiracy to commit an armed felony without proving that that person either intended to or did in fact engage in such a crime.[543]

Policy considerations aside, the *Pond* court likewise observes that a principle of intent elevation finds support in the case law of all other state courts to explicitly address it, namely, decisions from New York,[544] New Hampshire,[545] Michigan,[546] and North Carolina.[547]

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[543] *Id.* at 476-79. In supporting adoption of a principle of intent elevation, the *Pond* court also addressed "the state's argument that it would have been irrational for the legislature to adopt a legislative scheme in which offenders face broad vicarious liability for their roles in first and second degree robberies—whether as participants, accessories or, under a Pinkerton theory, coconspirators—and yet to stop short of extending that same vicarious liability to the crime of conspiracy itself." *Id.* at 487. In response, the *Pond* court highlighted that, "[f]irst, there is a fundamental difference between holding a person liable for his role in an actual crime, whatever that role might be, as opposed to punishing him solely for agreeing to commit a crime," such that there are "sound historical, practical and theoretical reasons for imposing stricter liability in the latter case than in the former." *Id.* (citing *Krulewitch v. United States*, 336 U.S. 440, 450 (1949) ("[T]he conspiracy doctrine will incriminate persons on the fringe of offending who would not be guilty of aiding and abetting or of becoming an accessory, for those charges . . . . lie [only] when an act which is a crime has actually been committed.") (Jackson, J., concurring)). "Second, under *Pinkerton*, coconspirators are already held vicariously liable for crimes in which their coconspirators' use of weapons or purported weapons is reasonably foreseeable." *Id.* at 488. In this sense, "*Pinkerton* liability is forward looking, holding conspirators liable as principals for crimes that predictably result from an already formed and clearly defined conspiracy." *Id.* Applying a principle of culpable mental state equivocation to conspiracies, in contrast, "would create a legal anachronism: it turns back the clock and rewrites the terms of the conspirators' original criminal agreement to reflect conduct that coconspirators are alleged to have subsequently performed." *Id.*

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

[545] *State v. Rodriguez,* 164 N.H. 800, 812 (2013) ("[T]o affirm the defendant's convictions for conspiracy to commit first degree assault and accomplice to first degree assault, we must be able to conclude that the properly-admitted evidence overwhelmingly established that he had at least a tacit understanding that deadly weapons would be used in the commission of the assault.")

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

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

The principle of intent elevation reflected in state case law also appears to accord with legal commentary: the scholarly literature on this issue, to the extent it exists, generally weighs against applying a principle of culpable mental state equivocation to the circumstances of a conspiracy.[548]

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

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

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

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

RCC § 303(a)(1): Relation National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target offense for which the defendant is being prosecuted could not have been completed?[549] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[550]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket, believing it to contain valuable items, only to discover that it is empty;[551] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only

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doubt that the defendant and [the co-conspirator] contemplated the use of a deadly weapon in carrying out the assault . . . .")

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

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

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

[551] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).

to discover that he isn't;[552] (3) a participant in a sting operation who receives property believing it to be stolen, only to discover that it isn't;[553] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is innocent.[554]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including conspiracy.[555] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for conspiracy prosecutions: (1) two thieves agree to jointly work towards the pickpocketing of a victim's jacket, believing it to contain valuable items, only to discover that it is empty; (2) two assailants plan to shoot into a bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't; (3) two participants in a sting operation agree to traffic in stolen property with an undercover agent, believing it to be stolen, only to discover that it isn't; and (4) two actors agree to jointly sell a controlled substance, only to discover that the substance is innocent.

Notwithstanding these factual symmetries, in practice, impossibility issues arise less frequently in the context of conspiracy prosecutions.[556] Furthermore, when they do arise, courts tend to shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterizes attempt jurisprudence.[557] Instead, "the conspiracy cases have usually gone the simple route of holding that impossibility is not a defense."[558] That being said, the same distinctions exist in this area of law, and it's important to recognize them in order to appreciate the boundaries of conspiracy liability.

There are four different categories of impossibility that might be recognized in the context of conspiracy.[559] The first is *pure factual impossibility*, which arises when the object of an agreement cannot be consummated because of circumstances beyond the parties' control.[560] 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.[561] The third category is *hybrid impossibility*, which arises where the object of an agreement is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense.[562] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed could not accomplish the ends sought" to be achieved by a criminal agreement.[563]

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[552] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[553] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[554] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[555] DRESSLER, *supra* note 61, at § 27.07.
[556] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4.
[557] *Id.*
[558] *Id.*
[559] This general framework and breakdown is drawn from DRESSLER, *supra* note 61, at § 27.07.
[560] *Id.*
[561] *Id.*
[562] *Id.*
[563] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

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

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

Pure Legal Impossibility. X and Y, adult males, agree to arrange a sexual encounter with Z, a 20 year-old woman. X and Y know Z is 20; however, they believe that the age of consent is 21 (when, in fact, it is 18). Therefore, X and Y believe themselves to be conspiring to commit statutory rape. If charged with conspiracy to commit statutory rape, this situation presents an issue of pure legal impossibility because X and Y have acted under a mistaken belief that the law criminalizes their intended objective, sexual activity with a 20 year-old woman.

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

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

Viewed through the lens of this framework, national legal trends can be summarized as follows. First, pure factual impossibility is not a defense to a conspiracy charge.[564] Illustrative decisions rejecting factual impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to defraud the United States although the government was aware of the scheme (and thus would have stopped it);[565] (2) there may be a conspiracy to murder although the person whom the other co-conspirators believe will carry out the deed is actually a government agent;[566] (3) there may be a conspiracy to obstruct justice even if the scheme of having certain individuals called as jurors could not have been accomplished by the

[564] DRESSLER, *supra* note 61, at § 29.09.
[565] *United States v. Everett*, 692 F.2d 596 (9th Cir. 1982).
[566] *People v. Liu*, 46 Cal.App.4th 1119, 54 Cal.Rptr.2d 578 (1996).

conspirators;[567] and (4) there may be a conspiracy to import controlled substances although a boat needed for the importation had already been seized by government agents.[568]

Second, hybrid impossibility is not a defense to a conspiracy charge.[569] Illustrative decisions rejecting hybrid impossibility claims in the context of conspiracy prosecutions include the following holdings: (1) there may be a conspiracy to commit rape on a woman believed to be unconscious although she was in fact dead;[570] (2) there may be a conspiracy to perform an abortion on a woman (during a historical era when abortion was criminal) although the woman is not pregnant;[571] (2) there may be a conspiracy to murder or rape a person who doesn't actually exist;[572] (3) there may be a conspiracy to receive stolen property although the property is not stolen;[573] and (4) there may be a conspiracy to steal trade secrets although the object of the conspiracy is not a trade secret.[574]

Factual and hybrid impossibility are by far the most common species of impossibility. The "stated majority rule" governing both of them is clear: "neither . . . is a defense to a criminal conspiracy."[575] Less clear are the legal trends governing pure legal impossibility and inherent impossibility in the conspiracy context since prosecutions implicating them rarely (if ever) arise. Nevertheless, to the extent they do, it appears that both forms of impossibility may provide a viable defense to a conspiracy charge.

That pure legal impossibility constitutes a viable defense to a conspiracy charge is not particularly surprising since, in such situations, "the requisite conspiratorial objective is lacking."[576] For example, just as "[a] hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place," so too "a charge of conspiracy to shoot a deer would be equally untenable" although the parties themselves believed deer hunting to be criminally prohibited.[577]

Inherent impossibility may also constitute a viable defense to a conspiracy charge. In the attempt context, courts generally seem reluctant to impose liability "where the means chosen are totally ineffective to bring about the desired result."[578] This also appears to be

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[567] *Gallagher v. People*, 211 Ill. 158, 71 N.E. 842 (1904).
[568] *United States v. Belardo-Quinones*, 71 F.3d 941 (1st Cir.1995),
[569] DRESSLER, *supra* note 61, at § 29.09.
[570] *United States v. Thomas*, 13 U.S.C.M.A. 278, 32 C.M.R. 278 (1962).
[571] *See People v. Tinskey*, 228 N.W.2d 782 (Mich. 1975).
[572] *See State v. Houchin*, 765 P.2d 178 (Mont. 1988); *United States v. Roeseler*, 55 M.J. 286, 291 (C.A.A.F. 2001); *State v. Heitman*, 629 N.W.2d 542 (Neb. 2001).
[573] *See United States v. Petit*, 841 F.2d 1546 (11th Cir. 1988).
[574] *See United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Hsu*, 155 F.3d 189 (3d Cir. 1998).
[575] DRESSLER, *supra* note 61, at § 29.09. That "[i]mpossibility of success is not a defense" to conspiracy generally reflects the common law view that "criminal combinations are dangerous apart from the danger of attaining the particular objective." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4. To the extent that there are special dangers inherent in group criminality, the factual or legal impossibility of committing a particular offense arguably does not negate the dangerousness of the conspiratorial agreement. *See* DRESSLER, *supra* note 61, at § 29.09. The foregoing perspectives on impossibility are endorsed by the U.S. Supreme Court in *United States v. Jimenez Recio*, 537 U.S. 270, 274–76 (2003).
[576] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.4; *see United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013).
[577] *In re Sealed Cases*, 223 F.3d 775 (D.C. Cir. 2000).
[578] *United States v. Heng Awkak Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *see, e.g.*, *Dahlberg v. People*, 225 Ill. 485, 490 (1907); *Attorney General v. Sillen*, 159 Eng. Rep. 178, 221 (1863); *United States v.*

the case in the conspiracy context, where the "inherently impossible" nature of an agreed-upon plan can preclude liability.[579] "For instance, an attack on a wooden Indian cannot be an assault and battery (though it might constitute malicious destruction of property), and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person."[580] So too with "an attempt or conspiracy to pick the pocket of what is merely a wooden dummy."[581]

These principles of conspiracy liability are mostly rooted in case law. However, some criminal codes address the relationship between impossibility and conspiracy. The basis for this modern legislative approach is the Model Penal Code's general definition of conspiracy, which effectively carries over Code's general abolition of impossibility claims in the attempt context to the conspiracy context.[582] Here's how this incorporation-based approach operates.

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[583] By broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[584]

Lincoln, 589 F.2d 379, 381 (8th Cir. 1979); *United States v. Roman*, 356 F. Supp. 434, 438 (S.D.N.Y. 1973); *Parham v. Commonwealth*, 347 S.E.2d 172, 174-75 (Va. Ct. App. 1986); *State v. Logan*, 656 P.2d 777, 779-80 (Kan. 1983); *People v. Elmore*, 261 N.E.2d 736, 737 (Ill. App. Ct. 1970); *People v. Richardson*, 207 N.E.2d 453, 456 (Ill. 1965).

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

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

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

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

[583] Model Penal Code § 5.01(1)(c).

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

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

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the conspiracy context. "It would be awkward, however, to incorporate the impossibility language of attempt into other inchoate offenses."[585] With that in mind, the Model Penal Code instead "treats conspiracy to attempt the commission of a crime as a conspiracy to commit that crime."[586]

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

> [if an] actor agrees that he or another will engage in conduct that he believes to constitute the elements of the offense, but that fortuitously does not in fact involve those elements, he would under this section be guilty of an agreement to attempt the offense, since attempt liability could be made out under Section 5.01 if the contemplated conduct had occurred.[587]

In practical effect, this statutory approach ensures that the Model Penal Code's general conspiracy provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[588] So, for example, as the Model Penal Code commentary illustrates: if D1 and D2 agree to rob a bank believing, incorrectly, that it is federally insured, they may be convicted of conspiracy to rob *a federally insured bank*, based upon their view of the situation.[589]

Since completion of the Model Penal Code, a relatively small number of modern criminal codes have imported this legislative solution to impossibility.[590] However, "the fact a code is silent on this issue, while expressly declaring impossibility is no defense to an attempt charge, is not to be taken to mean that impossibility is a defense to conspiracy."[591] Instead, and as illustrated by the case law referenced above, just the

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

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

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

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

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

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

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

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

opposite is true: in nearly all instances (i.e., factual and hybrid) impossibility is not a defense to conspiracy. [592]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of conspiracy prosecutions. RCC § 303(a) accomplishes this by establishing that an agreement to engage in or bring about conduct that, if carried out, would constitute an "attempt" will also suffice for conspiracy liability. The reference to an attempt is intended to incorporate the same approach applicable to impossibility in the latter context, which, pursuant to RCC § 301(a)(1), necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[593]

RCC § 303(a)(2): Relation to National Legal Trends on Overt Act Requirement. American criminal law generally recognizes that the general inchoate offense of conspiracy is "predominantly ideational [in] nature."[594] One relevant policy question this raises, however, is whether and to what extent *any conduct at all*, above and beyond the agreement at heart of conspiracy liability, is a necessary component of the offense.

Historically, conduct in furtherance of a criminal agreement was not understood to be required for a conspiracy conviction. At early common law, for example, a conspiracy was deemed complete upon formation of the unlawful agreement, such that no additional conduct needed to be proved.[595] More recently, however, American legal authorities have diverged from this early common law approach.[596] Rather than allowing proof of an agreement to constitute the sole *actus reus* of a conspiracy, modern conspiracy statutes frequently require proof of an overt act in furtherance of the conspiracy.[597] The basis for this shift is rooted in the Model Penal Code.

The Model Penal Code's general conspiracy provision, § 5.03(5), establishes that a person may not be convicted of conspiracy to commit a misdemeanor or a felony of the third degree[598] unless she or a fellow conspirator performs an overt act in furtherance of the conspiracy.[599] The relevant language reads: "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an

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

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

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

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

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

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

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

[599] Model Penal Code § 5.03(5).

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."[600]

The Model Penal Code's embrace of the overt act requirement is premised on the drafters view "that it affords at least a minimal added assurance, beyond the bare agreement, that a socially dangerous combination exists."[601] At the same time, however, it should be noted that the drafters did not wholly embrace this rationale—after all, Model Penal Code § 5.03(5) also exempts conspiracies to commit felonies of the first or second degree from the overt act requirement. For these offenses, the drafters believed that "the importance of preventive intervention is *pro tanto* greater than in dealing with less serious offenses," such that the requirement of an overt act should not be applied.[602]

Since publication of the Model Penal Code, the overt act requirement has gained "wide acceptance" among the states.[603] In fact, "[m]ost penal code revisions" actually *exceed* the recommendation of the Model Penal Code.[604] For example, whereas Model Penal Code § 5.03(5) would exclude first and second-degree felonies from the overt act requirement, modern criminal codes typically apply the overt-act rule to all crimes.[605] Even outside reform jurisdictions, moreover, application of a broad overt act requirement is a common feature of conspiracy legislation.[606]

Common law authorities have also frequently endorsed the overt act requirement, highlighting a range of virtues associated with it. For example, courts have observed that the overt act requirement, by requiring "that a conspiracy has moved beyond the talk stage

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[600] *Id.*

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

[602] *Id.*

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

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

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

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

and is being carried out,"[607] appropriately ensures "that society does not intervene prematurely"[608] while, at the same time, helping "to separate truly dangerous agreements from banter and other exchanges that pose less risk."[609] And on an even more basic level, courts have championed the fact that the overt act requirement, by prohibiting liability for "a project still resting solely in the minds of the conspirators,"[610] appropriately respects the admonition that "evil thoughts alone cannot constitute a criminal offense."[611]

As a matter of practice, the overt act requirement is, in those jurisdictions that recognize it, not particularly demanding.[612] Generally speaking, any act, no matter how trivial, is sufficient to satisfy the overt act requirement if performed in furtherance of the conspiracy.[613] In practical effect, this means that the act need not even constitute a "substantial step" towards completion of the criminal objective.[614] Nor, for that matter, must the act be illegal.[615] Indeed, otherwise innocent conduct such as writing a letter, making a telephone call, lawfully purchasing of an instrument to commit the offense, or attending a lawful meeting can, when made pursuant to an unlawful agreement, satisfy the overt act requirement.[616]

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

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Agreements to Achieve Non-Criminal Objectives. The recognition of conspiracy liability "reflects the fact that joint criminal plots pose risks to society that, if not unique, are undoubtedly greater than those posed by lone-wolf, would-be felons."[617] The members of a joint criminal plot "may benefit from the division of labor in the execution of criminal schemes," which in turn "may lead to the commission of additional crimes beyond those initially envisioned."[618]

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[607] *People v. Abedi*, 595 N.Y.S.2d. 1011, 1020 (Sup. Ct. 1993).
[608] *People v. Mass*, 628 N.W.2d 540, 559 (Mich. 2001) (Markman, J., concurring).
[609] *United States v. Sassi*, 966 F.2d 283, 284 (7th Cir. 1992).
[610] *Yates v. United States*, 354 U.S. 298 (1957); *see, e.g., People v. Arroyo*, 93 N.Y.2d 990 (1999); *State v. Miller*, 677 P.2d 1129 (Utah 1984); *Burk v. State*, 848 P.2d 225 (Wyo. 1993); *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001); *State v. Ladd*, 210 W.Va. 413, 557 S.E.2d 820 (2001).
[611] *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001) (collecting cases).
[612] *Heitman*, 629 N.W.2d at 553. In some jurisdictions, an overt act, although required to convict, is not a formal element of the offense." DRESSLER, *supra* note 61, at § 29.04. Instead, the act "merely affords a *locus penitentia*, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." *United States v. Britton*, 108 U.S. 199, 205 (1883). In other words, the overt-act requirement in such jurisdictions gives a conspirator, before that act occurs, "an opportunity to repent." *Russo*, 25 P.3d at 645.
[613] *Commonwealth v. Weimer*, 977 A.2d 1103, 1106 (Pa. 2009).
[614] *But see* LaFave, *supra* note 45, at 2 SUBST. CRIM. L. § 12.2 ("In a few states, this overt act must be a 'substantial step' toward commission of the crime.")
[615] *Heitman*, 629 N.W.2d at 553.
[616] DRESSLER, *supra* note 61, at § 29.04 (citing *Yates v. United States*, 354 U.S. 298, 333–34 (1957), overruled on other grounds in *Burks v. United States*, 437 U.S. 1 (1978))).
[617] *Pond*, 315 Conn. at 474.
[618] *Id.* (citations omitted); *see, e.g., Payan*, 992 F.2d at 1390 (collective criminal activity "increases the chances that the criminal objective will be attained, decreases the chances that the involved individuals will

Consistent with this criminogenic rationale, there is, and has historically been, a broad consensus that the general inchoate offense of conspiracy ought to be broadly construed, applying to all (or most) crimes in the special part of a criminal code.[619] But what about where two or more parties agree to engage in or bring about conduct that is generally immoral, but not itself criminal? Treatment of this issue—namely, of whether and to what extent the general inchoate crime of conspiracy ought to encompass non-criminal objectives—by American legal authorities has undergone a robust transformation over the course of the last century.[620]

Historically speaking, the law of conspiracy frequently encompassed non-criminal objectives. For example, the early common law definition of this general inchoate offense "views conspiracy as a combination formed to do either an unlawful act or a lawful act by unlawful means."[621] Under this formulation, it "is not essential . . . to criminal liability that the acts contemplated should constitute a criminal offense for which, without the elements of conspiracy, one alone could be indicted."[622] Rather, "it will be enough if the acts contemplated are corrupt, dishonest, fraudulent, or immoral, and in that sense illegal."[623]

Illustrative of this early common law trend are mid-twentieth century American conspiracy statutes, which extend to "any act injurious to the public health, to public morals, or for the perversion or obstruction of justice, or due administration of the laws."[624] Other illustrative statutory provisions include those criminalizing "conspiracies to cheat and defraud, and to oppress individuals or prevent them from exercising a lawful trade or from doing any other lawful act."[625] Viewed collectively,

> [t]hese broad formulations may be considered as being of two types, though they are not mutually exclusive: (1) those reaching behavior that the law does not regard as sufficiently undesirable to punish criminally when pursued by an individual, but which is considered immoral, oppressive to individual rights, or prejudicial to the public; and (2) those dealing with categories of behavior that the criminal law traditionally reaches, such as fraud and obstruction of justice, but which define such behavior far more broadly than does the law governing the related substantive crimes.[626]

More recently, however, American legal authorities have diverged from the common law approach.[627] Rather than allowing for conspiracy liability to extend to non-criminal objectives, most modern criminal codes limit the reach of the general inchoate crime of conspiracy to specific offenses.[628] And rather than address particular kinds of

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abandon the criminal path, makes larger criminal objective attainable, and increases the probability that crimes unrelated to the original purpose for which the group was formed will be committed") (citing *Iannelli*, 420 U.S. at 778).

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

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

[621] Wechsler et al., *supra* note 171, at 963.

[622] *E.g.*, *State v. Kemp*, 126 Conn. 60, 78 (1939) (quoting *State v. Parker*, 114 Conn. 354, 158 (1932)).

[623] *See id.*

[624] Model Penal Code § 5.03 cmt. at 395 (collecting statutes).

[625] *Id.* (collecting statutes).

[626] *Id.* at 395-96.

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

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

criminal objectives through vague conspiracy formulations, modern criminal codes typically rely upon the application of general conspiracy provisions to more comprehensively defined specific offenses.[629] The impetus for these changes is the Model Penal Code.

In what the drafters recognized to be a "significant departure[]" from the common law, the Model Penal Code's general definition of conspiracy, § 5.03(1), is framed in terms of conspiring to commit "a crime."[630] In practical effect, this excludes non-criminal objectives from scope of general conspiracy liability. The rationale provided for this change is rooted in the need for clarity and consistency, namely, the Model Penal Code drafters believed that the "over-broad conspiracy provisions" employed in common law statutes "fail to provide a sufficiently definite standard of conduct to have any place in a penal code."[631]

An illustrative example of these problems, highlighted by the drafters of the Model Penal Code, is the federal conspiracy to defraud provision, 18 U.S.C. § 371.[632] That provision renders any conspiracy to "defraud the United States in any manner or for any purpose" a felony.[633] Over the years, this statute "has grown through judicial interpretation to cover 'virtually any impairment of the Government's operating efficiency,'"[634] including much conduct that would not otherwise be an offense at all.[635] The breadth of the federal conspiracy statute is a function of the vagueness of the language it employs; as is often observed, the phrase "defraud the United States" lacks any fixed meaning.[636]

Notwithstanding their critique of common law conspiracy statutes, the Model Penal Code drafters were not wholly against extending conspiracy liability beyond criminal objectives.[637]Indeed, the Model Penal Code commentary explicitly acknowledges "that there are some activities that should be criminal only if engaged in by a group."[638] Where this expansion of liability is appropriate, however, the drafters "believe[d] [it] should be dealt with by special conspiracy provisions in the legislation governing the general class

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[629] *See* DRESSLER, *supra* note 61, at § 29.04; LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[630] Model Penal Code § 5.03 cmt. at 394.
[631] *Id.* at 396.
[632] *See id.* at 395.
[633] 18 U.S.C. § 371.
[634] Model Penal Code § 5.03 cmt. at 396 (quoting Goldstein, *supra* note 103, at, 461). This includes, for example, fraud in defense contracts, medicare fraud, or virtually any fraudulent taking or misappropriation involving a federally-funded institution or program. *See e.g., Glasser v. U.S.*, 315 U.S. 60, 80, (1942); *U.S. v. Bordelon*, 871 F.2d 491 (5th Cir. 1989) (HUD official involved in private commercial venture); *U.S. v. Abushi*, 682 F.2d 1289, 1293 (9th Cir. 1982) (food stamp fraud); *U.S. v. Hodges*, 770 F.2d 1475, 1478 (9th Cir. 1985) (fraud on federally insured savings and loan associations).
[635] Model Penal Code § 5.03 cmt. at 394; *see, e.g., United States v. Johnson*, 383 U.S. 169, 172 (1966). As a historical matter, "[s]chemes to defraud individuals or corporations at common law generally [were] held to be criminal conspiracies, and were punishable as conspiracies before the fraud became a substantive crime." LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[636] Model Penal Code § 5.03 cmt. at 394; *see* Goldstein, *supra* note 103, at 408; John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?*: *Reflections on the Disappearing Tort/crime Distinction in American Law*, 71 B.U. L. REV. 193, 246 (1991); Ellen S. Podgor, *Criminal Fraud*, 48 AM. U. L. REV. 729, 750 (1999).
[637] Model Penal Code § 5.03 cmt. at 396.
[638] *Id.*

of conduct in question, and they should be no less precise than penal provisions generally in defining the conduct they proscribe."[639]

Modern American criminal law has since followed suit, embracing both the prescriptions and accompanying rationale of the Model Penal Code.[640] On the legislative level, for example, the current legal trend is to limit general conspiracy liability to the achievement of criminal objectives, such that "[a]ll but three state penal code revisions since the adoption of the final draft of the Code in 1962 have agreed with the American Law Institute."[641] Among these jurisdictions, a "majority" apply general conspiracy liability to *all* criminal objectives.[642] However, a strong plurality go a step further and only apply conspiracy liability to *some* criminal objectives. For example, "a few of the modern recodifications" limit conspiracy liability to agreements to commit *a felony*.[643] Other conspiracy statutes are limited in other ways, "such as by specifying the crimes which will suffice as objectives,"[644] or "by including [only] felonies and higher misdemeanors."[645]

Contemporary American legal commentators are also strongly supportive of the Model Penal Code approach, highlighting, among other considerations,[646] the importance

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[639] *Id.* For illustrative examples of specific offenses that explicitly cover prohibited agreements, see Model Penal Code §§ 240.1 (bribery in official and political matters), 240.7(1)(selling political endorsement), and 240.7(2) (special influence). Likewise, to the extent that common law "provisions aimed at corruption of morals, obstruction of justice, cheating and defrauding" were simply an inartful way of encompassing criminal objectives, the "approach of the Model Penal Code . . . is to define the substantive crimes in these areas more specifically and comprehensively than do many present systems, with the result that there is no need to strike at the problems through over-broad conspiracy provisions." Model Penal Code § 5.03 cmt. at 396.

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

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

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

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

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

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

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

of fair notice[647] and the concomitant risk of "prosecutorial and judicial abuse" created by conspiracy statutes of uncertain scope.[648] As one commentator phrases it:

> People are entitled to fair notice that their planned conduct is subject to criminal sanction. In an age in which legislatures rather than courts define criminal conduct, people should be able to turn to a written code for reasonable guidance in the conduct of their lives. If the legislature has not made a specified act criminal it is unfair to surprise people by punishing the agreement to commit the noncriminal act.[649]

Relevant scholarly literature similarly highlights the fact that "[f]air notice is [] a constitutional requirement."[650] For example, "[a]lthough the Supreme Court has never ruled on the validity of this feature of conspiracy law, it once hinted that the breadth of the 'unlawfulness' element violates due process."[651] And on the state level, broad conspiracy statutes from the early common law era have been the subject of much constitutional litigation, though only rarely have they been struck down as unconstitutional.[652]

Whatever their constitutional status, however, the general consensus among contemporary common law authorities is that "[i]t is far better," as a policy matter, "to limit the general conspiracy statute to objectives which are themselves criminal, as has been done in the most recent recodifications."[653]

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

RCC §§ 303(a) and (b): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of conspiracy is concerned.[654] Generally speaking, though, the Model Penal Code's general definition of conspiracy, § 5.03(1),[655] provides the basis for most contemporary reform

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[647] *See, e.g, Commonwealth v. Bessette*, 217 N.E.2d 893, 896 n.5 (Mass. 1966).
[648] *E.g.,* LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3.
[649] DRESSLER, *supra* note 61, at § 29.04.
[650] *Id.*
[651] *Id.* (discussing *Musser v. Utah*, 333 U.S. 95, 96–97 (1948)).
[652] *See* DRESSLER, *supra* note 61, at § 29.04; *compare, e.g., State v. Bowling*, 427 P.2d 928, 932 (Ariz. Ct. App. 1967) *with People v. Sullivan*, 248 P.2d 520, 526 (Cal. Ct. App. 1952).
[653] LAFAVE, *supra* note 45, at 2 SUBST. CRIM. L. § 12.3. Which is not to say that conspiracy liability always needs to track the offenses in the Special Part. However, to the extent that "there are some activities which should be criminal only if engaged in by groups," commentators seem to agree with the Model Penal Code's prescription that they be "specifically identified in special conspiracy provisions no less precise than penal provisions generally." *Id.*
[654] This variance relates to both the "detail and nuance" of general conspiracy provision. Buscemi, *supra* note 161, at 1126 (providing a detailed overview of codification trends).
[655] The entirety of this provision reads as follows:

efforts.[656] The general definition of conspiracy incorporated into RCC §§ 303(a) and (b) incorporates drafting techniques from the MPC, while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy, and frequently criticized, drafting decision reflected in the Model Penal Code's general definition of conspiracy is the manner in which the culpable mental state requirement of conspiracy is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.03(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to conspiracy ambiguous.[657]

Illustrative is the prefatory clause of Model Penal Code § 5.03(1), which entails proof that the defendant enter the requisite agreement "with the purpose of promoting or facilitating" the commission of the offense that is the object of the conspiracy. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[658]

That the Model Penal Code's offense-level framing of the culpable mental state requirement of conspiracy fails to clarify the culpable mental state requirement (if any) applicable to each element of a conspiracy appears, at least in part, to have been intentional. For example, the commentary to the Model Penal Code's general conspiracy provision explicitly states that § 5.03(1) "does not attempt to [address the culpable mental state requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[659]

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

Model Penal Code § 5.03(1).

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

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

[658] *See id.*

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

This grant of policy discretion to the courts is problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement of conspiracy.[660] So too do the interests of due process: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[661] As a result, "[t]he ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."[662]

Since publication of the Model Penal Code, a few state legislatures have modestly improved upon the Code's treatment of conspiracy's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that conspiracy's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting an offense."[663] While helpful, however, no "state statute has attempted to deal comprehensively with the state of mind required for circumstance elements of the conspiracy offense."[664] (Note, though, that English statutory law explicitly codifies the culpable mental state requirement governing the circumstances of a conspiracy.[665]) And the same also appears to be true with respect to the culpable mental state requirement applicable to the results of a conspiracy, at least insofar as explicit statutory formulations are concerned.[666]

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

The RCC approach to codifying the culpable mental state of conspiracy, in contrast, strives to provide that clarification, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 303(a) establishes that the culpability requirement applicable to a criminal conspiracy necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses employed in various modern attempt statutes.[667] It effectively communicates that

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

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

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

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

Wesson, *supra* note 121, at 209.

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

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

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

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

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

conspiracy liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[668]

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

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the agreement.[669] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of conspiracy, separates the purpose requirement from the agreement requirement.[670] The latter approach is unnecessarily verbose—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing conspiracy.[671]

Finally, RCC § 303(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[672] More specifically, RCC § 303(b) establishes that: "Notwithstanding subsection (a), to be guilty of a conspiracy to commit an offense, the defendant and at least one other person must intend to bring about any result or circumstance required by that offense." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a conspiracy is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these

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[668] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

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

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

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

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

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

offenses, proof of intent on behalf of two or more parties is required as to the requisite elements under RCC § 303(b).

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

Another drafting flaw reflected in the Model Penal Code approach to codifying conspiracy liability, which is addressed by the RCC, is that the Model Penal Code's definition of a conspiracy, § 5.03(1), omits reference to the overt act requirement. That requirement is instead articulated through a separate provision, Model Penal Code § 5.03(5), which states that "[n]o person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired."

It seems clear that the drafters of the Model Penal Code intended to establish that an overt act is indeed an element of (relevant) conspiracy offenses.[673] If true, however, the preferable approach is to incorporate the overt act requirement into the definition of conspiracy itself, rather than through a separate stand-alone provision. This is the approach that various reform jurisdictions have taken,[674] and it is likewise the approach reflected in the RCC. More specifically, RCC § 303(a)(2) states as an element of the offense that "[o]ne of the parties to the conspiracy engages in an overt act in furtherance of the agreement."

One final codification point concerning the general definition of conspiracy incorporated into the RCC worth noting is that it clearly codifies the bilateral approach to conspiracy—in contrast to the Model Penal Code's problematic attempt at codifying a unilateral approach to conspiracy.[675] In most jurisdictions that retain a bilateral approach,

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

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

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

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

[675] As one commentator observes:

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

the common law "two or more persons" formulation is employed as the basis for statutorily articulating a plurality requirement.[676] The general definition of conspiracy incorporated into the RCC, in contrast, more clearly communicates the bilateral nature of the offense alongside RCC § 303(a)'s articulation of each of the offense's particular elements. Specifically, the prefatory clause of RCC § 303(a) establishes that: "[a] person is guilty of a conspiracy to commit an offense when . . . *that person and at least one other person*" meet the elements of a criminal conspiracy.[677]

RCC § 22E-304. Limitation on Vicarious Liability for Conspirators.

Relation to National Legal Trends. The change to current District law is supported by national legal trends. The Model Penal Code,[678] the Proposed Federal Criminal Code[679] and fifteen[680] of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part,[681] abolish the *Pinkerton* doctrine.

RCC § 22E-305. Exceptions to General Inchoate Liability.

Relation to National Legal Trends. Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense."[682] 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.[683]

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

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

[677] This language is drawn directly from DCCA case law. *See In re T.M.*, 155 A.3d 400, 411 (D.C. 2017). For a legislative proposal that employs similar language, see Wesson, *supra* note 121, at 220 (A conspiracy exists where, *inter alia*, the defendant and "another person each agree that they, or one or more of them, will engage in conduct which constitutes a crime or an attempt to commit a crime").

[678] MPC § 2.06. Commentary specifically states that "The most important point at which the Model Code formulation diverges from the language of many courts is that it does not make 'conspiracy' as such a basis of complicity in substantive offenses committed in furtherance of its aims." MPC Commentary at 295.

[679] Proposed New Federal Criminal Code § 401.

[680] Code of Ala. § 13A-4-3(a); Alaska Stat. § 11.16.110; *State ex rel. Woods v. Cohen*, 844 P.2d 1147, 1151 (Ariz. 1992); Ark. Code Ann. § 5-2-402; Colo. Rev. Stat. Ann. § 18-1-602; Del. Code Ann. tit. 11, § 271; Haw. Rev. Stat. Ann. § 702-221; Mo. Ann. Stat. § 562.041; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; People v. McGee, 399 N.E.2d 1177, 1182 (N.Y. 1979); N.D. Cent. Code Ann. § 12.1-03-01; State v. Lind, 322 N.W.2d 826, 841-42 (N.D. 1982); Or. Rev. Stat. Ann. § 161.155; S.D. Codified Laws §§ 22-3-3, 22-3-3.1, 22-3-5 and 22-3-8; *State v. Stein*, 27 P.3d 184, 189 (Wash. 2001) (*en banc*).

[681] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[682] ROBINSON, *supra* note 23, at § 83.

[683] *See, e.g.,* 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

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—a person may not be held criminally liable for soliciting or conspiring to commit acts that would also victimize that person.[684] This rule *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.[685]

The paradigm case is presented by a minor who engages in a sexual relationship with an adult that is considered by law to constitute statutory rape.[686] If the minor initiates the relationship, then the minor may technically satisfy the requirements of soliciting the commission of a statutory rape in the sense of having purposefully requested its perpetration.[687] And where the adult accepts the invitation, the minor may also technically satisfy the requirements of conspiring to commit statutory rape in the sense of having purposefully agreed to facilitate its perpetration.[688] Nevertheless, in the absence of express legislative authority to the contrary, the minor may not be convicted for soliciting or conspiring in the commission of her own victimization.[689]

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—general solicitation or conspiracy liability does not apply where the nature of the target offense is such that the solicitor or conspirator's criminal objective is inevitably incident to its commission.[690] This rule *exempts* from general solicitation and conspiracy liability those who might otherwise satisfy the requirements for

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objective is likewise not guilty of conspiracy to commit that crime."); *In re Meagan R.,* 42 Cal. App. 4th 17, 24, 49 Cal. Rptr. 2d 325, 329–30 (1996) (same); LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d) ("[I]t is a defense to a charge of solicitation to commit a crime that if the criminal object were achieved, the solicitor would not be guilty of a crime under the law defining the offense or the law concerning accomplice liability."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) (same).

[684] *See, e.g.,* DRESSLER, *supra* note 2, 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); *In re Meagan R.*, 42 Cal. App. 4th at 24–25; ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[685] *See* Ky. Rev. Stat. § 502.040 cmt. (noting victim "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime"); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83 (same in context of solicitation and conspiracy).

[686] *See, e.g.,* DRESSLER, *supra* note 2, at § 29.09[D]; *Queen v. Tyrrell*, [1894] 1 Q.B. 710; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

[687] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[688] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

[689] DRESSLER, *supra* note 2, at § 29.09[D]; *see, e.g., In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape," and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse"); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) ("A girl under sixteen years of age, the victim of []sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony."). *See also* Commentary on Proposed Del. Crim. Code § 705 (2017) (noting that this exception would also apply to "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.").

[690] *See, e.g., Com. v. Fisher*, 426 Pa. Super. 391, 395–96, 627 A.2d 732, 734 (1993) (quoting LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1); *Commonwealth v. Jennings*, 490 S.W.3d 339, 343–44 (Ky. 2016).

these general inchoate crimes in relation to the commission of an offense for which their planned participation was logically required as a matter of law.[691]

The paradigm case is a two-party transaction involving the purchase of controlled substances, which the buyer initiates for purposes of acquiring an individual supply.[692] Under these circumstances, the buyer may technically satisfy the requirements of general solicitation liability as applied to the distribution of controlled substances in the sense of having purposefully requested the seller to distribute a controlled substance.[693] And if the seller accepts the solicitation, the buyer may technically satisfy the requirements of general conspiracy liability as applied to the distribution of controlled substances in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[694] That said, it is well established that the buyer's conduct, without more, cannot not provide the basis for establishing general solicitation or conspiracy liability.[695] The reason? Because "the existence of a willing buyer is a prerequisite to the commission of the completed crime," the purchaser's conduct is "necessarily incident" to commission of the target offense of distribution.[696]

It's important to point out that, in applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime."[697] To take just one example, consider a situation where X persuades Y to join in a

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[691] *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

[692] *See, e.g.*, LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3(e); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991).

[693] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[694] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

[695] *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). For solicitation case law, see, for example, *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (solicitation of marijuana sale not criminal, as "the existence of a willing buyer is a prerequisite to the commission of the completed crime" and thus is "necessarily incident" to crime); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) ("[A]ppellant as the buyer of drugs is "inevitably incident" to the delivery of drugs and his conduct cannot be considered that of an accomplice. [Therefore, he cannot be convicted of solicitation]."); *Tyler*, 587 So. 2d at 1241–43 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A is not guilty as an accomplice to the offense of distribution and is not guilty of solicitation to commit the offense of distribution of a controlled substance.").

For conspiracy case law, see, for example, *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("the objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"); *United States v. Hawkins*, 547 F.3d 66, 71-72 (2d Cir. 2008) (simple drug transaction is not sufficient, by itself, to support a conspiracy conviction); *compare Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that simple drug transaction is sufficient to support conspiracy to distribute conviction against *seller*); *Tyler*, 587 So. 2d at 1241–43 (observing that: (1) "[i]n a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, the buyer's conduct would be 'inevitably or necessarily incidental' to the sale"; and (2) "in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, the seller's conduct would be 'inevitably or necessarily incidental' to that possession"); *see also People v. Moses*, 291 A.D.2d 814, 814, 737 N.Y.S.2d 748, 749 (2002); *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009) ("The buyer-seller exception [exists to protect] a buyer or transferee from the severe liabilities intended only for transferors.").

[696] *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998); *Tyler*, 587 So. 2d at 1241–43.

[697] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999).

tightly coordinated two-person plan to perpetrate an armed robbery against V.[698] Although, on these facts, consummation of an "armed robbery" is clearly "*easier* with the assistance of others," X and Y's teamwork "is not *necessary* to commit the offense" against V (i.e., the statutory elements of "[a]rmed robbery do[] not require proof that there was more than the one actor."[699]) As such, the conduct inevitably incident exception would not bar convicting X for soliciting or conspiring with Y to commit armed robbery.[700]

Both of these exceptions to the general rules of general inchoate liability are typically justified on the basis of legislative intent.[701] For example, with respect to the victim exception, the standard justification is that, "[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose [general inchoate] liability upon such a person."[702] And, with respect to the conduct inevitably incident exception, the standard justification is that "the legislature, by specifying the kind

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[698] *See Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002).

[699] *Id.*

[700] *See, e.g.,* LAFAVE, *supra* note 51, at § 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."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's conduct was not "inevitably incident" to the crime of assault" because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[701] *See, e.g.,* ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 23 ("There is a single principle behind these [victims and conduct inevitably incident] modifications of an offense definition [for conspiracy and solicitation]: while the actor has apparently satisfied all elements of the offense charged, he has not in fact caused the harm or evil sought to be prevented by the statute defining the offense.").

[702] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3; *id.* at § 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."); Michaels, *supra* note 52, at 571 ("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."); DRESSLER, *supra* note 52, at § 29.09 n.195 ("The prevailing rationale is that the offense of statutory rape is meant to protect a very young person (traditionally, females) from her less-than-fully informed decision to have sexual contact with an older individual (traditionally, a male). It would frustrate legislative intent, therefore, if the underage party . . . were subject to prosecution for conspiracy in her own victimization.")

As the U.S. Supreme Court observed in *Gebardi v. United States:*

> [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. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932).

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."[703]

In this way, the victim and conduct inevitably incident exceptions to the general rules of general inchoate liability are congruent with—and ultimately derived from—comparable exceptions that arise in the context of accomplice liability. For example, one commentator summarizes the relationship in the conspiracy context as follows:

> [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." Similarly, in the absence of contrary legislative intent, a pregnant woman may not be convicted as an accomplice in a criminal abortion of her own fetus, because her conduct is "inevitably incident" to the commission of the crime. And, because underage females and pregnant women cannot be convicted as accomplices in these offenses, they are also immune from prosecution for conspiracy to commit these offenses upon themselves.[704]

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to criminalize the relevant conduct.[705] This is to say: where the legislature has made an offense-specific determination regarding liability for victims or conduct inevitably

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[703] *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) (quotations and citations omitted); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently . . . 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."); *see also 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.")

For example, in *United States v. Parker*, the U.S. Court of Appeals for the Second Circuit justified the buyer-seller exemption to conspiracy liability by reference to:

> [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. The buyer-seller exception thus protects a buyer or transferee from the severe liabilities intended only for transferors.

554 F.3d 230, 235 (2d Cir. 2009).

[704] DRESSLER, *supra* note 2, at § 29.09[D].

[705] *See, e.g.,* ROBINSON, *supra* note 23, 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.").

incident, it is generally agreed that the courts should implement it.[706] In practice, then, these exceptions from general principles of inchoate liability constitute default rules of construction, to be applied in the absence of an offense-by-offense specification of liability.[707]

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.[708] The relevant code language is contained in Model Penal Code § 5.04(2), which establishes that:

> 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 under . . . 2.06(6)(a) or (6)(b).[709]

And the relevant complicity provisions incorporated by reference, Model Penal Code § 2.06(6)(a) and (6)(b), establish that:

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

The latter complicity provisions, as the explanatory note highlights, were intended to codify two different "special defenses to a charge that one is an accomplice."[710] The first is applicable "when the actor is himself a victim of the offense."[711] And the second is applicable "when the offense is so defined that the actor's conduct is inevitably incident to the commission of the offense."[712] With those exceptions in mind, Model Penal Code § 5.04(2) subsequently establishes that—as the explanatory note phrases it—"[i]n cases where the actor would not be guilty of the substantive offense as an accessory because of

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[706] *See, 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.").
[707] *See, e.g., United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. Langford*, 647 F.3d 1309, 1331–32 (11th Cir. 2011); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.
[708] *See generally* Model Penal Code § 5.04(2) cmt. at 481.
[709] Model Penal Code § 5.04(2) also references "Section 2.06(5)" of the Code's complicity provisions. That subsection provides that "[a] person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity." However, the RCC approach to complicity does not incorporate a similar provision. *See generally* Commentary on RCC § 210. Therefore, the relevance of this provision to general inchoate liability is not addressed here.
[710] Model Penal Code § 2.06(6): Explanatory Note.
[711] *Id.*
[712] *Id.*

some special policy of the criminal law, [that actor is not] liable for solicitation of or conspiracy to commit the same offense."[713] In this way, Model Penal Code § 5.04(2) "make[s] the scope of liability for conspiracy and solicitation congruent with the provisions of Section 2.06 on the liability of accessories."[714]

In support of this parallel approach, the Model Penal Code drafters point to the same justifications "embodied in the complicity provisions of the Model Code."[715] As the accompanying Model Penal Code commentary observes:

> The commentary to Section 2.06 explains that to hold the victim of a crime guilty of conspiring to commit it would confound legislative purpose. Concerning crimes as to which the behavior of more than one person is "inevitably incident," such as unlawful intercourse, bribery, or unlawful sales, it is pointed out that varying and conflicting policies are often involved—for example, ambivalence in public attitudes toward the crime and the requirement of corroboration of accomplice testimony. The position taken in the complicity provision, and now 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.[716]

The Model Penal Code drafters are also careful to distinguish this approach to general inchoate liability from the approach reflected in the common law doctrine known as Wharton's Rule. As accompanying Model Penal Code commentary proceeds to observe:

> As formulated by the author whose name it bears, th[is] doctrine holds that when to the idea of an offense plurality of agents is logically necessary, 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. The classic Wharton's rule cases involve crimes such as dueling, bigamy, adultery, and incest, but it has also been said to apply to gambling, the giving and receiving of bribes, and the buying and selling of contraband goods.[717]

While acknowledging that Wharton's Rule "has been unevenly applied and has been subject to a number of exceptions and limitations," the Model Penal Code drafters believed that the basic idea of barring conspiracy liability for any target offense that requires joint agreement was flawed as a matter of policy:

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[713] Model Penal Code § 5.04(2): Explanatory Note.
[714] *Id.*
[715] Model Penal Code § 5.04(2) cmt. at 481.
[716] *Id.*
[717] *Id.*

> Wharton's Rule as generally stated . . . 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. Further, the rule operates to immunize from a conspiracy prosecution both parties to any offense that inevitably requires concert, thus disregarding the legislative judgment that at least one should be punishable and taking no account of the varying policies that ought to determine whether the other should be. The 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.[718]

With that in mind, Model Penal Code § 5.04(2) "goes no further than to provide that a person who may not be convicted of the substantive offense under the complicity provision may not be convicted of the inchoate crime under the general conspiracy and solicitation sections."[719] This approach, as the drafters conclude, appropriately ensures that "the party who would be guilty of the substantive offense if it should be committed, may equally be convicted of soliciting or conspiring for its commission . . . ."[720]

Since completion of the Model Penal Code, the drafters' recommendations regarding adoption of parallel victim and conduct inevitably incident exceptions to general solicitation and conspiracy liability have been quite influential. For example, as a legislative matter, "many state codes follow [the] example" set by Model Penal Code § 5.04(2).[721] This includes about half of the criminal codes in jurisdictions that have undertaken comprehensive modernization efforts.[722] However, "[e]ven in jurisdictions

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[718] *Id.*; *see* 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, 1048 (1961).

[719] Model Penal Code § 5.04(2) cmt. at 481.

[720] *Id.*

[721] Michaels, *supra* note 52, at 562.

[722] *See* Ala. Code § 13A-4-1(c) ("A conspirator is not liable under this section if, had the criminal conduct contemplated by the conspiracy actually been performed, he would be immune from liability under the law defining the offense or as an accomplice under Section 13A-2-24"); Ark. Code Ann. § 5-3-103(a) ("It is a defense to a prosecution for solicitation or conspiracy to commit an offense that . . . [t]he offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense); Me. Rev. Stat. tit. 17-A, § 153 ("It is a defense to prosecution under this section that, if the criminal object were achieved, the person would not be guilty of a crime under the law defining the crime or as an accomplice under section 57."); Or. Rev. Stat. Ann. § 161.475(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 under ORS 161.150 to 161.165."); N.Y. Penal Law § 100.20 ("A person is not guilty of criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the crime solicited."); Colo. Rev. Stat. Ann. § 18-2-301 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission."); N.D. Cent. Code § 12.1-06-03 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 12.1-03-01."); Ill. Comp. Stat. Ann. ch. 720, § 5/8-3 ("It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense."); N.J. Stat. Ann. § 2C:5-3(b) ("It is a defense to a charge of conspiracy to commit a crime that if the object of the conspiracy were achieved, the person charged would

without an express statutory limitation" based on Model Penal Code § 5.04(2), courts have adopted a "legislative-exemption rule" of comparable scope.[723]

While the exceptions reflected in the Model Penal Code § 5.04(2) have had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions frequently modify them.[724] One particularly useful revision is the replacement of the Model Penal Code's incorporation-by-reference approach to codifying the victim and conduct inevitably incident exceptions in the general inchoate context with an explicit statement of those exceptions. Section 5-3-103(a) of the Arkansas Criminal Code is illustrative. The relevant provision provides:

> 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.[725]

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not be guilty of a crime under the law defining the crime or as an accomplice under section 2C:2-6e. (1) or (2)"); Pa. Cons. Stat. Ann. tit. 18, § 904 ("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 under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions)"); Haw. Rev. Stat. Ann. § 705-523(1) ("A person shall not be liable . . . for criminal conspiracy if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); and § 511(1) ("A person shall not be liable under section 705-510 for criminal solicitation of another if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); Tenn. Code Ann. § 39-12-105(c) ("It is a defense to a charge of attempt, solicitation or conspiracy to commit an offense that if the criminal object were achieved, the person would not be guilty of an offense under the law defining the offense or as an accomplice under § 39-11-402."); N.M. Stat. Ann. § 30-28-3(D) ("A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited."); and sources cited *infra* note 92.

[723] Michaels, *supra* note 52, at 562–64.

[724] For example, the legislatures in at least two jurisdictions statutorily adopt a broad version of Wharton's Rule alongside a conduct inevitably incident exception. *See* Ky. Rev. Stat. Ann. § 506.050 ("No 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* or when that crime is so defined that his conduct is an inevitable incident to its commission."); Del. Code Ann. tit. 11, § 521 ("No person may be convicted of conspiracy to commit an offense *when an element of the offense is agreement with the person with whom the person is alleged to have conspired*, or when the person with whom the person is alleged to have conspired is necessarily involved with the person in the commission of the offense."). For scholarly critiques of this form of Wharton's Rule consistent with the Model Penal Code approach, see, for example, Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1141–45 (1975); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83; LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c)(4).

[725] Ark. Code Ann. § 5-3-103(a); *see* Ala. Code § 13A-4-1(c); N.Y. Penal Law § 100.20; Ky. Rev. Stat. Ann. § 506.050; Colo. Rev. Stat. Ann. § 18-2-301. Note also that a similar approach has been incorporated into a proposed revision to the Delaware Criminal Code, which reads:

> *Section 705. Defense for Victims and Conduct Inevitably Incident*
>
> Unless otherwise provided by the Code or by the law defining the offense, it is a defense to soliciting or conspiring to commit an offense that:
>
> (a) the person is the victim of the offense; or

Consistent with the above authorities, the RCC creates two generally applicable exceptions to solicitation and conspiracy liability. The first exception, RCC § 304(a)(1), excludes the "victim of the target offense" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. The second exception, RCC § 304(a)(2), excludes an actor whose "criminal objective is inevitably incident to commission of the target offense as defined by statute" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 304 *is not* intended to constitute a universal bar on criminal liability for victims or conduct inevitably incident, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 5.04(2). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it provides an explicit statement of the victim and conduct inevitably incident exceptions as they apply in the general inchoate context, rather than relying on the parallel complicity provisions to articulate them by reference. This departure finds support in state legislative practice.[726]

RCC § 22E-306. Renunciation Defense to Attempt, Conspiracy, and Solicitation.

Relation to National Legal Trends. A particularly difficult issue confronting all general inchoate crimes is determining the legal relevance of a defendant's voluntary and complete renunciation of his or her criminal intent prior to completion of the target offense.[727] On the one hand, "under normal liability rules, an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense."[728] But, on the other hand, at the heart of general inchoate liability is the idea that an actor, if uninterrupted, would complete or bring about a criminal offense—a notion that the person who renounces her criminal plans and stops them from coming to

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(b) the offense is defined in such a way that the person's conduct is inevitably incident to its commission.

Proposed Del. Crim. Code § 705 (2017).

[726] *See supra* note 93 and accompanying text.

[727] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 185-186 (2000); Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 407 (1986).

[728] For example, it would be of no avail for a thief to argue that he subsequently returned the goods that he stole as a defense to a theft charge. Nor would courts find persuasive a defense to PWID that, although the actor illegally possessed narcotics with intent to sell on a Monday, he thought better of his drug trafficking scheme/voluntarily threw the drugs away on a Tuesday. Theft and PWID, like most other offenses are complete at the moment that the elements are satisfied, without regardless of whether actor has a subsequent change of heart. *See, e.g.,* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; Cahill, *supra* note 20, at 753.

fruition contradicts.[729] The American criminal justice system's efforts at resolving this tension, as well as the competing policy considerations it implicates, in any comprehensive way is a "relatively recent" development, with roots in the Model Penal Code.[730]

Prior to the drafting of the Model Penal Code, renunciation-related issues were typically addressed by courts in a piecemeal fashion (if they were addressed at all), which in turn produced policies that were often unclear and inconsistent. With respect to criminal attempts, for example, it was "uncertain under the [common law] whether abandonment of a criminal effort, after the bounds of preparation have been surpassed, will constitute a defense to a charge of attempt."[731] As for criminal solicitations, early common law authorities, while sparse, seem to indicate that renunciation was a viable defense.[732] But with respect to criminal conspiracies, "[t]he traditional rule concerning renunciation as a defense" clearly pointed in the opposite direction: "no subsequent action can exonerate."[733] Yet this traditional rule was also in seeming conflict with the well-established withdrawal defense to accomplice liability reflected in common law authorities.[734]

Faced with this lack of clarity and consistency of treatment, the drafters of the Model Penal Code opted to develop a comprehensive, broadly applicable statutory approach to dealing with renunciation in the context of general inchoate crimes. What they ultimately devised specifically recognizes a limited "affirmative defense" for "renunciation of criminal purpose" to attempt, solicitation, and conspiracy.[735] The foundation for this approach is provided in the Model Penal Code's general attempt provision, § 5.01.

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[729] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.,* FLETCHER, *supra* note 26, at 188 (observing that "the intent required for an attempt is not merely a firm resolve up to the time the attempt is complete as a punishable act," but rather, an "intent . . . to carry through").

[730] Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 7 (1989).

[731] Model Penal Code § 5.01 cmt. at 356. In reviewing common law authorities the Model Penal Code drafters distinguished between voluntary and involuntary abandonment:

> 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. There is no doubt that such an abandonment does not exculpate the actor from attempt liability otherwise incurred.
>
> A "voluntary" abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances. This may be termed repentence or change of heart. 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. Whether voluntary abandonments constitute a defense to an attempt charge is far from clear, there being few decisions squarely facing the issue.

Id.; *see* LAFAVE, *supra* note, at 2 SUBST. CRIM. L. § 11.5 (analyzing common law trends).

[732] *See, e.g.,* Hawaii Rev. Laws § 248-8 (1955); *Regina v. Banks*, 12 Cox Crim. Cas. 393, 399 (Assizes 1873); *State v. Kinchen*, 126 La. 39, 52 So. 185 (1910); *Forman v. State*, 220 Miss. 276, 70 So.2d 848 (1954); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

[733] Model Penal Code § 5.03 cmt. at 457 (collecting authorities).

[734] The common law rule is that "[o]ne who has given aid or counsel to a criminal scheme sufficient to otherwise be liable for the offense as an accomplice may sometimes escape liability by withdrawing from the crime." LAFAVE, *supra* note9, at 2 SUBST. CRIM. L. § 13.3 (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 457.

[735] Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6).

The relevant sub-section, Model Penal Code § 5.01(4), first establishes that it is an "affirmative defense" to attempt that the defendant "abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[736] Thereafter, this same provision elucidates the meaning of the phrase "complete and voluntary."[737] It provides, first, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[738] Then this provision adds that "[r]enunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[739]

The Model Penal Code applies a similar approach to treating renunciation in the context of the other general inchoate crimes delineated in Article 5. With respect to criminal solicitations, Model Penal Code § 5.02(3) provides that "[i]t is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." And with respect to criminal conspiracies, Model Penal Code § 5.03(6) establishes that "[i]t is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[740]

The Model Penal Code's renunciation provisions, when viewed collectively and in relevant context, comprise policies that are substantively identical to one another. Most importantly, all three require that the renunciation be "voluntary and complete," as defined in Model Penal Code § 5.01(4).[741] And they also treat renunciation as an "affirmative defense," which, pursuant to the Model Penal Code's general provision concerning legal and evidentiary burdens,[742] "means that the defendant has the burden of raising the issue

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[736] *Id.* § 5.01(4).

[737] *Id.*

[738] *Id.* In specifying this motive of increased risk, the Model Penal Code drafters intended to distinguish between fear of the law reflected in a general "reappraisal by the actor of the criminal sanctions hanging over his conduct," which satisfies the requirement, and "fear of the law [that] is . . . related to a particular threat of apprehension or detection," which does not. Model Penal Code § 5.01 cmt. at 356.

[739] Model Penal Code § 5.01(4).

[740] The commentary to the Model Penal Code is careful to explain that the issue of renunciation "should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators." Model Penal Code § 5.03 cmt. at 456.

[741] Model Penal Code § 5.01(4) (noting that the definition of "voluntary and complete" applies to all aspects of "this Article," that is, within Model Penal Code Article 5 that governs all inchoate crimes); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[742] The pertinent provision, Model Penal Code § 1.12, states in relevant part that:

> (1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.

and the prosecution has the burden of persuasion" as to whether the defendant did, in fact, voluntarily and completely repudiate his or her criminal purpose.[743] (In practical effect, this means that "the prosecution is not required to disprove [the absence of renunciation] unless and until there is evidence in its support."[744])

There are, however, some clear textual differences between these three provisions, namely, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy."[745] The commentary accompanying the Model Penal Code explains these variances as follows:

> 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. The solicitor, on the other hand, has incited another person to commit the crime, unless the solicitation is uncommunicated or rejected; consequently, the Code requires that he either persuade the other person not to do so or otherwise prevent the commission of the crime. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally

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> (2) Subsection (1) of this Section does not:
>
> (a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
>
> (b) apply to any defense that the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.

[743] Model Penal Code § 5.01: Explanatory Note. With respect to the Code's allocation of burdens, the drafters provide two main reasons for why "it is proper to require the defendant to come forward first with evidence in support of the defense." Model Penal Code § 5.01 cmt. at 359. First, "[t]he decided cases would seem to indicate that instances of renunciation of criminal purpose are not frequent, and that their occurrence is therefore improbable." *Id.* And second, "the facts that bear on such renunciation are most likely to be within the control of the defendant." *Id.*

[744] Model Penal Code § 5.01 cmt. at 359. Here's how one state appellate court has described this framework:

> A defendant is deemed to have raised the defense of renunciation, and thus to have met his burden of going forward with respect to that defense, whenever the evidence presented at trial, if construed in the light most favorable to the defendant, is sufficient to raise a reasonable doubt in support of each essential element of the defense . . . The defendant, however, has no burden of proof with respect to the defense of renunciation. Instead, the state has the burden of disproving that defense beyond a reasonable doubt whenever it is duly raised at trial.

State v. Riley, 123 A.3d 123, 130 (Conn. 2015).

[745] *See* Model Penal Code 5.03 cmt. at 458 (noting that "[t]he kind of action that will suffice varies for the three different inchoate crimes"). Textual variances aside, though, it seems relatively clear that a voluntary and complete renunciation, when accompanied by prevention of the offense contemplated, will similarly constitute a defense to attempt, solicitation, and conspiracy under the Code. *See infra* note 99 and accompanying text.

> be pursued despite renunciation by one conspirator, and the Code accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.[746]

The Model Penal Code commentary also provides a detailed analysis of the policy considerations that support recognition of the proposed renunciation defense to general inchoate crimes. That analysis revolves around two main rationales. First, "renunciation of criminal purpose tends to negative dangerousness."[747] In the context of attempt liability, for example, the drafters argue that:

> [M]uch of the effort devoted to excluding early "preparatory" conduct from criminal attempt liability is based on the desire not to impose liability when there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for defining preparation, indicating prima facie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime . . . .[748]

Second, a renunciation defense "provide[s] actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed."[749] The drafters of the Model Penal Code believed this incentive to hold "at all stages of the criminal effort," but nevertheless thought that it would be most significant "as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high."[750] That is,

> At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.[751]

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[746] Model Penal Code 5.03 cmt. at 458.
[747] Model Penal Code 5.01 cmt. at 359.
[748] *Id*.
[749] *Id.*
[750] *Id.*
[751] *Id*. The Model Penal Code commentary acknowledge "that the defense of renunciation of criminal purpose may add to the incentives to take the *first* steps toward crime," i.e., "[k]nowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation." Model Penal Code § 5.01 cmt. at 359. The drafters conclude, however, that "this is not a serious problem" for two reasons:

> First, any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary

Although framed in terms of attempt liability, the Model Penal Code commentary clarifies that the same "two most sensible propositions"—that renunciation negates dangerousness and incentivizes desistance—are just as applicable to the general inchoate crimes of solicitation and conspiracy.[752]

Since completion of the Model Penal Code, the drafters' recommendations concerning recognition of a broadly applicable renunciation defense to all general inchoate crimes has gone on to become quite influential. Based upon one survey of prevailing legal trends, for example, it appears that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense."[753] That same survey likewise concludes that: (1) "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation"[754]; and that (2) "[n]early every jurisdiction permits some form of renunciation defense to a charge of conspiracy."[755]

Legislative adoption of the Model Penal Code approach to renunciation is a particularly pervasive feature of modern criminal codes.[756] For example, a strong majority of reform jurisdictions include: (1) a renunciation defense to attempt liability based on Model Penal Code § 5.01(4)[757]; (2) a renunciation defense to solicitation liability based on

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steps would be a factor only where the actor was dubious of his plans and where, consequently, the probability of continuance was not great.

Id. "On balance," then, the MPC drafters "concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort." *Id.*

[752] *See* Model Penal Code § 5.02 cmt. at 382 (solicitation); Model Penal Code § 5.03 cmt. at 457-58 (conspiracy).

[753] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.16 (collecting authorities).

[754] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.56 (collecting authorities).

[755] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.30 (collecting authorities).

[756] *See, e.g.,* Hoeber, *supra* note 26, at 427 ("Most of the jurisdictions adopting comprehensive criminal codes in the wake of the Model Penal Code have enacted provisions for the defense.") (collecting authorities). Various legal authorities have recognized the importance of legislative, rather than judicial, resolution of renunciation-related issues. *See, e.g., Com. v. Nee*, 458 Mass. 174, 185, 935 N.E.2d 1276, 1285 (2010) ("[W]hatever merits renunciation may have . . . its incorporation into our criminal law must be left to the Legislature."); *State v. Stewart*, 143 Wis. 2d 28, 45-46, 420 N.W.2d 44, 51 (1988) ("The public policy arguments in favor of the [renunciation] defense are better addressed to the legislature than to the court."); Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs A General Attempt Provision and How Military Law Can Provide One*, 78 U. CIN. L. REV. 1043, 1072-73 (2010) ("One problem with [federal judicial recognition of the] abandonment defense is that circuits are not consistent about what is required to establish the defense."). *But cf.* Murat C. Mungan, *Abandoned Criminal Attempts: An Economic Analysis*, 67 ALA. L. REV. 1, 3 (2015) (noting "significant variation among states" on treatment of abandoned criminal attempts, including "cases where courts (i) excuse abandoning defendants even when the law does not provide an abandonment defense and (ii) punish abandoning defendants even where, under a strict reading of the law, the defendant ought to be excused.").

[757] *See* Ala. Code § 13A-4-2; Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-204; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-5; Ky. Rev. Stat. Ann. § 506.020; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mont. Code Ann. § 45-4-103; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.430; Pa. Cons. Stat. Ann. tit. 18, § 901; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-301; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; Minn. Stat. Ann. § 609.17.

Model Penal Code § 5.02(3)[758]; and (3) renunciation defense to conspiracy liability based on Model Penal Code § 5.03(6).[759] And "about two thirds" of these reform jurisdictions have also adopted a broadly applicable statutory elaboration of the meaning of "voluntary and complete" based on that provided by Model Penal Code § 5.01(4).[760]

While the Model Penal Code approach to renunciation has had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions routinely modify it. Many of these revisions are clarificatory or organizational; however, some are substantive.[761] Most significant is that a strong plurality of reform jurisdictions relax the Code's requirement that the target of the attempt, solicitation, or conspiracy *actually* be prevented/thwarted.[762] Instead, these state statutes allow for proof of a "substantial,"[763] "reasonable,"[764] or "proper"[765] effort to prevent or

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[758] *See* Alaska Stat. § 11.31.110; Ark. Code Ann. § 5-3-302; Colo. Rev. Stat.Ann. § 18-2-301; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Iowa Code Ann. § 705.2; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.060; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mich. Comp. Laws Ann. § 750.157b; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Or. Rev. Stat. § 161.440; Pa. Cons. Stat. Ann. tit. 18, § 902; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-302; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.M. Stat. Ann. § 30-28-3.

[759] *See* Ark. Code Ann. § 5-3-405; Colo. Rev. Stat. Ann. § 18-2-203; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-523; Ky. Rev. Stat. Ann. § 506.050; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mo. Ann. Stat. § 564.016; N.J. Stat. Ann. § 2C:5-2; N.Y. Penal Law § 40.10; Ohio Rev.Code Ann. § 2923.01; Or. Rev. Stat. § 161.460; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-104; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-303; Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-3-405; Haw. Rev. Stat. § 705-530; Neb. Rev. Stat. § 28-203; N.H. Rev. Stat. Ann. § 629:3; Vt. Stat. Ann. tit. 13, § 1406.

[760] Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1188 n.267 (1975) (collecting citations); *see* Hoeber, *supra* note 26, at 427 n.102 (same).

[761] *See infra* notes 98-116 and accompanying text.

[762] *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 (2012).

[763] With respect to conspiracy, for example, see Ala. Code § 13A-4-3(c) (stating that the defendant is not liable if "he gave a timely and adequate warning to law enforcement authorities or made a substantial effort to prevent the enforcement of the criminal conduct contemplated by the conspiracy"); N.Y. Penal Law § 40.10(1) (allowing an affirmative defense that "the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof"); Ark. Code Ann. § 5-3-405 (stating that defendant may qualify for renunciation defense if he or she "(A) [g]ave timely warning to an appropriate law enforcement authority; or (B) [o]therwise made a substantial effort to prevent the commission of the offense").

[764] With respect to conspiracy, for example, see Ariz. Rev. Stat. Ann. § 13-1005(A) (recognizing renunciation if the defendant "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the . . . conspiracy"); Haw. Rev. Stat. Ann. § 705-530(3) (allowing an affirmative defense if the defendant "gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy"); Minn. Stat. Ann. § 609.05(3) (holding that a person who "makes a reasonable effort to prevent the commission of the crime prior to its commission is not liable if the crime is thereafter committed"); Neb. Rev. Stat. Ann. § 28-203 (allowing the defense for a defendant who "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result");

[765] With respect to conspiracy, for example, see Alaska Stat. § 11.31.120(f) (allowing the affirmative defense if defendant "either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy"); *see also* N.H. Rev. Stat. Ann. § 629:3(III) (allowing a defendant who renounces "by giving timely notice to a law enforcement official of the conspiracy and of the actor's part in it, or by conduct designed to prevent commission of the

thwart the target offense—including, but not limited to, providing "timely warning to law enforcement authorities"[766]—to support a renunciation defense to either all,[767] some,[768] or at least one[769] of the general inchoate crimes of attempt, solicitation, and conspiracy.[770]

Modifications aside, it is nevertheless clear that the Model Penal Code approach to renunciation has robust support in American legal practice. And it is also supported by American legal commentary.[771] Indeed, as the drafters of the Hawaii Criminal Code observe: "Modern penal theory" has embraced "renunciation as an affirmative defense to inchoate crimes" for the same "two basic reasons" emphasized by the drafters of the Model Penal Code, namely, dangerousness and deterrence.[772]

With respect to incapacitating dangerous persons, it has been argued that recognition of 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 and whom we most fear . . . If on their own [people] renounce their wrongdoing and cease to aim at bringing about criminal ends, they no longer pose a danger and we no

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crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (establishing that renunciation is achieved by "(1) conduct designed to prevent the commission of the crime agreed upon; or (2) giving timely notice to a law enforcement official of the conspiracy and of the defendant's part in it"). Note that Ohio fully exonerates a defendant who merely withdraws from or "abandon[s] the conspiracy . . . by advising all other conspirators of the actor's abandonment." Ohio Rev. Code Ann. § 2923.01(I)(2).

[766] *See* sources cited *supra* notes 62-64.

[767] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1005 (reasonable effort formulation, applicable to attempt, conspiracy, and solicitation); Haw. Rev. Stat. Ann. § 705-530 (same).

[768] *Compare* Ala. Code § 13A-4-1 (substantial effort for solicitation) and Ala. Code § 13A-4-3 (substantial effort for conspiracy) *with* Ala. Code § 13A-4-2 (actually prevent commission of target offense, where attempt charged).

[769] *Compare* Neb. Rev. Stat. Ann. § 28-203 (reasonable efforts for conspiracy) *with* Neb. Rev. Stat. Ann. § 28-201 (no renunciation defense for attempt).

[770] In support of this position, it has been argued that "[t]he law should not demand more than can reasonably be expected. In particular, criminal liability should not be imposed because of police ineptitude or other happenstance factors, which deprive an actor's attempts to defuse a conspiracy of their ordinary effectiveness. Buscemi, *supra* note 59, at 1171. The opposing position contends that:

> If the renunciation defense is regarded as essentially a form of statutory grace conferred on deserving transgressors, then the more limited applicability of the MPC definition may be justified. To put it another way, since renunciation by its very nature comprehends absolution for an already-completed conspiracy offense, the defense may legitimately be restricted to those occasions when an actor succeeds in protecting society from the consequences of his prior criminal agreement. Where prevention efforts are unavailing, even a reformed conspirator will not be heard, under this line of reasoning, to gainsay his part in the illegal scheme.

Id.

[771] For scholarly commentary in support, see Moriarty, *supra* note 29; Hoeber, *supra* note 26; FLETCHER, *supra* note 26; LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. at §§ 11.1, 11.5, and 12.4; D. Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505. *But see* Cassidy & Massing, *supra* note 61 (arguing against recognition of renunciation defense to conspiracy).

[772] Haw. Rev. Stat. Ann. § 705-530. Other state law reform commissions have similarly endorsed these rationales. *See, e.g.*, Ala. Code § 13A-4-1 cmt. at 80 (1982); Minn. Stat. Ann. § 609.17 cmt. at 144 (1987); N.Y. Penal Law § 40.10 cmt. at 137 (1987).

> longer have a basis to fear them. Their actions suggest that they possess sufficient internal controls to avoid criminal conduct and therefore are not in need of the external control mechanisms wielded by the criminal law.[773]

And, insofar as deterrence is concerned, it has been asserted that the renunciation defense appropriately reflects the fact that:

> [T]hose that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.[774]

Legal scholarship also highlights other relevant justifications beyond these dangerousness and deterrence-based rationales. For example, "[r]etributively oriented commentators note that [renunciation] makes us reassess our vision of the defendant's blameworthiness or deviance."[775] This may be a reflection of the fact that (as various authorities have asserted):

> [a]ll 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.[776]

Whatever the basis of this intuition, it seems that members of the public share it.[777] Based upon the limited empirical research that has been conducted, it appears that lay jurors believe that those who voluntarily and completely renounce their criminal plans are not sufficiently blameworthy to merit punishment.[778]

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[773] Moriarty, *supra* note 29, at 5-6.

[774] Moriarty, *supra* note 29, at 5. *See, e.g.,* LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.1 ("The avoidance-of-harm rationale for such a defense is very strong. The person who solicits an offense is commonly in the best position to, and sometimes is the only person who can, avoid the commission of the offense. In addition, the possibility of effecting such avoidance is generally high; since the solicitor had the means to provide the motivation for the commission of the offense, he is also likely to have the means to effectively undercut that motivation.").

[775] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981).

[776] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4 (quoting Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4).

[777] *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014).

[778] In the relevant study, researchers employed a scenario-based methodology, which offered variations on a core burglary scenario. With respect to the renunciation scenario that occurred *after a substantial step* had been committed, the study found that 85% of people polled reported a finding of "no liability" and 92%

One other point highlighted by scholarly commentary is the extent to which "[i]nstances of renunciation of criminal purpose are not frequent."[779] As a result, the practical effect of enacting renunciation defenses rooted in the Model Penal Code approach "has *not been* to save large numbers of repentant criminals from confinement."[780] Rather, it has been to secure an intuitively fair outcome, otherwise consistent with important crime control considerations, with comparatively little social cost.[781]

It's important to point out that the broad support for the substantive policies that comprise the Model Penal Code's renunciation provisions does not extend to the Code's recommended evidentiary policies. Whereas the Model Penal Code ultimately places the burden of disproving the existence of a renunciation defense on the government beyond a reasonable doubt,[782] the majority approach, reflected in both contemporary national case law and legislation, is to require the defendant to persuade the factfinder of the presence of a renunciation defense beyond a preponderance of the evidence.[783] This is so, moreover, in the context of attempt,[784] solicitation,[785] and conspiracy[786] prosecutions alike.

Scholarly commentary emphasizes a range of policy rationales, which explain this departure from the Model Penal Code. First, "as an accurate reflection of reality, the defense will be relatively rare."[787] Second, "the absence of renunciation will be difficult for a prosecutor to prove" given that (among other reasons) "the defense will frequently involve information peculiarly within the knowledge of the defendant which he is best

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reported a finding of "no liability or no punishment." And with respect to the renunciation scenario that occurred *after the point of dangerous proximity to completion* had been reached, the study found that 46% reported a finding of "no liability" and 85% reported a finding of "no liability or no punishment." *See id.* at 250.

[779] Model Penal Code § 5.01 cmt. at 361.

[780] Moriarty, *supra* note 29, at 11.

[781] *Id.*

[782] As noted above, this means that once the defendant has met his or her burden of raising the issue, the prosecution is then required to *disprove* the presence of a voluntary and complete renunciation beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held guilty of the general inchoate crime for which he or she has been charged. *See supra* notes 41-43 and accompanying text.

[783] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 ("The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant . . . . The burden of persuasion is generally on the defendant, by a preponderance of the evidence."); *State v. Rollins*, 321 S.W.3d 353 (Mo. Ct. App. W.D. 2010) (observing that, as a matter of common law, "[t]he burden of establishing [a renunciation] defense is on the defendant"); *see also* LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (observing that "[a] few of the modern codes put the burden of persuasion on the prosecution as to virtually all issues, while a greater number allocate the burden to the defendant as to any matter which has been designated an 'affirmative defense.'").

[784] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("Most jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of an attempt require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.01 cmt. at 361 n.282 (citing reform codes which apply this evidentiary scheme to renunciation of an attempt).

[785] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of solicitation require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities).

[786] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of conspiracy require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 460 (citing reform codes which apply this evidentiary scheme to renunciation of a conspiracy).

[787] Buscemi, *supra* note 59, at 1173.

qualified to present."[788] Third, and perhaps most important, presenting a renunciation defense is "tantamount to an admission that [the] defendant did participate in a criminal [scheme]."[789] As a result, "one's sense of fairness is not as likely to be offended if the defendant is given the burden of demonstrating that it is more likely than not that he should be exculpated."[790]

An illustrative example of these policy considerations at work is the U.S. Supreme Court's recent decision in *Smith v. United States*, which held that the burden of persuasion for withdrawal from a conspiracy under federal law rests with the defendant, subject to a preponderance of the evidence standard.[791] "Where," as the *Smith* Court explained, "the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof."[792] This is particularly true in the context of repudiating a criminal enterprise, where "the informational asymmetry heavily favors the defendant."[793] Whereas "[t]he defendant knows what steps, if any, he took to dissociate" himself from the criminal enterprise,[794] it may be "nearly impossible for the Government to prove the negative that an act of withdrawal never happened."[795] And, perhaps most

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[788] *Id.*
[789] *Id.*
[790] Robinson, *supra* note 11, at 1 CRIM. L. DEF. § 171. As various legal commentators have observed, this reflects a:

> [S]ubtle balance which acknowledges that a defendant ought not to be required to defend until some solid substance is presented to support the accusation, but beyond this perceives a point where need for narrowing the issues coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim.

LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).
[791] *Smith v. United States*, 568 U.S. 106 (2013); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. In determining that the burden of persuasion for withdrawal from a conspiracy under federal law lies with the defense, the *Smith* held that doing so does not violate the Due Process Clause. *Id.* at 110. The *Smith* Court's reasoning can be summarized as follows:

> While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of the conspiracy crimes charged . . . .

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. For a state appellate decision applying the same constitutional reasoning in the renunciation context, see *Harriman v. State*, 174 So. 3d 1044, 1050 (Fla. Dist. Ct. App. 2015); *see also Cowart v. State*, 136 Ga. App. 528 (1975); *People v. Vera*, 153 Mich. App. 411 (1986)).
[792] *Smith*, 568 U.S. at 111 (quoting *Dixon v. United States*, 548 U.S. 1, 9 (2006)).
[793] *Smith*, 568 U.S. at 111.
[794] *Id.* at 113. For example, "[h]e can testify to his act of withdrawal or direct the court to other evidence substantiating his claim." *Id.*
[795] *Id.* at 113 ("Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him.").

importantly, "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense."[796] As a result, the *Smith* Court concluded, requiring the defendant to establish a withdrawal defense beyond a preponderance of the evidence is both "practical and fair."[797]

Consistent with the above considerations, the RCC incorporates 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. The RCC's recognition of a broadly applicable renunciation defense comprised of prevention, voluntariness, and completeness requirements generally accords with the substantive policies reflected in the relevant Model Penal Code provisions. At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in a few notable ways.[798]

First, and most generally, RCC § 304 culls together all renunciation policies into a single general provision—whereas the Model Penal Code separately codifies them in distinct general provisions. This organizational revision, which is consistent with legislative practice in other jurisdictions, enhances the clarity, simplicity, and accessibility of the RCC. [799]

Second, RCC § 304(a) codifies the conduct element of renunciation (i.e., the nature of the requisite preventative efforts by the defendant) in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is one

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[796] *Id.* at 110-11.

[797] *Id.* The *Smith* Court's observations have even more force in the context of a renunciation defense, however, given that the elements of a *voluntary* and *complete* renunciation are even more subjectively-oriented than those of withdrawal.

[798] RCC § 304 is based on, but not identical to, general renunciation provision incorporated into the Delaware Reform Code. More specifically, that provision, Delaware Reform Code § 706, reads as follows:

> (a) In a prosecution for attempt, solicitation, or conspiracy in which the offense contemplated was not in fact committed, it is a defense that:
>
> (1) the defendant prevented the commission of the offense
>
> (2) under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.
>
> (b) *Voluntary and Complete Renunciation Defined.* A renunciation is not "voluntary and complete" within the meaning of Subsection (a) when it is motivated in whole or in part by:
>
> (1) a belief that circumstances exist that:
>
> (A) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or
>
> (B) render accomplishment of the criminal purpose more difficult; or
>
> (2) a decision to:
>
> (A) postpone the criminal conduct until another time; or
>
> (B) transfer the criminal effort to:
>
> (i) another victim; or
>
> (ii) another but similar objective.
>
> (c) *Burden of Persuasion on Defendant.* The defendant has the burden of persuasion for this defense and must prove the defense by a preponderance of the evidence.

[799] For jurisdictions that compile their renunciation policies within a single general provision, see Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.Y. Penal Law § 40.10; Fla. Stat. Ann. § 777.04. Note also that RCC § 304(c) incorporates the burden of proof for this affirmative defense. *See, e.g.,* 18 U.S.C.A. § 373(b) ("If the defendant raises the affirmative defense [of renunciation to solicitation] at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.").

of statutory drafting, namely, the Model Penal Code variously describes the kinds of preventative acts that will suffice for a renunciation defense, thereby obscuring their substantive similarity. For example, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitiee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy." Notwithstanding these textual variances, prevention of the target offense appears to constitute both a necessary and sufficient condition for meeting any of these standards.[800] As a result, the Code's varying references to abandonment, persuasion, and thwarting are unnecessarily confusing—whereas a singular reference to prevention of the target offense would suffice.

The second problem relates to the substance of the Model Penal Code's conduct requirement, namely, it appears[801] to require proof that the defendant's preventative efforts were, in fact, a causal force leading to prevention of the target offense.[802] Aside from the potential proof issues this kind of actual prevention standard raises,[803] such an approach effectively "den[ies] the defense to those who have unwittingly attempted the impossible [while offering] it to all others."[804] Illustrative of the problem is the impossible conspiracy/solicitation presented in the New York case, *People v. Sisselman*: D1 asked D2, an undercover police informant, to assault V, only to thereafter renounce the assault scheme—prior to finding out that D2 was a police informant—by directing D2 not to carry out the assault.[805] Under circumstances like these, actual prevention cannot be proven since D2 never intended to go through with the crime in the first place.[806] Yet it would be would be "unfair to deny" this kind of defendant a renunciation defense given that he or she lacks

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[800] For example, the "otherwise prevented" language employed in the Code's attempt provision "is intended to make clear that abandonment will not be sufficient where the attempt has already progressed to the point where abandonment alone will not prevent the offense." ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. As for the use of such language in the Code's solicitation provision, persuading the solicitee not to commit the target offense is but one means of preventing commission of an offense (e.g., notifying/assisting law enforcement with prevention provides another). *Id.* And while the Code's conspiracy provision instead speaks of "thwart[ing] the success of the conspiracy," this "[p]resumably [] means that the defendant must prevent the achievement of the offense or offenses that are the objective of the conspiracy." *Id.* (noting, however, that one could also "argue that preventing any part of multiple objectives, or even reducing the degree of success of the conspiracy, might constitute 'thwart[ing] the success of the conspiracy.'"); *see also id.* (suggesting that these varying formulations might reflect "inadvertence in drafting").

[801] *But see* Model Penal Code § 5.03 cmt. at 458 ("Second, he must take action *sufficient* to prevent consummation of the criminal objective.").

[802] Moriarty, *supra* note 29, at 37 ("Since the crime could not have occurred whether or not defendant renounced, the desistance is not a 'but for' condition of the crime's non-occurrence. Consequently, it cannot be said that his or her abandonment caused that result."); *United States v. Dvorkin*, 799 F.3d 867, 880 (7th Cir. 2015) (noting that prevention means "actually prevented the commission of the crime (not merely made efforts to prevent it") (quoting S. Rep. No. 98–225, at 309 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3489).

[803] For example, in the context of multi-participant inchoate crimes, how does one establish that the defendant's conduct was the but for cause of the criminal scheme's failure where the police have received other information relevant to preventing that scheme independent of the defendant's assistance?

[804] Moriarty, *supra* note 29, at 37.

[805] *People v. Sisselman*, 147 A.D.2d 261, 262–64 (1989).

[806] *Id.*

"individual dangerousness" in precisely the same way that a defendant who *actually* prevents commission of the target offense does.[807]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(a) revises the Model Penal Code approach to codifying the conduct requirement of renunciation in two key ways. First, RCC § 304(a) simplifies the conduct requirement for renunciation to a uniformly phrased prevention prong.[808] Second, this prevention prong does not require *actual* prevention; instead, it only requires proof that "[t]he defendant engaged in conduct *sufficient* to prevent commission of the target offense."[809]

A third variance worth noting is that RCC § 304(b) codifies the meaning of "voluntary and complete" in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is reflected in the Model Penal Code's explanation of voluntariness, which states, in relevant part, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, *by circumstances* . . . that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[810] The italicized language *could* be read to incorporate an objectiveness component—i.e., renunciation is only *involuntary* when such circumstances *actually exist*.[811] Such a reading, if accurate, is problematic, however, given the general immateriality of accuracy to voluntariness.[812] For example, a renunciation motivated by an erroneous belief in probable police interference—or any other

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[807] *Id.* (quoting Model Penal Code § 5.03, cmt. at 457–458); *see* Moriarty, *supra* note 29, at 37 (noting that "[t]here seems to be no reason to distinguish between the two classes on the basis of [] social danger . . .").

[808] For state legislation that reduces the conduct requirement of renunciation of attempt to a singular prevention prong, see, for example, Alaska Stat. Ann. § 11.31.100 ("In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime."). For state legislation that reduces the conduct requirement of renunciation of conspiracy and solicitation to a singular prevention prong, see, for example, N.Y. Penal Law § 40.10 ("In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime."). *See also* Model Penal Code § 5.03 cmt. at 458 ("The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule."); *cf.* Model Penal Code § 2.06 cmt. at 326 (adopting general requirement of a "proper effort" to prevent the commission of the offense for withdrawal from accomplice liability, and observing that because "[t]he sort of effort that should be demanded turns so largely on the circumstances . . . it does not seem advisable to attempt formulation of a more specific rule").

[809] *See, e.g.*, N.H. Rev. Stat. Ann. § 629:3(III) (allowing defense for a defendant who renounces "by conduct designed to prevent commission of the crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (same); *see also* COMMENTARY ON HAW. REV. STAT. ANN. § 705-530 (noting that the "reasonable effort" standard entails proof that the defendant's conduct be sufficient under all foreseeable circumstances to prevent the offense); *see also* Moriarty, *supra* note 29, at 37 (observing that "a rule whose formulation leads to the conviction of the impossible attempter, while simultaneously freeing all others who renounce, suggests that a rethinking and possible reformulation of the rule may be in order").

[810] Model Penal Code § 5.01(4).

[811] Which is to say, where such circumstances do not in fact exist, then perhaps a defendant motivated by an *erroneous belief* in their existence could still avail him or herself of the defense.

[812] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

circumstance rendering completion less likely—seems just as involuntary as a renunciation motivated by an accurate belief in the same.

The second problem relates to the disjunction between the Model Penal Code's usage of the "in whole or in part" language in the context of the Code's explanation of voluntariness and the absence of such language in the Code's explanation of completeness. More specifically, whereas under Model Penal Code § 5.01(4), renunciation "is not voluntary if *it is motivated, in whole or in part*, by [relevant] circumstances," a 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."[813] This drafting variance *could* be read to indicate that where a defendant's renunciation is motivated *only in part* by a decision to postpone the criminal conduct until another time—or to transfer the criminal effort to another victim or similar objective—then the defense is still available. If true, however, this would be problematic: a renunciation premised only *in part* upon a decision to delay or transfer one's criminal scheme to another person seems just as incomplete as one *solely* motivated by such a decision.[814]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(b) revises the Model Penal Code approach to codifying the meaning of "voluntary and complete" in two key ways. First, RCC § 304(b) reframes the voluntariness prong in terms of whether a defendant is motivated by a "*belief* that [such] circumstances exist."[815] Second, RCC § 304(b) applies the "in whole or in part" language to both the voluntariness and completeness prongs of the renunciation defense.[816]

Finally, RCC § 304(c), by placing the burdens of production *and* persuasion with respect to a renunciation defense on the defendant, departs from the Model Penal Code's recommendations.[817] As noted above, this departure reflects majority legal trends and is also supported by important policy considerations.

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[813] Model Penal Code § 5.01(4).

[814] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[815] *See, e.g.,* Haw. Rev. Stat. Ann. § 705-530(4)(a) ("belief that circumstances exist"); Ariz. Rev. Stat. Ann. § 13-1005(C)(1) (same); N.Y. Penal Law § 40.10(5) (same). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then it is intended to effectively narrow the instances in which renunciation will be held voluntary, by excluding from the defense cases where the defendant is motivated by an erroneous belief that one of the enumerated circumstances exists. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[816] *See, e.g.,* Haw. Rev. Stat. Ann. § 705-530(4) ("A renunciation is not 'voluntary and complete' within the meaning of this section if it is motivated in *whole or in part* by . . . ."); Ariz. Rev. Stat. § 13-1005(C)(same); N.Y. Penal Law § 40.10(5) (same); *see also* 18 U.S.C.A. § 373 ("A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective."). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then the dual application of the "in whole or in part" language is intended to effectively narrow the instances in which renunciation will be held complete, by excluding from the defense cases where the defendant is partially motivated by a decision to postpone or transfer the criminal effort. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[817] *But see* Model Penal Code § 5.03 cmt. at 459 n.260 (conceding that it would be reasonable to put the burden on the defendant in states that have less stringent renunciation requirements, such as taking "reasonable efforts" to prevent the crime").

Chapter 4. Justification Defenses.

RCC § 22E-401. Lesser Harm.

Relation to National Legal Trends. *Codification of a lesser harm defense statute is broadly supported by national legal trends.*

A 2015 academic survey[1] reviewed 52 American jurisdictions[2] and found that 45[3] recognize a "lesser evils" defense. Of those 45 jurisdictions, 18 jurisdictions have codified such a defense in a statute.[4]

RCC § 22E-402. Execution of Public Duty.

Relation to National Legal Trends. *Codifying an execution of public duty defense is generally supported by national legal trends. Out of 29 reform jurisdictions,[5] 18 have codified a similar defense.[6] The Model Penal Code also recognizes an execution of public duty defense that is similar to the RCC defense.[7]*

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[1] Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 127-140 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses).

[2] The research surveyed all 50 states, the federal criminal code, and the District of Columbia.

[3] *Id.* at 10. (Page numbers listed are for online version.)

[4] *See* Alaska Stat. Ann. § 11.81.320; Ariz. Rev. Stat. Ann. § 13- 417; Colo. Rev. Stat. Ann. § 18-1- 702; Del. Code Ann. tit. 11 § 463; Haw. Rev. Stat. § 703-302; 720 Ill. Comp. Stat. Ann. 5/7- 13; Ky. Rev. Stat. Ann. § 503.030; Me. Rev. Stat. Ann. tit. 17-A, § 103; Mo. Ann. Stat. § 563.026; Neb. Rev. Stat. Ann. § 28- 1407; N.H. Rev. Stat. Ann. § 627:3; N.J. Stat. Ann. § 2C:3-2; N.Y. Penal Law § 35.05; Or. Rev. Stat. Ann. § 161.200; 18 Pa. Cons. Stat. Ann. § 503; Tenn. Code Ann. § 39-11-609; Tex. Penal Code Ann. § 9.22; and Wis. Stat. Ann. § 939.47.

[5] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[6] Ala. Code § 13A-3-22; Alaska Stat. Ann. § 11.81.420; Ariz. Rev. Stat. Ann. § 13-402; Ark. Code Ann. § 5-2-603; Colo. Rev. Stat. Ann. § 18-1-701; Conn. Gen. Stat. Ann. § 53a-17; Del. Code Ann. tit. 11; § 462; Haw. Rev. Stat. Ann. § 703-303; Ky. Rev. Stat. Ann. § 503.040; Me. Rev. Stat. tit. 17-A; § 102; Mo. Ann. Stat. § 563.021; N.H. Rev. Stat. Ann. § 627:2; N.J. Stat. Ann. § 2C:3-3; N.D. Cent. Code Ann. § 12.1-05-02; Or. Rev. Stat. Ann. § 161.195; 18; Pa. Stat. and Cons. Stat. Ann. § 504; Tenn. Code Ann. § 39-11-610; Tex. Penal Code Ann. § 9.21.

[7] *See* Model Penal Code § 3.03. As compared to the Model Penal Code, four aspects of the revised statute may constitute substantive changes. First, the revised defense does not apply when any other defense or exclusion from liability applies whereas the MPC statute specifies that is does not apply when another justification defense applies. Some affirmative defenses and exclusions in the revised code are in the nature of a justification defense. Second, the revised defense expressly requires that a person's belief in the legality of their conduct be reasonable. Third, the revised defense does not limit the reasonable belief provisions to instances in which there was a lack of jurisdiction or a defect in process. Fourth, the revised defense substitutes the more modern phrase "authorized by a court order or warrant" for the more antiquated phrase "authorized by the judgment or direction of a competent court or tribunal or in the lawful execution of legal process." These changes improve the clarity and consistency of the revised statute.

RCC § 22E-403. Defense of Self or Another Person.

Relation to National Legal Trends. *Statutory codification of self-defense and defense of others is broadly supported by national legal trends, however, there is variance with respect to the rights of initial aggressors*[8] *and the duty to retreat.*

All 29 reform jurisdictions[9] codify a defense for using force to defend a person.[10] A growing majority of states impose no duty to "retreat to the wall" before using deadly force outside of one's home or business. [11] A few states include the Model Penal Code's surrender-possession and comply-with-demand limits on deadly force.[12]

RCC § 22E-404. Defense of Property.

Relation to National Legal Trends. *Statutory codification of a defense of property defense statute is broadly supported by national legal trends, however, contrary to the RCC, many states permit the use of deadly force with respect to defense of property and few expressly permit defending property of another.*

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[8] *See* § 10.4(e) The aggressor's right to self-defense, 2 Subst. Crim. L. § 10.4(e) (3d ed.) (explaining An initial aggressor (or mutual combatant) to use self-defense in two situations: when a nondeadly aggressor is met with deadly force or when the initial aggressor withdraws (or tries to withdraw)).

[9] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[10] Ala.Code § 13A-3-23; Alaska Stat. Ann. § 11.81.330; Ariz. Rev. Stat. Ann. § 13-405; Ark. Code Ann. §§ 5-2-605, 5-2-607; Colo. Rev. Stat. Ann. § 18-1-704; Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. Ann. § 703-304; 720 Ill. Comp. Stat. Ann. 5/7-1; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5222; Ky. Rev. Stat. Ann. § 503.050; Me. Rev. Stat. tit. 17-A § 108; Minn. Stat. Ann. § 609.065; Mo. Ann. Stat. § 563.031; Mont. Code Ann. § 45-3-102; Mont. Code Ann. § 45-3-105; N.H. Rev. Stat. Ann. § 627:4; N.J. Stat. Ann. § 2C:3-4; N.Y. Penal Law § 35.15; N.D. Cent. Code Ann. § 12.1-05-03; Ohio Rev. Code Ann. § 2901.05; Or. Rev. Stat. Ann. § 161.209; 18 Pa. Stat. and Cons. Stat. Ann. § 505; S.D. Codified Laws § 22-16-35; Tenn. Code Ann. § 39-11-611; Tex. Penal Code Ann. § 9.31; Utah Code Ann. § 76-2-407; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.48.

[11] *See* § 10.4(f) Necessity for retreat, 2 Subst. Crim. L. § 10.4(f) (3d ed.) (explaining the National Rifle Association has recently advocated for states to pass "Stand Your Ground" laws, but the ABA Task Force has found that "[s]tand-your-ground laws hinder law enforcement, are applied inconsistently, and disproportionately affect minorities," and also "that states with some form of stand-your-ground laws have seen increasing homicide rates.").

[12] *Id*. (citing Conn. Gen. Stat. Ann. § 53a-19; Del. Code Ann. tit. 11, § 464; Haw. Rev. Stat. § 703-304; Me. Rev. Stat. Ann. tit. 17-A, § 108; Neb. Rev. Stat. § 28-1409; N.J. Stat. Ann. § 2C:3-4); Model Penal Code § 3.04.

All 29 reform jurisdictions[13] codify a defense of property defense.[14] Most jurisdictions allow deadly force to protect against arson, burglary, robbery, or felonies (generally or only forcible), but five states[15] follow the MPC and RCC approach and limit deadly force to instances in which there is a substantial risk to the person.[16] Ten states expressly allow a person to use force to protect property of another.[17]

RCC § 22E-408. Special Responsibility Defenses.

Relation to National Legal Trends. *The RCC Special Responsibility Defenses statute's above-mentioned substantive changes have widespread support from national legal trends.*

The codification of the special responsibility defenses is strongly supported by national legal trends. A 2015 academic survey[18] reviewed 52 American jurisdictions[19] and found that 49[20] recognize in some manner a defense for parents applying force to discipline their children, and 19[21] have a defense for guardians of incompetent individuals. The survey found no case law refuting the existence of a justification defense for guardians.[22]

Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC)[23], seventeen have codified specific special

[13] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[14] Ala. Code § 13A-3-26; Alaska Stat. Ann. § 11.81.350; Ariz. Rev. Stat. Ann. § 13-408; Ark. Code Ann. §§ 5-2-608, 5-2-609, 5-2-620; Colo. Rev. Stat. Ann. § 18-1-706; Conn. Gen. Stat. Ann. § 53a-21; Del. Code Ann. tit. 11, § 466; Haw. Rev. Stat. Ann. § 703-306; 720 Ill. Comp. Stat. Ann. 5/7-3; Ind. Code Ann. § 35-41-3-2; Kan. Stat. Ann. § 21-5223; Ky. Rev. Stat. Ann. § 503.080; Me. Rev. Stat. tit. 17-A; § 105, Minn. Stat. Ann. § 609.06; Mo. Ann. Stat. § 563.041; Mont. Code Ann. § 45-3-104; N.H. Rev. Stat. Ann. § 627:7; N.J. Stat. Ann. § 2C:3-6; N.Y. Penal Law § 35.25; N.D. Cent. Code Ann. § 12.1-05-06; Ohio Rev. Code Ann. § 2305.40; Or. Rev. Stat. Ann. § 161.229; 18 Pa. Stat. and Cons. Stat. Ann. § 507; S.D. Codified Laws § 22-18-4; Tenn. Code Ann. § 38-2-102; Tex. Penal Code Ann. § 9.41; Utah Code Ann. § 76-2-406; Wash. Rev. Code Ann. § 9A.16.020; Wis. Stat. Ann. § 939.49.

[15] Del.Code Ann. tit. 11, § 466; Haw.Rev.Stat. § 703-306; Ky.Rev.Stat.Ann. § 503.080; Neb.Rev.Stat. § 28-1411; Pa.Cons.Stat.Ann. tit. 18, § 507.

[16] § 10.6(b) Defense of dwelling, 2 Subst. Crim. L. § 10.6(b) (3d ed.).

[17] *See* § 10.6(e) Property of another, 2 Subst. Crim. L. § 10.6(e) (3d ed.) (citing Del. Code Ann. tit. 11, § 466; Haw. Rev. Stat. § 703-306; Ky. Rev. Stat. Ann. § 503.080; Neb. Rev. Stat. § 28-1411; N.D. Cent. Code § 12.1-05-06 (nondeadly force); Pa. Cons. Stat. Ann. tit. 18, § 507; S.D. Cod. Laws § 22-18-4 (nondeadly force); Tenn. Code Ann. § 39-11-615; Tex. Penal Code Ann. § 9.43; Wis. Stat. Ann. § 939.49).

[18] Paul H. Robinson et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 127-140 (2015) Available at: https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses.

[19] The research surveyed all 50 states, the federal criminal code, and the District of Columbia.

[20] *Id.* at 51. (Page numbers for listed online version.)

[21] *Id.* at 53.

[22] *Id.*

[23] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

relationship justification defenses beyond parents and guardians.[24] In addition, New Jersey has a general limited duty of care defense based on relationships where the actor would have a duty under civil law.[25]

Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[24]Ala. Code § 13A-3-24; Alaska Stat. Ann. § 11.81.430; Colo. Rev. Stat. § 18-1-703; Del. Code. Ann. Tit. 11§ 468; Haw. Rev. Stat. § 703-309; Ky. Rev. Stat. Ann. § 503.110; Me. Rev. Stat. tit. 17-A § 106; Minn. Stat. § 609.06; Mo. Rev. Stat. 563.061; Mont. Code. Ann. 45-3-107 (use of force only for parent, guardian, or teacher); N.H. Rev. Stat. Ann. § 627:6; N.D. Cent. Code § 12.1-05-05; Pa. Cons. Stat. § 509; S.D. Codified Laws § 22-18-5 and § 22-18-6; Tx. Penal Code Ann. § 9.61-63; Utah Code Ann. § 76-2-401 (use of force for discipline by parents, guardians, teachers, or those overseeing individuals in custody); Wa. Rev. Code § 9A.16.100 and § 9A.16.020.

[25] N.J. Stat. Ann. § 2C:3-8 ("The use of force upon or toward the person of another is justifiable as permitted by law or as would be a defense in a civil action based thereon where the actor has been vested or entrusted with special responsibility for the care, supervision, discipline or safety of another or of others and the force is used for the purpose of and, subject to section 2C:3-9(b) [mistake of law as to force allowed/necessary], to the extent necessary to further that responsibility…").

Chapter 5. Excuse Defenses.

RCC § 22E-501. Duress.

Relation to National Legal Trends. *Statutory codification of a duress defense is broadly supported by national legal trends.*

Of the 29 reform jurisdictions,[1] 27 codify a duress (or "coercion") defense.[2] Ten reform states specify that duress is an affirmative defense that the defendant bears the burden of proving.[3] Twenty-one reform jurisdictions provide that the defense of duress is available to a defendant if the threatened harm is directed toward a third person.[4] Twenty-three reform jurisdictions limit the defense when the actor was reckless or negligent or a coconspirator.[5] Twenty-five reform jurisdictions specify that the actor's conduct must be reasonable.[6]

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[1] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[2] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mo. Ann. Stat. § 562.071; Mont. Code Ann. § 45-2-212; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[3] Alaska Stat. Ann. § 11.81.440; Ark. Code Ann. § 5-2-208; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Tex. Penal Code Ann. § 8.05; Wis. Stat. Ann. § 939.46.

[4] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302.

[5] Ala. Code § 13A-3-30; Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Mo. Ann. Stat. § 562.071; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; Or. Rev. Stat. Ann. § 161.270; 18 Pa. Stat. and Cons. Stat. Ann. § 309; Tenn. Code Ann. § 39-11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[6] Alaska Stat. Ann. § 11.81.440; Ariz. Rev. Stat. Ann. § 13-412; Ark. Code Ann. § 5-2-208; Colo. Rev. Stat. Ann. § 18-1-708; Conn. Gen. Stat. Ann. § 53a-14; Del. Code Ann. tit. 11, § 431; Haw. Rev. Stat. Ann. § 702-231; 720 Ill. Comp. Stat. Ann. 5/7-11; Ind. Code Ann. § 35-41-3-8; Kan. Stat. Ann. § 21-5206; Ky. Rev. Stat. Ann. § 501.090; Me. Rev. Stat. tit. 17-A, § 103-A; Minn. Stat. Ann. § 609.08; Mo. Ann. Stat. § 562.071; Mont. Code Ann. § 45-2-212; N.J. Stat. Ann. § 2C:2-9; N.Y. Penal Law § 40.00; N.D. Cent. Code Ann. § 12.1-05-10; 18 Pa. Stat. and Cons. Stat. Ann. § 309; S.D. Codified Laws § 22-5-1; Tenn. Code Ann. § 39-

RCC § 22E-502. Temporary Possession.

Relation to National Legal Trends. *The RCC temporary possession statute appears to be novel in its generality, based on preliminary research. However, this general defense is consistent with principles of liability that appear in codified defenses, case law, and jury instructions for specific offenses.*

Much like the District, other jurisdictions have codified offense-specific defenses for possession of contraband where an actor's purpose is to aid law enforcement.[7] Additionally, case law in other jurisdictions has recognized that temporary lawful possession is insufficient to support a conviction for possession of contraband.[8]

RCC § 22E-503. Entrapment.

Relation to National Legal Trends. *Statutory codification of an entrapment defense is strongly supported in other jurisdictions' statutes, however, the burden of proof for the defense and the scope of a derivative entrapment defense are largely left to case law.*

Of the 29 reform jurisdictions,[9] 24 have codified an entrapment defense.[10] Of those 24 jurisdictions, 11 states specify that the defense is an affirmative defense or that the

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11-504; Tex. Penal Code Ann. § 8.05; Utah Code Ann. § 76-2-302; Wash. Rev. Code Ann. § 9A.16.060; Wis. Stat. Ann. § 939.46.

[7] *See e.g.,* N.Y. Pub. Health Law § 3305 ("The provisions of this article restricting the possession and control of controlled substances and official New York state prescription forms shall not apply… (c) to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.").

[8] *See e.g., Stanton v. State*, 746 So. 2d 1229, (Fla. Dist. Ct. App. 1999) ("We do not think that a person who takes temporary possession of contraband for the sole purpose of turning it into the authorities, and promptly does so, is guilty of a crime. If a person finds contraband washed up on the beach, or floating in the sea, and takes the contraband forthwith to the authorities, we do not think that the law does, or is intended to, criminalize temporary possession for that purpose. Likewise if a parent discovers contraband in possession of his or her child, and disposes of it, we do not think the law criminalizes the parent's temporary possession."); *Adams v. State,* 706 P.2d 1183, 1185 (Alaska Ct.App.1985) (finding a temporary lawful possession defense available where defendant turns controlled substance over to police, destroys it, or promptly return it to its source); *People v. Mijares,* 491 P.2d 1115, 1119 (1971) ("It would be incongruous to adhere to cases declaring that abandonment concludes an existing narcotic possession and then hold that during the brief moment involved in abandoning the narcotic, a sufficient possession which did not previously exist somehow comes into being to support a conviction for possession of contraband.").

[9] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[10] Ala. Code § 13A-3-31; Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Colo. Rev. Stat. Ann. § 18-1-709; Conn. Gen. Stat. Ann. § 53a-15, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, 720 Ill. Comp. Stat. Ann. 5/7-12, Ind. Code Ann. § 35-41-3-9; Kan. Stat. Ann. § 21-5208; Ky. Rev. Stat. Ann. § 505.010; Mo. Ann. Stat. § 562.066; Mont. Code Ann. § 45-2-213; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. §

defendant bears the burden of proving inducement,[11] however, they do not address whether the government has the burden of proving predisposition. Twenty-three reform jurisdictions specify that a person can be entrapped by an agent of the government or a person cooperating with the government,[12] however, they do not address in the statutory text whether the inducement can also be indirect.

RCC § 22E-504. Mental Disease or Defect Affirmative Defense.

Relation to National Legal Trends. *Statutory codification of an insanity defense is strongly supported in other jurisdictions' statutes, however, the scope of the revised statute, which follows the Model Penal Code and current District case law, is a minority approach.*

A majority of states currently follow a narrower insanity defense rule closer to the M'Naghten rule requiring total cognitive incapacity,[13] with six additional states following an even narrower approach of entirely abolishing insanity as an affirmative defense.[14]

Of the 29 reform jurisdictions,[15] only six states clearly follow the MPC approach or a modified version that includes both a cognitive and a volitional prong and requires only substantial incapacity.[16] There are an additional 4 states that require only substantial incapacity but do not acknowledge volitional incapacity as a basis for the defense.[17] New

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12.1-05-11; Or. Rev. Stat. Ann. § 161.275; 18 Pa. Stat. and Cons. Stat. Ann. § 313; Tenn. Code Ann. § 39-11-505, Tex. Penal Code Ann. § 8.06; Utah Code Ann. § 76-2-303; Wash. Rev. Code Ann. § 9A.16.070.

[11] Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, Mo. Ann. Stat. § 562.066; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. § 12.1-05-11; 18 Pa. Stat. and Cons. Stat. Ann. § 313.

[12] Alaska Stat. Ann. § 11.81.450; Ariz. Rev. Stat. Ann. § 13-206; Ark. Code; Ann. § 5-2-209, Colo. Rev. Stat. Ann. § 18-1-709; Conn. Gen. Stat. Ann. § 53a-15, Del. Code Ann. tit. 11, § 432; Haw. Rev. Stat. Ann. § 702-237, 720 Ill. Comp. Stat. Ann. 5/7-12, Ind. Code Ann. § 35-41-3-9; Kan. Stat. Ann. § 21-5208; Ky. Rev. Stat. Ann. § 505.010; Mo. Ann. Stat. § 562.066; Mont. Code Ann. § 45-2-213; N.H. Rev. Stat. Ann. § 626:5; N.J. Stat. Ann. § 2C:2-12; N.Y. Penal Law § 40.05; N.D. Cent. Code Ann. § 12.1-05-11; Or. Rev. Stat. Ann. § 161.275; 18 Pa. Stat. and Cons. Stat. Ann. § 313; Tenn. Code Ann. § 39-11-505, Tex. Penal Code Ann. § 8.06; Utah Code Ann. § 76-2-303; Wash. Rev. Code Ann. § 9A.16.070.

[13] Insanity defense rules can be categorized on multiple axes, primarily according to whether they allow for volitional as well as cognitive incapacity to excuse criminal conduct and whether they require absolute or substantial impairment of said mental ability. Paul H. Robinson, et. al., The American Criminal Code: General Defenses, 7 J. Legal Analysis 37, 67-68 (2015) (*available at* https://www.law.upenn.edu/live/files/4100-american-criminal-code-general-defenses). A majority of 28 jurisdictions require absolute impairment and a majority of 29 jurisdictions do not include a volitional prong, not including the 6 jurisdictions that have abolished the insanity defense.

[14] *Robinson*, *supra* at 70; *see also Kahler v. Kansas*, 140 S.Ct. 1021, 1037 (upholding the constitutionality of abolishing the insanity defense).

[15] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[16] Arkansas, Connecticut, Delaware, Hawaii, Kentucky, and Wisconsin.

[17] Illinois, Maine, New York, and Oregon.

Hampshire alone retains the Durham rule,[18] which the D.C. Court of Appeals considered to be an outdated formulation of substantially the same standard as the MPC-like formulation adopted by the court in *Bethea*.[19] Fourteen reform states follow M'Naghten in excusing only absolute cognitive incapacity[20] and the remaining four states are among those that have effectively abolished the insanity defense, allowing evidence of insanity only as evidence that the defendant did not have the required state of mind to commit the offense.[21]

The MPC approach followed by the District occurs in a minority of U.S. jurisdictions. The majority of states decline to acknowledge, or give great weight to, the potential impact of volitional incapacity or substantial incapacity as well as absolute cognitive impairment. This majority approach runs counter to both medical evidence and the legal principles underlying the existence of the insanity, excluding defendants whose mental capacities are significantly impaired from this defense. The RCC substantially retains the District's current insanity rule in the revised mental disease or defect affirmative defense.

§ 22E-505. Developmental Incapacity Defense.*

Relation to National Legal Trends. *The RCC developmental incapacity defense has limited support in United States criminal codes and case law.*

According to one source,[22] most states do not set a minimum age for juvenile delinquency proceedings, but those that do have range from 6 to 12 years of age, including:

- 2 states have a minimum age of prosecution set at 12 years old: California and Massachusetts;[23]
- 1 state has a minimum age of 11 years old: Nebraska;[24]
- 14 states have a minimum age of 10: Arizona, Arkansas, Colorado, Kansas, Louisiana, Minnesota, Mississippi, Nevada, North Dakota, Pennsylvania, South Dakota, Texas, Vermont, and Wisconsin; [25]

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[18] *See State v. Fichera*, 153 N.H. 588 (2006).

[19] *See Bethea*, 365 A.2d at 90-91 ("Our shift from the *Durham-McDonald* formula to that of the Model Penal Code as supplemented by *McDonald* represents not so much a change in the substantive concepts of criminal responsibility as a rephrasing of existing principles.").

[20] Alabama, Alaska, Arizona, Colorado, Indiana, Minnesota, Missouri, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, and Washington.

[21] Kansas, Montana, North Dakota, and Utah.

[22] *See* National Juvenile Defender Center, *The Criminalization of Childhood* (July 2019) at 2.

[23] Cal. Welf. & Inst. Code § 602 (2019); Mass. Gen. Laws Ann. ch. 119, § 52 (2018). Note, however, that California law provides exceptions for murder and certain sex offenses. Cal. Welf. & Inst. Code § 602. Both of these changes in law occurred since the the Council specified in D.C. Code § 16–2320(c)(2) a minimum age of 10, for transfer of custody of delinquent children to the Department of Youth Rehabilitation Services (DYRS). *See* Committee on the Judiciary, Report on Bill 21-0683, the "Comprehensive Youth Justice Amendment Act of 2016" (Oct. 5, 2016) at 7-8 (citing other states' minimum age for delinquency adjudication).

[24] Neb. Rev. Stat. Ann. § 43-247(1) (2016).

[25] Ariz. Rev. Stat. Ann. § 8-307(A) (1997); Ark. Code Ann. § 9-27-303(15) (2019); Colo. Rev. Stat. Ann. § 19-2-104(1)(a) (2018); Kan. Stat. Ann. § 38-2302(n) (2016); La. Child. Code Ann. § art. 804(3) (2011); In re S.A.C., 529 N.W.2d 517 (Minn. Ct. App. 1995) (applying Minn. Stat. Ann. § 260C.007(6)(12) (2019)); Minn. Stat. Ann. § 611.14 (West 2012); Miss. Code Ann. § 43-21-105(i) (2019); Nev. Rev. Stat. Ann. §

• 1 state has a minimum age of 8: Washington;[26]
• 2 states have a minimum age of 7: Connecticut and New York;[27] and
• 1 state has a minimum age of 6: North Carolina.[28]

Some states have explicitly repealed common law *doli incapax* rules with respect to sex crimes, in part or whole, by statute.[29]

Case law in other U.S. jurisdictions on the applicability of *doli incapax* to juvenile proceedings is also divided, although many jurisdictions have not addressed the issue.[30]

Internationally, many countries have minimum ages at 12 or above,[31] and the United Nations Committee on the Rights of the Child encourages countries to consider minimum ages as high as 16, and states that an "absolute minimum" of 12 years is necessary to comply with international standards.[32]

194.010 (2015); N.D. Cent. Code Ann. § 12.1-04-01 (2019); 42 Pa. Stat. And Cons. Stat. Ann. § 6302 (2018); S.D. Codified Laws § 26-8C-2 (2019); Tex. Fam. Code Ann. § 51.02(2)(A) (2015); Vt. Stat. Ann. tit. 33, § 5102(2)(c) (2019); Wis. Stat. Ann. § 938.12(1) (2019).

[26] Wash. Rev. Code. Ann. § 9A.04.050 (2011). Note, however, that the government must prove children age 8 to 12 "have sufficient capacity to understand the act" in order to proceed against them. *Id.*

[27] Conn. Gen. Stat. Ann. § 46b-120(1)(A)(i) (2019); N.Y. Fam. Ct. Act § 301.2(1) (McKinney 2016).

[28] N.C. Gen. Stat. Ann. § 7B-1501 (2017).

[29] *See, e.g.,* S.C. CODE ANN. § 16-3-659 ("The common law rule that a boy under fourteen years is conclusively presumed to be incapable of committing the crime of rape shall not be enforced in this State."); N.J. STAT. ANN. § 2C:14-5 ("No actor shall be presumed to be incapable of committing a crime under this chapter because of age or impotency or marriage to the victim.").

[30] *See § 9.6(c)Juvenile court jurisdiction,* 2 Subst. Crim. L. § 9.6(c) (3d ed.) ("Most juvenile court acts place no lower age limit on juvenile court jurisdiction. Thus, unless the common law immunity for infants under seven is incorporated into juvenile law, children under seven may be adjudged delinquent for conduct for which they lacked criminal responsibility. This issue seems not to have been confronted in the cases (perhaps indicating that it is not the practice to adjudicate as delinquent children under seven), and the commentators are not in agreement on the point. On the one hand, it is claimed that "the traditional concept of incapacity has no application" in juvenile court, presumably on the ground that juvenile courts are not intended to deal with moral responsibility and are concerned only with the welfare of children. On the other, it is contended that the common law immunity should be applicable because the juvenile court serves to vindicate the public interest in the enforcement of the criminal law. Even if that is so, it does not follow that a significantly higher minimum age of criminal responsibility set by statute should be deemed equally applicable to delinquency proceedings in juvenile court." (internal citations omitted); 83 A.L.R.4th 1135 (Originally published in 1991) ("Reported decisions have split on the issue of whether the defense of infancy is available in juvenile delinquency proceedings. Cases denying the availability of the defense have generally relied on the maxim that juvenile delinquency proceedings are different from criminal proceedings in that their purpose is curative and rehabilitative rather than punitive (§ 4). Under this line of reasoning, the infancy defense, which is a rule of criminal law, has no application to delinquency proceedings. In opposition, several decisions have held the infancy defense to be applicable in juvenile delinquency proceedings (§ 3). The courts taking this view have generally justified their holdings by saying that, regardless of the stated purposes of juvenile courts, they are, for the purposes of delinquency adjudications, in effect criminal courts for minors and as such should permit such defenses as are permitted in regular criminal courts.").

[31] *See., e.g.,* Canada, 12 years (Criminal Code, RSC 1985, c C-46, s. 13);

[32] United Nations Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice* (2007) at paragraph 32 ("From these recommendations, it can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.").

Chapter 6. Offense Classes, Penalties, & Enhancements.

RCC § 22E-601. Offense Classifications.

[No national legal trends section.]

RCC § 22E-602. Authorized Dispositions.

[No national legal trends section.]

RCC § 22E-603. Authorized Terms of Imprisonment.

[No national legal trends section.]

RCC § 22E-604. Authorized Fines.

[No national legal trends section.]

RCC § 22E-605. Charging and Proof of Penalty Enhancements.

[No national legal trends section.]

RCC § 22E-606. Repeat Offender Penalty Enhancements.

[No national legal trends section.]

RCC § 22E-607. Pretrial Release Penalty Enhancement.

[No national legal trends section.]

RCC § 22E-608. Hate Crime Penalty Enhancements.

[No national legal trends section.]

RCC § 22E-609. Hate Crime Penalty Enhancement Civil Provisions.

[No national legal trends section.]

RCC § 22E-610. Abuse of Government Power Penalty Enhancement.

Relation to National Legal Trends. *The RCC abuse of government power statute appears to be novel in its generality, based on preliminary research. However, at least*

one reform jurisdiction[1] applies a penalty enhancement where a law enforcement officer commits an assault.[2]

[1] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[2] *See* Tex. Penal Code Ann. § 22.02.

Chapter 7. Definitions.

RCC § 22E-701. Generally Applicable Definitions.

Note: Many of the definitions that are now codified in RCC § 22E-701 were originally codified in offense-specific statutes such as former RCC § 22E-1001, Offenses Against Persons Definitions, former RCC § 22E-1301, Sexual Offense Definitions, and former 22E § 22E-1001, Property Offense Definitions, and the national legal trends research below may refer to these former RCC statutes. Given this original organization, several definitions had multiple national legal trends sections, in which case they are all included here in this compilation.

In addition, there may be national legal trends research within the General Part Provisions' national legal trends research for some of the definitions that are codified in RCC § 22E-701.

Finally, as with all entries in this Appendix, these entries track older versions of proposed CCRC legislation, which may significantly depart from the corresponding CCRC legislation recommended in this Report.

"Act"

[No national legal trends section.]

"Actor"

[No national legal trends section.]

"Ammunition"

[No national legal trends section.

"Amount of damage"

[No national legal trends section.]

"Assault weapon"

[No national legal trends section.]

"Audiovisual recording"

[No national legal trends section.]

"Block"

[No national legal trends section.]

"Bodily injury"

National Legal Trends. The substantive revision to the current definition of "bodily injury," deleting impairment of a "mental faculty," is well-supported by the criminal codes of the reformed jurisdictions. At least 25 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1] ("reformed jurisdictions") statutorily define "bodily injury"

[1] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

or a similar term.[2] Only four[3] of these 25 reformed jurisdictions specifically include psychological distress or injury in the statutory definition of "bodily injury" or similar terms.

In addition, the possible substantive change of deleting "loss or impairment of the function of a bodily member [or] organ" and "physical disfigurement" from the current definition of "bodily injury" is well-supported by the criminal codes of reformed jurisdictions. None of the 25 reformed jurisdictions that statutorily define "bodily injury" or a similar term[4] includes "loss or impairment of the function of a bodily member [or]

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[2] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[3] Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[4] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment

organ," "physical disfigurement," or similar language that suggests a comparatively high threshold of physical harm. Like the RCC definition of "bodily injury," the 25 reformed jurisdictions generally require "impairment of physical condition."[5]

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of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[5] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or

Relation to National Legal Trends. The Model Penal Code (MPC) defines "bodily injury" for offenses against persons as "physical pain, illness or any impairment of physical condition."[6] A plurality of jurisdictions with codified definitions of bodily injury follow the precise language of the MPC definition,[7] although many others codify variants on the MPC definition.[8]

"Building"

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "building." However, it does provide a definition for "occupied structure" that is similar.[9]

"Bump stock"

[No national legal trends section.]

"Business yard"

Relation to National Legal Trends. The Model Penal Code (MPC) does not have a similar definition.

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impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); Utah Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[6] Model Penal Code § 210.0(2).

[7] *See, e.g.,* Haw. Rev. Stat. Ann. § 707-700; Me. Rev. Stat. Tit. 17-A, § 2; Neb. Rev. Stat. Ann. § 28-109; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-1-601; Vt. Stat. Ann. Tit. 13 § 1021.

[8] *See, e.g., Alaska Stat.* § 11.81.900 ("'physical injury' means a physical pain or an impairment of physical condition."); Ind. Code § 35-31.5-2-29 ("'Bodily injury' means any impairment of physical condition, including physical pain.).

[9] MPC § 221.0 ("'occupied structure' means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present."). The MPC does, however, employs the word "building" in the same offense definitions as "occupied structure," suggesting the two terms are intended to have different meanings.

"Check"

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "check."

"Circumstance element"

[No national legal trends section.]

"Class A contraband"

[No national legal trends section.]

"Class B contraband"

[No national legal trends section.]

"Close relative"

[No national legal trends section.]

"Coercive threat"
[Previously "coercion"]

Relation to National Legal Trends. *The above discussed changes to current District have mixed support in national legal trends.*

First, excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[10] (reformed jurisdictions), only six define "coercion" for use in their respective human trafficking offenses.[11] Of the jurisdictions that define "coercion," half do not include fraud or deception.[12] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Second, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. While only five reformed jurisdictions define "coercion" for use in their respective human trafficking

[10] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[11] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5, Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01, Wash. Rev. Code Ann. § 9A.40.010.

[12] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

offenses, all but one include controlling access to a controlled substance.[13] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

Generally, several of the reformed jurisdictions prohibit sexual assault by coercion or a similarly broad provision prohibiting threats.[14]

The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion." Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"), the three additions to the list of prohibited threats in coercion (subsections (D), (G) and (J)) are used in other reformed code jurisdictions.

Relation to National Legal Trends. The Model Penal Code (MPC) has no definition of "coercion." However, it has a similar list of threatening conduct in the definition of "theft by extortion."[15] Additionally, within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[16] the three

[13] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[14] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent" and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a sexual act or sexual contact when the actor "[c]ompels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting" and defining "coercion" as "to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."); Ohio Rev. Code Ann. § 2907.02(A)(1) (offense prohibiting sexual conduct when the actor "coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."); 18 Pa. Stat. Ann. § 3121(a)(1), 3101 (prohibiting sexual intercourse by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied."); S.D. Codified Laws § 22-22-1(1) (offense of rape prohibiting sexual penetration "through the use of coercion."); Tex. Penal Code Ann. §§ 22.011(a)(1), (b)(1) (prohibiting sexual activity without consent and stating that a sexual assault is "without the consent" of the complainant if "the actor compels the other person to submit or participate by the use of . . . coercion."), 1.07(9)(A) (defining "coercion" to include a "threat, however communicated to commit an offense.").

[15] The conduct the MPC includes is: "threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit the actor." MPC § 223.4.

[16] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

additions to the list of prohibited threats in coercion (subsections (D), (G) and (J)) are used in other reformed code jurisdictions.[17]

"Commercial sex act"

Relation to National Legal Trends. *The above discussed change to current District is supported by national legal trends.*

Omitting cross-references to various prostitution offenses from the definition of "commercial sex act" is supported by state criminal codes. A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[18] (reformed jurisdictions) define "commercial sex act,"[19] and none include the commission of prostitution and related offenses.

"Community-based organization"

[No national legal trends section.]

"Comparable offense"

[No national legal trends section.]

"Complainant"

[No national legal trends section.]

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[17] Other state statutes that include threats to report a person's immigration status include: Cal. Penal Code § 519; Colo. Rev. Stat. Ann. § 18-3-207; Md. Code Ann., Crim. Law § 3-701; Or. Rev. Stat. Ann. § 164.075; Va. Code Ann. § 18.2-59. Some of these states also include threatened destruction of immigration documentation, such as green cards. Other states that include threats of to commit any crime include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Ky. Rev. Stat. Ann. § 514.080; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11 (threaten to commit any felony); Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406. And states that include a threat to materially harm a list of designated interests include: Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.41.520; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

[18] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[19] Alaska Stat. Ann. § 11.41.360; Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Ind. Code Ann. § 35-42-4-4; Ky. Rev. Stat. Ann. § 529.010; Me. Rev. Stat. tit. 17-A, § 851; Mo. Ann. Stat. § 566.200; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; N.H. Rev. Stat. Ann. § 633:6; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3001; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.01; Wash. Rev. Code Ann. § 9A.40.010; Wis. Stat. Ann. § 940.302.

"Conduct element"

[No national legal trends section.]

"Consent"

National Legal Trends. The Model Penal Code (MPC) has no equivalent definition to "consent," although it does use the term in some provisions.[20] The American Law Institute (ALI) has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent"[21] that is generally consistent with the RCC definitions of "consent" and "effective consent" (which refers to "consent"), but includes some detailed clarificatory language that is omitted in the RCC definition as unnecessary.[22] Other states and commentators have definitions that are very similar to the RCC definition.[23]

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[20] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[21] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 9, September 14, 2018) "'Consent'

(i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.

(ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.

(iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.

(iv) Notwithstanding subsection (d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in the Sections of this Article applicable to such situations.

(v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent."

[22] Specifically, subsections (iii) and (v) of the draft ALI definition of "consent" provide clarificatory language regarding the lack of physical or verbal resistance and the revocation or withdrawal of consent. Such clarifications are fully consistent with the RCC definition of "consent" and "effective consent" (which refers to "consent") but may be more confusing than helpful in clarifying the fundamental issue of whether there was effective consent at a given point in time during a sexual encounter.

[23] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-401(1.5) (defining "consent" as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4."); 720 Ill. Comp. Stat. Ann. 5/11-1.70 (defining "consent" as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent."); Minn. Stat. Ann. § 609.341(4) (defining "consent" as "(a) . . . words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. (b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act. (c) Corroboration of the victim's testimony is not required to show lack of consent."); Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or

Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes. Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[24] and a comparable distinction between consent and effective consent is made in Missouri,[25] and case law in one state has used the distinction in the context of burglary.[26] The Texas and Tennessee

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sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[24] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

[25] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22E-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[26] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[27] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[28] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[29] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[30] However, in recent years, use of the conceptual distinction between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[31]

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[27] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[28] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[29] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[30] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[31] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

The Model Penal Code (MPC) has no equivalent definition, although it does use the term "consent" in some provisions.[32] Other states and commentators have definitions that are very similar to the RCC definition.[33] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent" that is similar to the RCC's.[34]

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition, although it does use the term "consent" in some provisions.[35] Other states and commentators have definitions that are very similar to the RCC definition.[36] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and has provided a definition of "consent" that is similar to the RCC's.[37]

"Controlled substance"

[No national legal trends section.]

"Correctional facility"

[No national legal trends section.]

"Counterfeit mark"

[No national legal trends section.]

["Crime of violence" [RESERVED]]

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[32] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[33] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[34] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

[35] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[36] Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[37] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 3, April 6, 2017) ("'Consent' . . . means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact. Consent may be express or it may be inferred from behavior -- both action and inaction -- in the context of all the circumstances.").

"Culpability requirement"

[No national legal trends section.]

"Culpable mental state"

[No national legal trends section.]

"Dangerous weapon"

Relation to National Legal Trends. First, the MPC and all 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[38] incorporate into their assault statutes inherently dangerous weapons and/or a broader category of objects or substances that can cause death or serious bodily, although the precise labeling of the terms used varies.[39] The MPC and at least 27 of these reformed jurisdictions statutorily define the weapon terms used in their assault statutes. These definitions generally do not address whether imitation firearms or other weapons constitute either category of weapon, presumably leaving the matter to case law, although at least one jurisdiction statutorily defines a deadly weapon or dangerous weapon as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[40] In addition, two reformed jurisdictions include gradations in their assault statues for the use of imitation weapons or a complaining witness's perception of an object.[41]

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[38] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[39] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Alaska Stat. Ann. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1)(B), (a)(1)(C), (a)(4), 11.41.230(a)(2); Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(1)(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), (a)(5), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-2(c)(1), 5/12-3.05(e)(1), (f)(1); Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. §§ 21-5412(b)(1), 21-5413(b)(1)(B), (b)(2)(B); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.025(1)(a), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(B), 208-B(1)(A), (1)(B); Minn. Stat. Ann. § 609.222; Mo. Ann. Stat. §§ 565.052(1)(2), (1)(4), 565.056(1)(2); Mont. Code Ann. §§ 45-5-201(1)(b), 45-5-213(1)(a); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. §§ 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.13(A)(2), 2903.12(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. § 2701(a)(2), 2702.1(a)(4); S.D. Codified Laws §§ 22-18-1(3), 22-18-1.1(2); Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (a)(1)(B)(iii); Tex. Penal Code § 22.02(a)(2); Utah Code Ann. § 76-5-103(1)(b)(i); Wis. Stat. Ann. § 940.24(1).

[40] Utah Code Ann. § 76-1-601(5)(b)(i).

[41] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable

Second, of the 29 reformed jurisdictions, nine define dangerous weapons or similar terms by the item's actual use, attempted use, and threatened use,[42] as does the RCC definition. In contrast, the MPC[43] and nine reformed jurisdictions[44] define dangerous weapons or similar terms by the item's use or intended use. The remaining jurisdictions take a variety of different approaches[45] or do not appear to statutorily define dangerous weapons or similar terms.

Third, the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes refer to the weapon as being "capable,"[46] "highly capable,"[47] or "readily capable"[48] of causing death or serious bodily injury. However, four reformed jurisdictions use "likely"[49] as does the RCC. The MPC definition of "deadly weapon" uses "known to be capable,"[50] as do three reformed jurisdictions.[51]

Fourth, the MPC and the majority of the 27 reformed jurisdictions that statutorily define the weapons terms used in their assault statutes generally do not address whether body parts can constitute dangerous weapons. However, at least one reformed jurisdiction

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apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[42] Ala. Code § 13A-1-2(5) (definition of "dangerous instrument."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument."); Ariz. Rev. Stat. Ann. 13-105(12) (definition of "dangerous instrument."); Conn. Gen. Stat. Ann. § 53a-3(7) (definition of "dangerous instrument."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon.").

[43] Model Penal Code § 210.0(4).

[44] Ark. Code Ann. § 5-1-102(4) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5) (definition of "deadly weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon.").

[45] *See, e.g.*, Ind. Code Ann. § 35-31.5-2-86 ("in the manner it : (A) is used; (B) could ordinarily be used; or (C) is intended to be used."); Mont. Code Ann. § 45-2-101(79) (defining "weapon," in part, "regardless of its primary function.").

[46] Utah Code Ann. § 76-1-601(5) (definition of "dangerous weapon."); Tex. Penal Code Ann. § 1.07(17) (definition of "deadly weapon."); Tenn. Code Ann. § 39-11-106(5) (definition of "deadly weapon."); Ohio Rev. Code Ann. § 2923.11(A) (definition of "deadly weapon."); Me. Rev. Stat. Ann. tit. 17-A, § 2(9); Conn. Gen. Stat. Ann. definition of "deadly weapon." 53a-3(7) (definition of "dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1-901(e) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(15) (definition of "dangerous instrument.").

[47] Ala. Code §13A-1-2(5) definition of "dangerous instrument.")

[48] Wash. Rev. Code Ann. § 9A.04.110(6) (definition of "deadly weapon."); Or. Rev. Stat. Ann. § 161.015(1) (definition of "dangerous weapon."); N.Y. Penal Law § 10.00(13) (definition of "dangerous instrument."); Mont. Code Ann. § 45-2-101(79) (definition of "weapon."); Mo. Ann. Stat. § 556.061(20) (definition of "dangerous instrument."); Ky. Rev. Stat. Ann. § 500.080(3) (definition of "dangerous instrument."); Ind. Code Ann. § 35-31.5-2-86 (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(4) (definition of "dangerous instrument.")

[49] Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon."); S.D. Codified Laws § 22-1-2(10) (definition of "dangerous weapon."); 18 Pa. Stat. Ann. § 2301 (definition of "deadly weapon."); Minn. Stat. Ann. § 609.02(6) (definition of "dangerous weapon.");

[50] Model Penal Code § 210.0(4).

[51] N.J. Stat. Ann. § 2C:11-1(c) (definition of "deadly weapon."); N.H. Stat. Ann. § 625:11(V) (definition of "deadly weapon."); Haw. Rev. Stat. Ann. § 707-700 (definition of "dangerous instrument.");

statutorily defines "dangerous instrument" as including "parts of the human body when a serious physical injury is a direct result of the use of that part of the human body."[52] There is extensive and conflicting case law in many jurisdictions on whether body parts can be dangerous weapons.[53]

"Deadly force"

Relation to National Legal Trends. Eighteen out of 29 reform jurisdictions[54] have codified a definition of deadly force,[55] however, the scope of each definition largely depends on the definition of "serious bodily injury" which is used in the definition of deadly force and varies.

"Debt bondage"

[No national legal trends section.]

"Deceive" and "deception"

Relation to National Legal Trends. The "deception" definition is not broadly supported by law in a majority of jurisdictions, but is largely consistent with law in a significant minority of jurisdictions with reformed criminal codes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[56] nearly half,[57] as well as the Model Penal Code[58] (MPC), have statutory definitions of

[52] Ky. Rev. Stat. Ann. § 500.080(3).
[53] 67 A.L.R.6th 103 (Originally published in 2011).
[54] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).
[55] Ala. Code 1975 § 13a-3-20(2); Alaska Stat. Ann. § 11.81.900(16); Ariz. Rev. Stat. Ann. § 13-105(14); Ark. Code Ann. § 5-2-601(2); Conn. Rev. Stat. Ann. § 53a-3(5); Del. Code Ann. Tit. 11, § 471(A); Kan. Stat. Ann. § 21-5221; Ky. Rev. Stat. Ann. § 503.010(1); Me. Rev. Stat. Ann. Tit. 17, § 2(8); Minn. Stat. Ann. § 609.066; Mon. Ann. Stat. § 563.011; Nh Rev. Stat. Ann. § 627:9(Ii); N.J. Stat. Ann. § 2c:3-11(B); N.D. Cent. Code Ann. § 12.1-05-12(1); Ohio Rev. Code Ann. § 2901.01(2); 18 Pa. Stat. And Cons. Stat. Ann. § 501; Tenn. Code Ann. § 39-11-611; Wash. Rev. Code Ann. § 9a.16.010.
[56] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[57] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010 ; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.
[58] MPC § 223.3.

"deception," either in standalone form, or incorporated into a specific offense.[59] The "deception" definition is broadly consistent with the definitions in the MPC and other jurisdictions, with a few exceptions.

First, only a minority of the reformed code jurisdictions define "deception" to require materiality.[60] However, the MPC[61] and six states require that the false impression must be of "pecuniary significance."[62]

Second, although the revised "deception" definition is consistent with the MPC[63] in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship, most reformed code jurisdictions with statutory "deception" definitions have not followed this approach. Only three reformed code jurisdictions[64] with statutory "deception" definitions criminalize failure to correct a false impression when the actor has a legal duty to do so.

Third, the MPC[65] and a majority of reformed code jurisdictions with statutory "deception" definitions also include false impressions as to a person's state of mind.[66] The definition includes false impressions as to state of mind insofar as the state of mind relates to false intentions to perform acts in the future. However, false impressions as to states of mind more generally are not included in the definition.

"Demonstrating"

[No national legal trends section.]

"Deprive"

Relation to National Legal Trends. The Model Penal Code (MPC) has a definition of "deprive" that is substantively similar to the revised definition, although the MPC does not include language that explicitly includes causing another person to lose a substantial portion of the value or benefit of the property.[67] The MPC's approach has been adopted by a majority of the 29 states[68] that have comprehensively reformed their criminal codes

[59] For example, the MPC does include a general deception definition, but instead defines the types of deceptions that would constitute theft by deception. MPC § 223.3.
[60] Mo. Ann. Stat. § 570.010; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.
[61] MPC § 223.3.
[62] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.
[63] MPC § 223.3.
[64] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.
[65] MPC § 223.3.
[66] Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-36-101; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922.
[67] MPC § 223.0(1) ("'deprive' means: (a) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or (b) to dispose of the property so as to make it unlikely that the owner will recover it."
[68] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo.

influenced by the MPC and have a general part[69] (hereafter "reformed code jurisdictions"). Most of these reformed code jurisdictions explicitly include in their definitions of "deprive" causing the other person to lose a significant portion of the value or benefit of the property.[70]

"Detection device"

[No national legal trends section.]

"Distribute"

[No national legal trends section.]

"District official"

[No national legal trends section.]

"Domestic partner"

[No national legal trends section.]

"Domestic partnership"

[No national legal trends section.]

"Dwelling"

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "dwelling."[71] Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part

Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[69] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[70] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. tit. 17-A, § 352; N.H. Rev. Stat. Ann. § 637:2; N.Y. Penal Law § 155.00; Or. Rev. Stat. Ann. § 164.005; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[71] The MPC does provide a definition for "occupied structure," which states that the term "means any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." MPC § 211.0. However, the MPC also uses the term "dwelling," which suggests that "occupied structure" and "dwelling" are intended to have different meanings.

(hereafter "reformed code jurisdictions"),[72] six use substantially similar definitions of "dwelling."[73]

"Effective consent"

Relation to National Legal Trends. Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[74] and a comparable distinction between consent and effective consent is made in Missouri,[75] and case law in one state has used the distinction in the context of

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[72] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[73] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Kan. Stat. Ann. § 21-5111; Tenn. Code Ann. § 39-14-401. Seven other states only refer to a place that is "usually used," seemingly not including places that are "designed for" or "adapted for use" as a place of lodging. Conn. Gen. Stat. Ann. § 53a-100; Del. Code Ann. tit. 11, § 829; Ky. Rev. Stat. Ann. § 511.010; N.Y. Penal Law § 140.00; Or. Rev. Stat. Ann. § 164.205; Tex. Penal Code Ann. § 30.01; Utah Code Ann. § 76-6-201. The remaining states either provide no definition or use the MPC's "occupied structure" definition or something similar.

[74] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

[75] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of pressures are

burglary.[76] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[77] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[78] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[79] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[80] However, in recent years, use of the conceptual distinction between

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identified other in the offense definitions (e.g., deception in fraud, RCC § 22E-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[76] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[77] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[78] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[79] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[80] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has

"effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[81]

See, generally, the commentary to "consent," above, for more information.

Relation to National Legal Trends. Although courts have long struggled with related issues,[82] distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes.

Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[83] and case law in one state has used the distinction in the context of

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been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[81] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

[82] For example, the line between "mere puffery" and outright deception sufficient to create criminal liability is frequently litigated. *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970) (holding that "claims or statements in advertising may go beyond mere puffing and enter the realm of fraud where the product must inherently fail to do what is claimed for it.").

[83] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9). And Missouri also has a definition. Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The Revised Criminal Code differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear

burglary.[84] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[85] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[86] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[87] But that definition of ineffective consent does not appear to be applicable anywhere else in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[88] However, in recent years, use of the conceptual distinction

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against the victim. The kinds of pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22A-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[84] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[85] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[86] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[87] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[88] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About*

between "effective consent" and simple consent has become widespread among new proposals for substantive criminal law.[89]

"Elderly person"

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "elderly person."

"Factual cause"

[No national legal trends section.]

"Fair market value"

Relation to National Legal Trends. The Model Penal Code (MPC) does not define "fair market value," but also does not codify fair market value as a method for determining "value."[90] At least two of the 29 states[91] that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[92] (hereafter "reformed code jurisdictions") statutorily define "fair market value" for their theft offenses.[93]

"False knuckles"

[No national legal trends section.]

Consent in Rape Cases, 2 Ohio St. J. Crim. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

[89] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

[90] MPC § 223.1(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.").

[91] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code § 5-36-101; Conn. Gen. Stat. Ann. § 53a-118; Del. Code Ann. tit. 11, § 857; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/15-3; Ky. Rev. Stat. Ann. § 514.010; Me. Rev. Stat. tit. 17-A, § 352; Mo. Ann. Stat. § 570.010; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.Y. Penal Law § 155.00; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.005; 18 Pa. Stat. Ann. § 3901; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[92] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[93] Ariz. Rev. Stat. Ann. § 13-1804; Ohio Rev. Code Ann. § 2913.61.

"Felony"

[No national legal trends section.]

"Financial injury"

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "financial injury."

"Firearm"

[No national legal trends section.]

"Firearms instructor"

[No national legal trends section.]

"Halfway house"

[No national legal trends section.]

"Healthcare provider"

[No national legal trends section.]

"Health professional"

[No national legal trends section.]

"Homelessness"

[No national legal trends section.]

"Identification number"

[No national legal trends section.]

"Image"

[No national legal trends section.]

"Imitation dangerous weapon"

[No national legal trends section.]

"Imitation firearm"

[No national legal trends section.]

"Immediate precursor"

[No national legal trends section.]

"Incapacitated individual"

[No national legal trends section.]

"Innocent or irresponsible person"

[No national legal trends section.]

"In fact"

[No national legal trends section.]

"Intentionally"

[No national legal trends section.]

"Intoxication"

[No national legal trends section.]

"Knowingly"

[No national legal trends section.]

"Labor"

Relation to National Legal Trends. *The above discussed change to current District has mixed support in national legal trends.*

Defining "labor" to exclude commercial sex acts has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[94] (reformed jurisdictions), only seven statutorily define "labor."[95] None of these seven jurisdictions'

[94] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[95] Ark. Code Ann. § 5-18-102; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; 18 Pa. Stat. Ann. § 3001.

definitions of "labor" explicitly exclude sexual activity, and one explicitly includes sexual activity.[96] The remaining jurisdictions' definitions of "labor" do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines "labor", but does not specify whether commercial sex acts are included.[97]

"Large capacity ammunition feeding device"

[No national legal trends section.]

"Law enforcement officer"

National Legal Trends. The MPC does not enhance its offenses against persons based on the status of the complainant.

"Legal cause"

[No national legal trends section.]

"Live broadcast"

[No national legal trends section.]

"Live performance"

[No national legal trends section.]

"Machine gun"

[No national legal trends section.]

"Manufacture"

[No national legal trends section.]

"Misdemeanor"

[No national legal trends section.]

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[96] Del. Code Ann. tit. 11, § 787.

[97] UNIFORM ACT ON PREVENTION AND REMEDIES FOR HUMAN TRAFFICKING, National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines "labor" as "work of economic or financial value." However, commentary to the Department of Justice model act notes that "labor" includes "work activities which would, but for the coercion, be otherwise legitimate and legal. The legitimacy or legality of the work is to be determined by focusing on the job, rather than on the legal status or work authorization status of the worker." Department of Justice Model State Anti-Trafficking Criminal Statute. This implies that "labor" does not include commercial sex acts to the extent that commercial sex acts are otherwise illegal.

"Monitoring equipment or software"

[No national legal trends section.]

"Motor vehicle"

Relation to National Legal Trends. The revised definition of "motor vehicle" is substantively similar to the definitions of "motor vehicle" and "vehicle" in the states with UUV statutes that define these terms.[98] In addition, a majority of states include aircraft and watercraft in their UUV statutes. By expanding the scope of the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense, the revised definition reflects the national trends for the scope of UUV. The Model Penal Code (MPC) does not use the term motor vehicle for its UUV statute, but codifies as elements of the offense "automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle."[99]

"Negligently"

[No national legal trends section.]

"Objective element"

[No national legal trends section.]

"Obscene"

[No national legal trends section.]

"Offense element"

[No national legal trends section.]

"Official custody"

[No national legal trends section.]

"Omission"

[No national legal trends section.]

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[98] Ala. Code §§ 13A-8-11 and 13A-8-1; Ariz. Rev. Stat. Ann. §§ 13-1803, 13-1803, and 13-105; Ark. Code Ann. §§ 5-36-108 and 5-36-101; Alaska Stat. Ann. § 11.46.360(a)(1); Colo. Rev. Stat. Ann. § 18-4-409; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 708-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. §§ 514.100 and 514.010; Me. Rev. Stat. tit. 17-A, §360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03(A); Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-406; Tex. Penal Code Ann. §31.07; Minn. Stat Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; N.C. Gen. Stat. Ann. § 14-72.2; Iowa Code Ann. § 714.7; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. §§ 943.23 and 939.22.

[99] MPC § 223.9.

"Open to the general public"

[No national legal trends section.]

"Opium poppy"

[No national legal trends section.]

"Owner"

Relation to National Legal Trends. The Model Penal Code (MPC) does not codify a definition of "owner," although it uses the term in at least one of its property offenses.[100]

Several of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[101] have a definition of "owner" that is similar to the definition in the RCC, but the precise language varies.[102]

"Payment card"

Relation to National Legal Trends. The Model Penal Code (MPC) defines "credit card" as "a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer."[103] It is unclear if the MPC definition includes not only actual cards, but also the numbers or descriptions of those cards.[104]

"Pecuniary gain"

[No national legal trends section.]

"Pecuniary loss"

[No national legal trends section.]

"Person"

Relation to National Legal Trends. The Model Penal Code (MPC) defines "person" for its entire code as "include[s] any natural person and, where relevant, a

[100] MPC § 223.9 (unauthorized use of a vehicle).
[101] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[102] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 5/15-2; Conn. Gen. Stat. Ann. § 53a-118; Tenn. Code Ann. § 39-11-106; Haw. Rev. Stat. Ann. § 708-800.
[103] MPC § 224.6.
[104] See Commentary to MPC § 224.6.

corporation or an unincorporated association."[105] The Proposed Federal Criminal Code has a similar definition for its entire code.[106]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[107] (hereafter "reformed code jurisdictions") have a definition of "person," but the precise language varies.

"Person acting in the place of a parent per civil law"

[No national legal trends section.]

"Person with legal authority over the complainant"

[No national legal trends section.]

"Personal identifying information"

[No national legal trends section.]

"Physically following"

[No national legal trends section.]

"**Physically monitoring"**

[No national legal trends section.]

"Pistol"

[No national legal trends section.]

"Poppy straw"

[No national legal trends section.]

"Position of trust with or authority over"

[No national legal trends section.]

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[105] MPC § 1.13.

[106] Proposed Federal Criminal Code § 109(ae) ("'Person' means a human being and a corporation or organization as defined in section 409.").

[107] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

"Possess"

[No national legal trends section.]

"Prior conviction"

[No national legal trends section.]

"Property"

Relation to National Legal Trends. The Model Penal Code (MPC) defines "property" as "anything of value" and has an open-ended list of items that are of value, such as real estate and tangible and intangible personal property.[108] The Proposed Federal Criminal Code has as a similar definition.[109]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[110] have a definition of "property," but the precise language varies.[111]

"Property of another"

Relation to National Legal Trends. The Model Penal Code (MPC) has a definition of "property of another"[112] that is substantively identical to the revised definition in the RCC, as does the Proposed Federal Criminal Code.[113] Specifically, the definitions in the

[108] MPC § 223.0(6) ("'property' means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.").

[109] Proposed Federal Criminal Code § 1741(f) ("'property' means any money, tangible or intangible personal property, property (whether real or personal) the location of which can be changed (including things growing on, affixed to, or found in land and documents although the rights represented thereby have no physical location), contract right, chose-in-action, interest in or claim to wealth, credit, or any other article or thing of value of any kind. 'Property' also means real property the location of which cannot be moved if the offense involves transfer or attempted transfer of an interest in the property.").

[110] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[111] *See, e.g.*, Tenn. Code Ann. § 39-11-106; Kan. Stat. Ann. § 21-5111; Ark. Code Ann. § 5-36-101; N.H. Rev. Stat. Ann. § 637:2.

[112] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

[113] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor

MPC[114] and the Proposed Federal Criminal Code[115] have a more narrow exclusion of security interests than D.C. definition currently does. The security interest exclusion in these models only applies to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.

The MPC's definition of "property of another" has been widely adopted by the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[116] (hereafter "reformed code jurisdictions"). With regards to the security interest exclusion, the reformed code jurisdictions with a security interest exclusion similar to D.C.'s clearly apply it only to property in the possession of the defendant in which the other person, the complaining witness or victim of the crime, has a security interest.[117]

The MPC, Proposed Federal Criminal Code, and reformed code jurisdictions' definitions of "property of another" support other changes to the revised definition of "property of another" in the RCC. For instance, the MPC[118] and jurisdictions[119] do not include "without consent" as the current definition of "property of another" does in D.C.[120] The Proposed Federal Criminal Code does.[121]

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shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[114] MPC § 223.0(7).

[115] Proposed Federal Criminal Code § 1741(g).

[116] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 New Crim. L. Rev. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[117] For some of these jurisdictions, the term "owner" is used instead of "property of another," or the security interest exception is codified as a general statement of principle rather than as part of a definition. *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1; N.D. Cent. Code Ann. § 12.1-23-10; 18 Pa. Cons. Stat. Ann. § 3901; S.D. Codified Laws § 22-1-2; Me. Rev. Stat. tit. 17-A, § 352.

[118] MPC § 223.0(7) ("property of another" includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement.").

[119] *See, e.g.*, Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.990; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 857; Ky. Rev. Stat. Ann. § 514.010; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-1.

[120] 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.").

[121] Proposed Federal Criminal Code § 1741(g) ("'Property of another' means property in which a person other than the actor or in which a government has an interest which the actor is not privileged to infringe without consent, regardless of the fact that the actor also has an interest in the property and regardless of the fact that the other person or government might be precluded from civil recovery because the property was

The Model Penal Code (MPC) definition of "property of another" includes a statement "regardless of the fact that the other person might be precluded from civil recovery because the property was used in an unlawful transaction or was subject to forfeiture as contraband."[122] Many of the jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part also include such a statement.[123]

"Protected person"

Relation to National Legal Trends. The MPC does not enhance assault or robbery on the basis of the identity of the complainant. However, the revisions to the District's current penalty enhancements and offenses for individuals of specific ages, occupations, and status as a "vulnerable adult," as reflected in the definition of "protected person," are supported by national trends.

First, although the substance of the requirements for senior citizens and minors is largely the same in the definition of "protected person" as it is in the current penalty enhancements, the RCC assault and robbery offenses effectively eliminate the defenses for these enhancements that exist under current District law by relying on a culpable mental state requirement. Many of the reformed jurisdictions' assault statutes enhance some or all grades of the offense due to the complaining witness being elderly[124] or young,[125] with varying age thresholds. None of these jurisdictions use an affirmative defense in the penalty enhancement.

Second, inclusion of "vulnerable adult"[126] in the definition of "protected person" effectively makes harms to a "vulnerable adult" subject to new enhanced penalties in RCC assault and robbery offenses. A significant number of the reformed jurisdictions enhance assaults against individuals with physical or mental disabilities that limit their ability to care for themselves.[127]

Third, inclusion of a "law enforcement officer" and "public safety officer" in the definition of "protected person" effectively makes harms to some persons in these groups subject to new enhanced penalties in the RCC assault and robbery offenses. Most reformed

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used in an unlawful transaction or was subject to forfeiture as contraband. Property in possession of the actor shall not be deemed property of another who has a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security agreement. 'Owner' means any person or a government with an interest in property that is 'property of another' as far as the actor is concerned.").

[122] MPC § 223.0(7).

[123] *See, e.g.*, Alaska Stat. Ann. § 11.46.990; Del. Code Ann. tit. 11, § 857; S.D. Codified Laws § 22-1-2; Ky. Rev. Stat. Ann. § 514.010.

[124] *See, e.g.*, Ark. Code Ann § 5-13-202(a)(4)(D); Del. Code Ann tit. 11 § 612(a)(6); 720 Ill. Comp. Stat. Ann. 5/12-3.05(d)(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3).

[125] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(d); Ariz. Rev. Stat. Ann. § 13-1204(A)(6); Del. Code Ann tit. 11 § 612(a)(11); 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(e)(3), (g)(5); N.H. Stat. Ann. §§ 631:1(I)(d), 631:2(d); N.D. Cent. Code Ann. § 12.1-17-02(2).

[126] The definition of "vulnerable adult" is discussed in the commentary to the definition in RCC § 22E-1001(21).

[127] *See, e.g.*, Ark. Code Ann. § 5-13-202(a)(4)(F); Conn. Gen. Stat. Ann. § 53a-59a; Colo. Rev. Stat. Ann. § 18-6.5-103; 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(1)(e)(5), (1)(g)(5)(D); Del. Code Ann. tit. 11, § 1105; Minn. Stat. Ann. § 609.2231(8); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

jurisdictions enhance assaults when the complaining witness is a LEO.[128] The scope of the definition of "law enforcement officer," "peace officer," and similar terms varies amongst jurisdictions, but several seem to include officers similar to Metro transit police.[129] In addition, many reformed jurisdictions enhance assaults to emergency medical first responders, either in the same enhanced gradation for assaults against LEOs,[130] or in a lesser gradation than an assault on a LEO.[131]

Fourth, inclusion of "a transportation worker" in the definition of "protected person" effectively makes harms to some persons in this group subject to new enhanced penalties in the RCC assault and robbery offenses. At least one reformed jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire,[132] and several reformed jurisdictions specifically enhance assaults committed against public transportation workers.[133]

Fifth, inclusion of "District official or employee" in the definition of "protected person" effectively makes harms to some persons in this group subject to different

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[128] *See, e.g.*, Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4; Del. Code Ann. tit. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05; Ind. Code Ann. § 35-42-2-1(e)(2), (g)(5); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Wis. Stat. Ann. § 940.23; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5).

[129] *See, e.g.*, Ark. Code Ann. § 5-1-102(10) ("'Law enforcement officer" means any public servant vested by law with a duty to maintain public order or to make an arrest for an offense."); Ariz. Rev. Stat. Ann. § 13-105(29) ("'Peace officer" means any person vested by law with a duty to maintain public order and make arrests and includes a constable."); Mont. Code Ann. § 45-2-101(55) ("'Peace officer' means a person who by virtue of the person's office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of the person's authority.").

[130] *See, e.g.*, Ala. Code § 13A-6-21(4) ("emergency medical personnel."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5) ("emergency medical service provider" or "emergency medical care provider."); Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5) (including emergency medical technicians and paramedics); K.Y. Rev. Stat. Ann. § 508.025(1)(4) ("paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties."); Conn. Gen. Stat. Ann. § 53a-167c(a) ("emergency medical . . . personnel."); Mo. Ann. Stat. §§ 565.052, 565.054, 565.056 and 565.002 (defining "special victim," in part, as "[e]mergency personnel, any paid or volunteer firefighter, emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted in the performance of his or her official duties or as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(b)(5)(a), (b)(5)(c) ("Any person engaged in emergency first-aid or medical services acting in the performance of his duties.").

[131] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(c)(3) (enhancing first degree battery if the complainant is a "law enforcement officer acting in the line of duty" and 5-13-202(a)(4)(A), (a)(4)(E) (enhancing second degree battery when the complainant is a LEO or an emergency medical services provider); Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a), (A)(8)(c), (E), (F) (making aggravated assault against a peace officer either a class 5 felony, unless it results in physical injury, in which case it is a class 4 felony, and making aggravated assault against an emergency medical technician or paramedic a class 6 felony).

[132] N.Y. Penal Law § 60.07.

[133] *See, e.g.*, Del. Code Ann. tit. §§ 11, 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. 5/12-3.05(d)(7); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.J. Stat. Ann. § 2C:12-1(g); Or. Rev. Stat. Ann. § 163.164(d); Tenn. Code Ann. § 39-13-102(d).

enhanced penalties in the RCC assault and robbery offenses. Several reformed jurisdictions enhance assaults against state officials or employees.[134]

Sixth, inclusion of "a citizen patrol member" in the definition of "protected person" effectively makes harms to some persons in this group subject to different enhanced penalties in the RCC assault and robbery offenses. At least two reformed jurisdictions specifically enhance assaults on similar citizen patrol groups.[135]

"Public conveyance"

[No national legal trends section.]

"Public official"

[No national legal trends section.]

"Public safety employee"

[No national legal trends section.]

"Purposely"

[No national legal trends section.]

"Rail transit station"

[No national legal trends section.]

"Recklessly"

[No national legal trends section.]

"Recording device"

[No national legal trends section.]

"Restricted explosive"

[No national legal trends section.]

[134] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20.

[135] Minn. Stat. Ann. § 609.2231(7); 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4).

"Result element"

[No national legal trends section.]

"Retail value"

[No national legal trends section.]

"Sadomasochistic abuse"

[No national legal trends section.]

"Sawed-off shotgun"

[No national legal trends section.]

"Secure juvenile detention facility"

[No national legal trends section.]

"Self-induced intoxication"

[No national legal trends section.]

"Serious bodily injury"

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[136] At least 27 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[137] ("reformed jurisdictions") have adopted the MPC definition or have a substantively similar definition.[138]

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[136] Model Penal Code § 210.0(3).

[137] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[138] Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Alaska Stat. Ann. § 11.81.900(a)(57) (defining "serious physical injury" as "(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted

disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Ariz. Rev. Stat. Ann. § 13-105(39) (defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. § 18-1-901(3)(p) (defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. § 53a-3(4) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 222(26) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female."); Haw. Rev. Stat. Ann. § 707-700 ("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Ind. Code Ann. § 35-31.5-2-292 (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Ky. Rev. Stat. Ann. § 500.080 (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ" and specifying injuries that constitute "serious physical injury" for a person under the age of 12 years); Me. Rev. Stat. tit. 17-A, § 2(23) (defining "serious bodily injury" as "a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Minn. Stat. Ann. § 609.02(8) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); Mo. Ann. Stat. § 556.061 (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); N.H. Rev. Stat. Ann. § 625:11(VI) (defining "serious bodily injury" as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body."); N.J. Stat. Ann. § 2C:11-1(b) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); N.Y. Penal Law § 10.00(10) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. § 12.1-01-04(27) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the three substantive revisions to the definition of "serious bodily injury," deleting "unconsciousness," "extreme physical pain," and impairment of a "mental faculty" are well supported by the criminal codes of the 29 reformed jurisdictions. Of the 27 reformed jurisdictions with statutory definitions of "serious bodily injury" or a similar term, only three[139] include unconsciousness in the definition. Only four of these reformed jurisdictions[140] include extreme pain or similar language in the definition. Only three reformed jurisdictions include psychological distress in the definition,[141] and two of these jurisdictions require

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any degree of prolonged or intractable pain."); Or. Rev. Stat. Ann. § 161.015(8) (defining "serious physical injury" as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); 18 Pa. Stat. Stat. Ann. § 2301 (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); S.D. Codified Laws § 22-1-2(44A) (defining "serious bodily injury" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ."); Wis. Stat. Ann. § 939.22(14) (defining "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.").

[139] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[140] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[141] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

mental illness or impairment as opposed to impairment of a "mental faculty."[142] The third reformed jurisdiction refers to impairment of a "mental faculty."[143]

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[144] A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[145] (reformed jurisdictions) have adopted the MPC definition[146] or a substantively similar definition.[147]

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[142] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.").

[143] Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

[144] Model Penal Code § 210.0(3).

[145] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[146] *See, e.g.*, Haw. Rev. Stat. Ann. § 707-700 ("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); 18 Pa. Stat. Ann. § 2301 (defining "serious bodily injury" as "[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[147] *See, e.g.*, Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Me. Rev. Stat. tit. 17-A, § 2(23) ("'Serious bodily injury' means a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Mo. Ann. Stat. § 556.061 (defining

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the two revisions to the definition of "serious bodily injury," deleting "unconsciousness" and "extreme physical pain," are well supported by national legal trends. Only three reformed jurisdictions[148] and at least one non-reformed jurisdiction[149] include unconsciousness in the definition of the highest level of bodily injury. Similarly, only four reformed jurisdictions[150] and at least one non-reformed jurisdiction[151] include extreme pain or similar language in the definition of the highest level of bodily injury. The MPC definition of "serious bodily injury" does not include unconsciousness or pain.[152]

"Serious mental injury"

Relation to National Legal Trends. The Model Penal Code (MPC) does not define the term "serious mental injury.

"Services"

National Legal Trends. The Model Penal Code (MPC) does not define "services." The Proposed Federal Criminal Code does, with close-ended list of items that constitute "services."[153]

Many of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[154] have a definition of "services," but the precise language varies.[155]

Relation to National Legal Trends. *The above discussed change to current District has mixed support in national legal trends.*

"serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.").

[148] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[149] Wyo. Stat. Ann. § 6-1-104(x) ("unconsciousness.").

[150] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[151] Wyo. Stat. Ann. § 6-1-104(x) ("severe protracted physical pain.").

[152] Model Penal Code § 210.0(3).

[153] Proposed Federal Criminal Code § 1741(i) ("'Services' means labor, professional service, transportation, telephone, mail or other public service, gas, electricity and other public utility services, accommodations in hotels, restaurants or elsewhere, admission to exhibitions, and use of vehicles or other property.").

[154] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[155] *See, e.g.*, Ala. Code § 13A-8-10; Haw. Rev. Stat. Ann. § 708-800; Me. Rev. Stat. Ann. tit. 17-A, § 357; S.D. Codified Laws § 22-1-2.

Defining "services" to exclude commercial sex acts has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[156] (reformed jurisdictions), only a minority of reformed jurisdictions define the term "services."[157] Of these states one explicitly includes sexual activity in the definition of "services"[158] and one explicitly excludes sexual activity from the definition of "services."[159] The remaining jurisdictions' definitions of "service" do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines "services", and specifies that "commercial sexual activities and sexually explicit performances shall be considered 'services.[.]"[160]

"Sexual act"

Relation to National Legal Trends: The American Law Institute (ALI) has recently undertaken a review of the Model Penal Code's (MPC) sexual assault offenses, and has provided draft definitions of "sexual penetration"[161] and "oral sex."[162] Neither definition has an intent requirement like subsection (C) of the District's current definition of "sexual act" or the revised definition of "sexual act," but the ALI definition of "sexual penetration" does exclude penetration "except when done for legitimate medical, hygienic, or law enforcement purposes."

There is mixed support in the criminal codes of reformed jurisdictions for requiring an intent "to sexually degrade, arouse, or gratify any person" for all types of penetration in the revised definition of "sexual act," in part because the reformed jurisdictions take a variety of approaches in defining what is required for an act of sexual penetration.

At least 13 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[163]

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[156] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[157] Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[158] 720 Ill. Comp. Stat. Ann. 5/10-9.

[159] Haw. Rev. Stat. Ann. § 707-780.

[160] Uniform Act on Prevention and Remedies for Human Trafficking. National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines "services" to include "commercial sexual activity and sexually-explicit performances[.]"

[161] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(a) (Tentative Draft No. 9, September 14, 2018) (defining "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygenic, or law-enforcement purposes.").

[162] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(b) (Tentative Draft No. 9, September 14, 2018) (defining "oral sex" as "a touching of the anus or genitalia of one person by the mouth or tongue of another person.").

[163] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska,

(reformed jurisdictions) define "sexual act" or a similar term that encompasses all types of sexual penetration and oral sex,[164] but at least 12 other reformed jurisdictions[165] separately define different types of sexual penetration, such as sexual intercourse and oral sex. Only two of these reformed jurisdictions specify a "purpose" or "intent to" gratify, arouse, etc., like subsection (C) of the current definition of "sexual act" and these reformed jurisdictions limit the "intent to" requirement to the equivalent of subsection (C) in the current definition of "sexual act."[166] However, several of the reformed jurisdictions exclude from the

New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[164] Conn. Gen. Stat. Ann. § 53a-65(2) (defining "sexual intercourse."); Haw. Rev. Stat. Ann. § 707-730 (defining "sexual penetration."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual penetration."); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(C) (defining "sexual act."); Minn. Stat. Ann. § 609.341(1)(12) (defining "sexual penetration."); N.J. Stat. Ann. § 2C:14-1(c) (defining "sexual penetration."); N.D. Cent. Code Ann. § 12.1-20-02(4) (defining "sexual act."); N.H. Rev. Stat. Ann. § 632-A:1(V) (defining "sexual penetration."); Ohio Rev. Code Ann. § 2907.01(A) (defining "sexual conduct."); S.D. Codified Laws § 22-22-2 (defining "sexual penetration."); Tenn. Code Ann. § 39-13-501(7) (defining "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1) (defining "sexual intercourse."); Wis. Stat. Ann. § 940.225(5)(c) (defining "sexual intercourse.")

[165] Ala. Code Ann. § 13A-6-60(1), (2) (defining "sexual intercourse" and "deviate sexual intercourse."); Ariz. Rev. Stat. Ann. § 13-1401(A)(1), (A)(4) (defining "oral sexual contact" and "sexual intercourse."); Ark. Code Ann. § 5-14-101(1), (12) (defining "deviate sexual activity" and "sexual intercourse."); Colo. Rev. Stat. Ann. § 18-3-401(5), (6) (defining "sexual intrusion" and "sexual penetration."); Del. Code Ann. tit. 11, § 761(b), (c), (g), (i) (defining "cunnilingus," "fellatio," "sexual intercourse," and "sexual penetration."); Ky. Rev. Stat. Ann. § 510.010(1), (8) (defining "deviate sexual intercourse" and "sexual intercourse."); Kan. Stat. Ann. § 21-5501(a), (b) (defining "sexual intercourse" and "sodomy."); Mo. Ann. Stat. § 566.010(3), (7) (defining "deviate sexual intercourse" and "sexual intercourse."); N.Y. Penal Law § 130.00(1), (2)(a), (2)(b) (defining "sexual intercourse," "oral sexual conduct," and "anal sexual conduct."); Or. Rev. Stat. Ann. § 163.305(4), (7) (defining "oral or anal sexual intercourse" and "sexual intercourse."); 18 Pa. Stat. Ann. § 3101 (defining "deviate sexual intercourse" and "sexual intercourse."); Tex. Penal Code Ann. § 21.01(1), (3) (defining "deviate sexual intercourse" and "sexual intercourse.").

[166] Me. Rev. Stat. tit. 17-A, § 251(1)(C) (defining "sexual act" to include "[a]ny act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(3) (defining "deviate sexual intercourse" as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any purpose or for the purpose of terrorizing the victim.").

definitions penetration for medical purposes[167] or medical and law-enforcement purposes.[168]

"Sexual contact"

Relation to National Legal Trends: There is strong support in the criminal codes of reformed jurisdictions for limiting the additional intent requirement in the revised definition of "sexual contact" to an intent to "sexually degrade, arouse, or gratify any person" and deleting an intent to "abuse, humiliate, [or] harass" from the current definition. At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[169] (reformed jurisdictions) define "sexual contact" or a similar term that encompasses sexual touching.[170] Twenty-one of these reformed jurisdictions specify an additional intent or

[167] Ky. Rev. Stat. Ann. § 510.010(1), (8) (stating "deviate sexual intercourse" does not include "penetration of the anus by any body part or a foreign object in the course of the performance of generally recognized health-care practices" and "'sexual intercourse' does not include penetration of the sex organ by any body part or a foreign object in the course of the performance of generally recognized health-care practices."); S.D. Codified Laws § 22-22-2 (stating that "[p]ractitioners of the healing arts lawfully practicing within the scope of their practice . . . are not included within the provisions" of the definition of "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1)(b) (stating that "sexual intercourse" includes "any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.").

[168] Kan. Stat. Ann. § 21-5501(a), (b) (stating that "sexual intercourse" does not include "penetration of the female sex organ by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto" and that "sodomy" does not include "penetration of the anal opening by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto."); 18 Pa. Stat. Ann. § 3101 (stating that "deviate sexual intercourse" includes "penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.");

[169] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[170] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Ariz. Rev. Stat. Ann. § 13-1401(A)(3) (defining "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such conduct."); Ark. Code Ann. § 5-14-102(11) (defining "sexual contact" as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or

humiliating such person."); Del. Code Ann. tit. 11, § 761(f) (defining "sexual contact" as (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing."); Haw. Rev. Stat. Ann. § 707-700 (defining "sexual contact" as "any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of another, or of the sexual or other intimate parts of the actor by another, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.); Ky. Rev. Stat. Ann. § 510.010(7) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."); Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires."); N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."); Ohio Rev. Code Ann. § 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."); Or. Rev. Stat. Ann. § 135.305(6) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimidate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (defining "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."); S.D. Codified Laws § 22-22-7.1 (defining "sexual contact" as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party. Practitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be made by the court prior to trial, are not included within the provisions of this section. In any pretrial proceeding under this section, the prosecution has the burden of establishing probable cause."); Tex. Penal Code Ann. § 21.01(2) (defining "sexual contact" as "except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the

sexual desire of any person."); Tenn. Code Ann. § 39-13-501(6) (defining "sexual contact" as "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification."); Wash. Rev. Code Ann. § 9A.44.010(2) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

purpose requirement[171] or require that the contact can be reasonably construed for a specified intent or purpose.[172] Of these 21 reformed jurisdictions, two jurisdictions include

[171] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.); Ky. Rev. Stat. Ann. § 510.010(7) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."); Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires."); Ohio Rev. Code Ann. § 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."); Or. Rev. Stat. Ann. § 135.305(6) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimidate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (defining "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."); S.D. Codified Laws § 22-22-7.1 (defining "sexual contact" as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party. Practitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be made by the court prior to trial, are not included within the provisions of this section. In any pretrial proceeding under this section, the prosecution has the burden of establishing probable cause."); Tex. Penal Code Ann. § 21.01(2) (defining "sexual contact" as "except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."); Wash. Rev. Code Ann. § 9A.44.010(2) (defining

an intent or purpose to abuse[173] and three jurisdictions include an intent or purpose to humiliate.[174] None of the 21 reformed jurisdictions specifically include an intent or purpose to "harass," but one of the jurisdictions requires an intent to "terrorize"[175] and two additional reformed jurisdictions require an "aggressive" intent or the purpose of arousing or satisfying "aggressive desires."[176]

"sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[172] Del. Code Ann. tit. 11, § 761(f) (defining "sexual contact" as (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing."); N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."); Tenn. Code Ann. § 39-13-501(6) (defining "sexual contact" as "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[173] Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.").

[174] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[175] Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.").

[176] Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of

The 21 reformed jurisdictions generally require an intent or purpose to sexually arouse or gratify, but two jurisdictions do include an intent or purpose to degrade[177] or sexually degrade.[178]

"Significant bodily injury"

Relation to National Legal Trends. Only seven[179] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[180] (reformed jurisdictions) have an intermediate level of bodily injury like "significant bodily injury" in current District law. In addition, at least one non-reformed jurisdiction has a similar intermediate level of bodily injury.[181] The MPC does not have an intermediate level of bodily injury.

These jurisdictions take a variety of approaches in defining the intermediate level of bodily injury. None of them define the injury in terms of whether it requires immediate medical attention or hospitalization like the District's current and revised definitions of "significant bodily injury" do, although one jurisdiction does require "medical treatment when the treatment requires the use of regional or general anesthesia."[182] The jurisdictions typically define the intermediate level of injury in relation to the impairment or disfigurement required in the highest level of bodily injury.[183] Many of the jurisdictions

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the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.").

[177] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person.").

[178] Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[179] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev. Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[180] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[181] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

[182] S.C. Code Ann. § 16-3-600(A)(2) ("moderate bodily injury.").

[183] *See, e.g.*, Minn. Stat. Ann. § 609.02(7a) (defining "substantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member") and 609.02(7b) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); N.D. Cent. Code Ann. § 12.1-01-04(29) (defining "substantial bodily injury" as a "substantial temporary disfigurement, loss, or impairment of the function of any bodily member or organ") and § 12.1-01-04(27) (defining "serious bodily injury" as

also include in their definitions specific injuries that will satisfy the intermediate level of bodily injury like the RCC does, including a fracture of bone,[184] certain lacerations,[185] burns,[186] temporary loss consciousness,[187] and concussions.[188] None of the definitions directly address injuries caused by strangulation or suffocation, although one jurisdiction does specifically list petechiae.[189]

"Significant emotional distress"

[No national legal trends section.]

"Simulated"

[No national legal trends section.]

"Sound recording"

[No national legal trends section.]

"Speech"

[No national legal trends section.]

"Strangulation or suffocation"

[No national legal trends section.]

"Strict liability"

[No national legal trends section.]

"Stun gun"

[No national legal trends section.]

"bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.").

[184] Haw. Rev. Stat. Ann. § 707-700 ("a bone fracture."); Minn. Stat. Ann. § 609.02(7a) ("causes a fracture of any bodily member."); Wash. Rev. Code Ann. § 9A.04.110(b) ("causes a fracture of any bodily part."); Wis. Stat. Ann. § 939.22(38) ("any fracture of a bone."); S.C. Code Ann. § 16-3-600(A)(2) ("injury that results in a fracture.").

[185] Haw. Rev. Stat. Ann. § 707-700 ("a major . . . laceration, or penetration of the skin."); Wis. Stat. Ann. § 939.22(38) ("a laceration that requires stiches.").

[186] Haw. Rev. Stat. Ann. § 707-700 ("a burn of at least second degree severity."); Wis. Stat. Ann. § 939.22(38) ("a burn.").

[187] Wis. Stat. Ann. § 939.22(38) ("temporary loss of consciousness.").

[188] Haw. Rev. Stat. Ann. § 707-700 ("concussion."); Wis. Stat. Ann. § 939.22(38) ("a concussion.").

[189] Wis. Stat. Ann. § 939.22(38).

"Transportation worker"

[No national legal trends section.]

"Undue influence"

[No national legal trends section.]

"Value"

Relation to National Legal Trends. The Model Penal Code (MPC) determines "value" for its theft and theft related offenses as "the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal."[190] The MPC's approach has been adopted by a minority of the 29 states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[191] (hereafter "reformed code jurisdictions"). The Proposed Federal Criminal Code has a similar approach, "The amount involved in a theft . . . shall be the highest value by any reasonable standard, regardless of the actor's knowledge of such value, of the property or services which were stolen by the actor, or which the actor believed that he was stealing, or which the actor could reasonably have anticipated to have been the property or services involved."[192]

The majority of the reformed code jurisdictions have adopted definitions of "value" that are substantively similar or identical to the RCC definition of "value,"[193] with the exception of the payment card and unendorsed check provision in subsection (c). However, at least one reformed code jurisdiction has a similar provision.[194]

"Vulnerable adult"

"Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "vulnerable adult."

"Written instrument"

Relation to National Legal Trends. The Model Penal Code (MPC) defines the term "writing" more generally, to include a "printing or any other method of recording

[190] MPC § 223.1(2)(c).
[191] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[192] Proposed Federal Criminal Code § 1735(7).
[193] Ala. Code § 13A-8-1; Alaska Stat. Ann. § 11.46.980; Ariz. Rev. Stat. Ann. § 13-1801; Ark. Code Ann. § 5-36-101; Conn. Gen. Stat. Ann. § 53a-121; Del. Code Ann. tit. 11, § 224; Haw. Rev. Stat. Ann. § 708-801; Me. Rev. Stat. tit. 17-A, § 352; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.020; Mont. Code Ann. § 45-2-101; N.Y. Penal Law § 155.20; Or. Rev. Stat. Ann. § 164.115; 18 Pa. Stat. Ann. § 3903; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 31.08; Wash. Rev. Code Ann. § 9A.56.010.
[194] N.H. Rev. Stat. Ann. § 637:2(V)(c).

information, money, coins, tokens, stamps, seals, credit cards, badges, trade-marks, and other symbols of value, right, privilege, or identification."[195] The specific list of items and documents that constitute a "writing" is not identical to that used in the definition of "written instrument," but both definitions are intended to be broad enough to capture virtually any form of written information.

The following entries no longer correspond to terms that are defined in RCC § 22E-701, but may still contain relevant research.

"Duty of care"

Relation to National Legal Trends. The Model Penal Code (MPC) does not use the term "duty of care," but its offense for endangering the welfare of a child requires that the defendant violate "a duty of care, protection, or support."[196]

"Prohibited weapon"

Relation to National Legal Trends. Given the complexity of other jurisdictions' weapons laws, it is only possible to generally compare the RCC's treatment of the objects specified in the definition of "prohibited weapon" with the treatment of these objects in other jurisdictions and the MPC. The MPC defines "deadly weapon" as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."[197] Although this definition does not mention specific types of weapons other than firearms, the expansive definition would likely include all the objects in the RCC definition of "prohibited weapon," with the possible exception of a firearm silencer.

The 29 reformed jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[198] generally include the objects in the RCC definition of "prohibited weapon," again with the possible exception of a firearm silencer. Machine guns and sawed-off shotguns are included in many reformed jurisdictions' assault gradations by the inclusion of "firearm"[199] in the definition of "deadly weapon" or similar term, and are also presumably included in the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause

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[195] MPC § 224.1.
[196] MPC § 230.4.
[197] MPC § 210.0(4).
[198] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.
[199] *See, e.g.*, Wis. Stat. Ann. § 939.22(10) (definition of "dangerous weapon" including "any firearm."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon" including a "firearm."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Me. Rev. Stat. tit. 17-A, § 2 (definition of "use of a dangerous weapon" including "the use of a firearm."); N.H. Rev. Stat. Ann. § 625:11(V) (definition of "deadly weapon" including "any firearm.").

death or serious bodily injury.[200] In addition, at least one reformed jurisdiction punishes an assault with a machine gun more seriously than an assault committed with another firearm or other deadly weapon.[201] Several reformed jurisdictions also specifically include blackjacks,[202] slungshots,[203] metallic or other false knuckles,[204] and switchblade knives[205] in their assault gradations through the definitions of "deadly weapon" or other similar term for inherently dangerous weapons. It does not appear that any reformed jurisdictions specifically mention sandbag cudgels or sand clubs, but such weapons would presumably fall under broader categories such as bludgeons,[206] as well as the expansive definitions of deadly weapons or dangerous weapons as objects likely to cause death or serious bodily injury.[207] Firearm silencers appear to be largely excluded from the weapons gradations in reformed jurisdictions' assault offenses, although at least one reformed jurisdiction punishes an assault with a firearm equipped with a silencer more seriously than an assault with another firearm or other deadly weapon.[208]

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[200] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

[201] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum of 45 years" to commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[202] *See e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); Mo. Ann. Stat. § 556.061(22) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon.").

[203] *See, e.g.*, N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[204] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Alaska Stat. Ann. § 11.81.900(17) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon.").

[205] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon."); N.D. Cent. Code Ann. § 12.01-04(6) (definition of "dangerous weapon.").

[206] *See, e.g.*, Ala. Code § 13A-1-2(7) (definition of "deadly weapon."); Colo. Rev. Stat. Ann. § 18-1-901(e)(II) (definition of "deadly weapon."); Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon."); .D. Cent. Code Ann. § 12.1-01-04(6) (definition of "dangerous weapon."); Del. Code Ann. tit. 11, § 222(5) (definition of "deadly weapon.").

[207] *See, e.g.*, Conn. Gen. Stat. Ann. § 53a-3(6) (definition of "deadly weapon" including "any weapon, whether loaded or unloaded, from which a shot may be discharged ."); Ky. Rev. Stat. Ann. § 500.080(4) (definition of "deadly weapon."); N.Y. Penal Law § 10.00(12) (definition of "deadly weapon" including "any loaded weapon from which a shot, readily capable of producing death or other serious physical injury, may be discharged."); Utah Code Ann. § 76-1-601(5)(a) (definition of "dangerous weapon" including "any item capable of causing death or serious bodily injury.").

[208] Ill. Comp. Stat. Ann. 5/12-3.05(e)(1), (e)(5), (f)(1), (h) (making it a Class X felony to commit a battery by discharging a firearm other than a machine gun or a firearm equipped with a silencer, a Class X felony "for which a person shall be sentenced to a term of imprisonment of a minimum of 12 years and a maximum

"Occupant"

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the MPC and have a general part,[209] two have definitions that resemble the RCC's definition of "occupant."[210]

of 45 years" to commit a battery by discharging a machine gun or a firearm equipped with a silencer with MM, and making it a Class 3 felony to commit a battery by using a deadly weapon other than discharging a firearm).

[209] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[210] Tenn. Code Ann. § 39-14-401 ("Occupied" means the condition of or other building"); Utah Code Ann. § 76-6-409.3 ("'Tenant or occupant' includes any person, including the owner, who occupies the whole or part of any building, whether alone or with others.").

Subtitle II. Offenses Against Persons.

Chapter 11. Homicide

RCC § 22E-1101. Murder.

Relation to National Legal Trends. *The aggravated murder offense's above-mentioned substantive changes to current District law have mixed support in national legal trends*.

First, omitting as an aggravating circumstance that the murder was committing in the course of committing or attempting to commit kidnapping, robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of committing, or attempting to commit, kidnapping.[1]

Second omitting as an aggravating circumstance that the murder was committed in the course of committing or attempting to commit robbery, arson, rape, or other sexual offense is not consistent with most criminal codes. A majority of states nationwide still include as an aggravating circumstance that the murder was committed in the course of robbery, arson, or sexual offense, or in the course of attempting to commit one of those offenses.[2]

Third, omitting as an aggravating circumstance that there was more than one murder arising out of one incident is supported by many criminal codes. Half of states nationwide do not include as an aggravating circumstance that more than one murder was committed in a single incident,[3] including twelve[4] of the 29 states that have adopted a new criminal code influenced by the Model Penal Code (MPC) ("reformed jurisdictions").[5]

Fourth, omitting as an aggravating circumstance that the murder involved a drive by or random shooting is consistent with most criminal codes. A majority of states do not recognize drive by or random shooting as an aggravating circumstance.[6]

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[1] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03. However, CCRC staff did not analyze how these states may provide for separate prosecution and penalties for commission of such crimes in the course of committing murder.

[2] *E.g.*, Iowa Code Ann. § 707.2, N.Y. Penal Law § 125.26, Tex. Penal Code Ann. § 19.03.

[3] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Iowa Code Ann. § 707.2; Idaho Code Ann. § 19-2515; Ind. Code Ann. § 35-50-2-9; Mass. Gen. Laws Ann. ch. 279, § 69; Mich. Comp. Laws Ann. § 750.316; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.C. Gen. Stat. Ann. § 15A-2000; Neb. Rev. Stat. Ann. § 29-2523; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Okla. Stat. Ann. tit. 21, § 701.12; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.D. Codified Laws § 23A-27A-1; Wyo. Stat. Ann. § 6-2-102.

[4] Alaska Stat. Ann. § 12.55.125; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Ind. Code Ann. § 35-50-2-9; Minn. Stat. Ann. § 609.185; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303;; N.H. Rev. Stat. Ann. § 630:1; N.J. Stat. Ann. § 2C:11-3; Ohio Rev. Code Ann. § 2903.01; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[5] Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007).

[6] Only seven states recognize drive by or random shootings as an aggravating circumstance for murder. Ala. Code § 13A-5-40; Cal. Penal Code § 190.2; 720 Ill. Comp. Stat. Ann. 5/9-1; La. Stat. Ann. § 14:30; Minn. Stat. Ann. § 609.185; Tenn. Code Ann. § 39-13-204; Wash. Rev. Code Ann. § 10.95.020.

Fifth, omitting as an aggravating circumstance that the murder was committed due to the victim's race, color, religion, national origin, sexual orientation, or gender identity or expression is consistent with most criminal codes and reformed criminal codes. Almost all states omit bias motivation as an aggravating circumstance for murder.[7]

Sixth, omitting the recidivist aggravating circumstance is not consistent with state criminal codes. A majority of states recognize as an aggravating circumstance that the accused had been previously convicted or murder, manslaughter, or other violent offenses.[8]

Seventh, adding as an aggravating circumstance that the victim was a law enforcement officer is consistent with state criminal codes. Only five states omit as an aggravating circumstance that the victim is a law enforcement officer.[9] Adding as an aggravating factor that the victim was a participant in a citizen patrol, District official or employee, or family member of a District official or employee

Eighth, it is unclear whether recognizing as an aggravating factor that when the murder was committed with recklessness as to the victim being a public safety employee in the course of official duties, transportation worker in the course of official duties, District official or employee in the course of official duties, or member of a citizen patrol member, while in the course of a citizen patrol is consistent with national legal trends. CCRC staff has not yet determined whether other jurisdictions recognize the victim's status as a public safety employee, transportation worker, government official or employee, or member of a citizen patrol as an aggravating circumstance.

Ninth, it is unclear whether adding as an aggravating circumstance that the victim was under the age of 18, or over the age of 65 is supported by national legal trends. CCRC staff has not researched the specific age ranges that qualify as aggravating circumstances for murder in other jurisdictions. However, almost half of the states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[10]

Tenth, it is unclear whether adding as an aggravating circumstance that the victim was a "vulnerable adult" is consistent with national legal trends. Although it is unclear whether other jurisdictions' criminal codes define a term similar to the RCC's "vulnerable

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[7] Only four states explicitly include bias motivation as an aggravating circumstance for murder: Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Cal. Penal Code § 190.2; Nev. Rev. Stat. Ann. § 200.033.

[8] Alaska Stat. Ann. § 12.55.125; Ala. Code § 13A-5-49; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Ky. Rev. Stat. Ann. § 532.025; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; Neb. Rev. Stat. Ann. § 29-2523; N.Y. Penal Law § 125.27; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1; Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102. However, CCRC staff did not analyze how these states may provide for separate recidivist penalty enhancements applicable to murder.

[9] Arkansas, Hawaii, Maine, Texas, and Wyoming.

[10] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03**;** Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

adult," almost half of all states recognize as an aggravating circumstance that the victim was vulnerable due to age or infirmity.[11]

Eleventh, eliminating the procedural requirements procedural requirements under D.C. Code § 22-2104.01 and § 24-403.01, is not generally supported by state criminal codes. A majority of states hold a separate sentencing proceeding to determine whether aggravating circumstances were present.[12]

Twelfth, it is unclear whether including as an aggravating circumstance that the murder was committed by using a dangerous weapon is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[13] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed.

Thirteenth, omitting that the murder was EHAC as an aggravating circumstance has mixed support in state criminal codes. A slight majority of states do not recognize as an aggravating circumstance that the murder was EHAC.[14] However, only a minority of states explicitly recognize torture or infliction of substantial suffering[15] or mutilation or desecration of the body[16] as an aggravating circumstance.

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[11] Ala. Code § 13A-5-40; Ark. Code Ann. § 5-4-604; Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201; Conn. Gen. Stat. Ann. § 53a-54b; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; 720 Ill. Comp. Stat. Ann. 5/9-1; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; La. Stat. Ann. § 14:30; N.J. Stat. Ann. § 2C:11-3; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 19.03**;** Utah Code Ann. § 76-5-202; Va. Code Ann. § 18.2-31; Wyo. Stat. Ann. § 6-2-102.

[12] In most states that still employ the death penalty, a separate hearing is held after conviction for murder to determine whether aggravating factors outweigh any mitigating factors before the death penalty may be imposed. *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977). However, among non-death penalty states, a minority do not appear to require any separate proceeding to determine the presence of aggravating factors that authorize heightened penalties as compared to ordinary murder. Alaska Stat. Ann. § 11.41.100; Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Minn. Stat. Ann. § 609.185; *State v. Pallipurath*, No. A-5491-11T3, 2015 WL 10438847, at *11 (N.J. Super. Ct. App. Div. Mar. 11, 2016); *State v. Chadwick-McNally*, No. S-1-SC-36127, 2018 WL 1007882, at *4 (N.M. Feb. 22, 2018); *State v. Grega*, 168 Vt. 363, 386, 721 A.2d 445, 461 (1998).

[13] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

[14] Haw. Rev. Stat. Ann. § 707-701; Iowa Code Ann. § 707.2; Ind. Code Ann. § 35-50-2-9; Kan. Stat. Ann. § 21-5401; Ky. Rev. Stat. Ann. § 532.025; La. Stat. Ann. § 14:30; Mass. Gen. Laws Ann. ch. 279, § 69; Md. Code Ann., Crim. Law § 2-203; Me. Rev. Stat. tit. 17-A, § 201; Minn. Stat. Ann. § 609.185; Miss. Code. Ann. § 97-3-19; Mont. Code Ann. § 46-18-303; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:1; N.M. Stat. Ann. § 31-20A-5; Nev. Rev. Stat. Ann. § 200.033; Ohio Rev. Code Ann. § 2903.01; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; 11 R.I. Gen. Laws Ann. § 11-23-2; S.C. Code Ann. § 16-3-20; Tex. Penal Code Ann. § 19.03; Utah Code Ann. § 76-5-202 (include especially heinous, atrocious, or cruel, but "must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death"); Va. Code Ann. § 18.2-31; Vt. Stat. Ann. tit. 13, § 2311; Wash. Rev. Code Ann. § 10.95.020.

[15] Del. Code Ann. tit. 11, § 4209; Ga. Code Ann. § 17-10-30; Ind. Code Ann. § 35-50-2-9; Mo. Ann. Stat. § 565.032; Mont. Code Ann. § 46-18-303; N.J. Stat. Ann. § 2C:11-3; Or. Rev. Stat. Ann. § 163.095; 42 Pa. Stat. Ann. § 9711; S.D. Codified Laws § 23A-27A-1.

[16] Ind. Code Ann. § 35-50-2-9; Nev. Rev. Stat. Ann. § 200.033; S.C. Code Ann. § 16-3-20; Tenn. Code Ann. § 39-13-204; Utah Code Ann. § 76-5-202.

Fourteenth, recognizing that acting under "extreme emotional disturbance" is a mitigating circumstance is not strongly supported by other criminal codes. Only ten states recognize acting "under extreme emotional disturbance" as a circumstance that can mitigate murder down to manslaughter.[17] The majority of states use the traditional "heat of passion" formulation.[18]

Fifteenth, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not supported by national legal trends. Only four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[19] However, the Commission has not reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

RCC § 22E-1101 (a). – First Degree Murder.

Relation to National Legal Trends. *The above discussed changes to current District law have mixed support among national legal trends.*

First, abolishing the distinction between premeditated and non-premeditated murders is consistent with national legal trends. A majority of the twenty nine reformed jurisdictions as well as the MPC[20] and the Proposed Federal Criminal Code[21] do not distinguish between murders that are premeditated and those that are not.

Second, criminalizing felony murder as second degree murder instead of first degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. However, a small number of jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[22]

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[17] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[18] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

[19] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

[20] MPC § 210.2.

[21] Proposed Federal Criminal Code § 1601.

[22] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110; Haw. Rev. Stat. Ann. § 707-701 (Hawaii does not recognize felony murder); Ky. Rev. Stat. Ann. § 507.020 (Kentucky does not recognize felony murder); Me. Rev. Stat. tit. 17-A, § 201, Me. Rev. Stat. tit. 17-A, § 202; 18 Pa. Stat. Ann. § 2502; Wis. Stat. Ann. § 940.05 Wis. Stat. Ann. § 940.03.

Third, the District would be an outlier in treating second degree murder with the addition of an aggravating circumstance as a form of first degree murder. No other jurisdictions specifically treat aggravated second degree murder as a form of first degree murder.[23]

Fourth, it is unclear whether incorporating a penalty enhancement for using a dangerous weapon as an element that elevates second degree murder to first degree murder is consistent with national legal trends. Only a few states specifically recognize as an aggravating factor that a weapon was used to commit the murder.[24] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for murders committed while armed, or whether such enhancements may be applied on conjunction with other enhancements.

Fifth, it is unclear if eliminating the procedural requirements procedural requirements under § 24-403.01, is supported by state criminal codes. CCRC staff has not researched what procedures other jurisdictions require for applying sentencing enhancements applicable to second degree murder.

Sixth, abolishing D.C. Code § 22-2101, the specialized form of murder involving obstructing railroads, is consistent with national legal trends. The District is the only jurisdiction in the country that retains this form of murder as a separate offense.

Seventh, recognizing that acting under "extreme emotional disturbance" as a mitigating circumstance is not strongly supported by state criminal codes. Ten states recognize acting "under extreme emotional disturbance" as a circumstance that can mitigate murder down to manslaughter.[25] However, the majority of states use the traditional "heat of passion" formulation.[26]

Seventh, statutorily recognizing that any legally recognized partial defenses may mitigate murder to manslaughter is not generally supported by state criminal codes. Only

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[23] However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.

[24] Ala. Code § 13A-5-40 (but requires that weapon be fired into a house or vehicle); Ariz. Rev. Stat. Ann. § 13-701; Colo. Rev. Stat. Ann. § 18-1.3-1201 (but only if possession of the weapon constitutes a class 1 felony).

[25] Ark. Code Ann. § 5-10-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.030; Mont. Code Ann. § 45-5-103; N.D. Cent. Code Ann. § 12.1-16-01; N.H. Rev. Stat. Ann. § 630:2; N.Y. Penal Law § 125.20; Or. Rev. Stat. Ann. § 163.118. In addition, Maine's manslaughter statute recognizes acting "under the influence of extreme anger or extreme fear brought about by adequate provocation[.]" Me. Rev. Stat. tit. 17-A, § 203.

[26] Alaska Stat. Ann. § 11.41.115.; Ala. Code § 13A-6-3; Ariz. Rev. Stat. Ann. § 13-1103; Cal. Penal Code § 192; Colo. Rev. Stat. Ann. § 18-3-103; Ga. Code Ann. § 16-5-2; Iowa Code Ann. § 707.4; Idaho Code Ann. § 18-4006; 720 Ill. Comp. Stat. Ann. 5/9-2; Ind. Code Ann. § 35-42-1-3; Kan. Stat. Ann. § 21-5404; La. Stat. Ann. § 14:31; Com. v. Knight, 637 N.E.2d 240, 246 (Mass. App. Ct. 1994); Cox v. State, 534 A.2d 1333, 1335-36 (Md. 1988); People v. Sullivan, 586 N.W.2d 578, 582 (Mich. Ct. App. 1998); Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.023; Miss. Code. Ann. § 97-3-35; State v. Alston, 588 S.E.2d 530, 535-36 (N.C. Ct. App.2003); Neb. Rev. Stat. Ann. § 28-305; Nev. Rev. Stat. Ann. § 200.040; N.J. Stat. Ann. § 2C:11-4; N.M. Stat. Ann. § 30-2-3; Nev. Rev. Stat. Ann. § 200.040; Ohio Rev. Code Ann. § 2903.03; Okla. Stat. Ann. tit. 21, § 711; State v. McGuy, 841 A.2d 1109, 1112-13 (R.I. 2003); State v. Smith, 609 S.E.2d 528, 530 (S.C. Ct. App. 2005); S.D. Codified Laws § 22-16-15; Tenn. Code Ann. § 39-13-211; Tex. Penal Code Ann. § 19.02; Canipe v. Com., 25 Va. App. 629, 643, 491 S.E.2d 747, 753 (1997); State v. Yoh, 910 A.2d 853, 864-65 (Vt. 2006); Wis. Stat. Ann. § 940.01; State v. Wade, 490 S.E.2d 724, 732 (W.V. 1997); Yung v. State, 906 P.2d 1028, 1035 (Wyo. 1995).

four states' voluntary manslaughter statutes include partial defenses as a mitigating circumstance.[27] However, staff has not yet reviewed relevant case law in other jurisdictions to determine if courts have recognized other partial defenses as a mitigating circumstance.

RCC § 22E-1101 (b). – Second Degree Murder.

Relation to National Legal Trends. *The changes to the second degree murder statute have mixed support from national legal trends.*

First, omitting knowingly causing the death of another without premeditation and deliberation from second degree murder is supported by national legal trends. A slight minority of reformed jurisdictions retains both first and second degree murder, and includes knowingly causing the death of another as a form of second degree murder.[28]

Second, criminalizing felony murder as second degree murder is not generally supported by state criminal codes. A majority of jurisdictions treat felony murder as a form of first degree murder. Only six jurisdictions treat felony murder as a lower grade of murder as compared to intentionally or knowingly causing the death of another.[29]

Third, it is unclear whether the changes to predicate offenses for felony murder are consistent with national legal trends. CCRC staff has not researched which specific offenses may serve as predicate offenses for felony murder in other jurisdictions, and how those offenses correspond to the offenses included in the revised second degree murder statute.

Fourth, the limitations to felony murder liability also have mixed support from other jurisdictions. First, a minority of states' felony murder statutes include an "in furtherance" requirement.[30] Second, a minority of states bar felony murder liability when the decedent

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[27] 18 Pa. Stat. Ann. § 2503; 720 Ill. Comp. Stat. Ann. 5/9-2; Kan. Stat. Ann. § 21-5404; Wis. Stat. Ann. § 940.01.

[28] Alaska Stat. Ann. § 11.41.110; Ariz. Rev. Stat. Ann. § 13-1104; Ark. Code Ann. § 5-10-103; Colo. Rev. Stat. Ann. § 18-3-103; Haw. Rev. Stat. Ann. § 707-701.5; Kan. Stat. Ann. § 21-5403; Minn. Stat. Ann. § 609.19; Mo. Ann. Stat. § 565.021; N.H. Rev. Stat. Ann. § 630:1-b; N.Y. Penal Law § 125.25; S.D. Codified Laws § 22-16-7; Tenn. Code Ann. § 39-13-210; Wash. Rev. Code Ann. § 9A.32.050; Wis. Stat. Ann. § 940.05.

[29] Alaska Stat. Ann. § 11.41.100, Alaska Stat. Ann. § 11.41.110 (although Alaska criminalizes felony murder as second degree murder, the same grade as depraved heart or intent-to-cause-serious—physical-injury murder, Alaska's first degree murder statute does include unintentional forms of murder when the victim is under the age of 16, and recognizes a limited form of felony murder that must be predicated on either intentionally damaging an oil or gas pipeline, or making terroristic threats); Haw. Rev. Stat. Ann. § 707-701.5 (Hawaii is one of two states to entirely abolish the felony murder rule by statute); Ky. Rev. Stat. Ann. § 507.020 (Kentucky is one of two states to abolish the felony murder rule by statute); Me. Rev. Stat. tit. 17-A, § 201; Me. Rev. Stat. tit. 17-A, § 202; *People v. Aaron*, 299 N.W.2d 304, 326 (Mich. 1980) (Abolishing the felony murder rule. "Our review of Michigan case law persuades us that we should abolish the rule which defines malice as the intent to commit the underlying felony"); 18 Pa. Stat. Ann. § 2502 (under Pennsylvania's criminal code, intentionally cause the death of another is first degree murder, felony murder is second degree murder); Wis. Stat. Ann. § 940.01, Wis. Stat. Ann. § 940.01 (Wisconsin's first-degree intentional homicide covers intentionally causing the death of another, and felony murder is covered by a separate statute with less severe penalties).

[30] Ark. Code Ann. § 5-10-102; Ariz. Rev. Stat. Ann. § 13-1105; Colo. Rev. Stat. Ann. § 18-3-102; Conn. Gen. Stat. Ann. § 53a-54c; N.D. Cent. Code Ann. § 12.1-16-01; N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; Tex. Penal Code Ann. § 19.02; Wash. Rev. Code Ann. § 9A.32.030, Wash. Rev. Code Ann. § 9A.32.050.

was a participant in the underlying felony.[31] Third, slightly less than half of reformed jurisdictions require that the lethal act be committed by the accused or an accomplice to the underlying offense.[32]

RCC § 22E-1102. Manslaughter.

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did*

[31] Alaska Stat. Ann. § 11.41.110 ("causes the death of a person other than one of the participants"); Colo. Rev. Stat. Ann. § 18-3-102 ("the death of a person, other than one of the participants, is caused by anyone"); Conn. Gen. Stat. Ann. § 53a-54c ("causes the death of a person other than one of the participants"); N.J. Stat. Ann. § 2C:11-3 ("causes the death of a person other than one of the participants"); N.Y. Penal Law § 125.25 ("causes the death of a person other than one of the participants"); Or. Rev. Stat. Ann. § 163.115 ("causes the death of a person other than one of the participants"); Utah Code Ann. § 76-5-203 ("a person other than a party as defined in Section 76-2-202 is killed in the course of the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense"); *Wooden v. Com.,* 284 S.E.2d 811, 816 (Va. 1981) ("we hold that under § 18.2-32, a criminal participant in a felony may not be convicted of the felony-murder of a co-felon killed by the victim of the initial felony"); Wash. Rev. Code Ann. § 9A.32.030 ("causes the death of a person other than one of the participants").

[32] Colo. Rev. Stat. Ann. § 18-3-102; Ark. Code Ann. § 5-10-102; Conn. Gen. Stat. Ann. § 53a-54c; *Weick v. State*, 420 A.2d 159, 161-62 (Del. 1980) ("The defendants contend that this section was improperly applied to them because, manifestly, s 635(2) was not intended to punish one who commits a felony for a homicide that occurs during the perpetration of that felony but is not committed by him, his agent, or someone under his control. We agree."); *State v. Sophophone*, 270 Kan. 703, 713, 19 P.3d 70, 77 (2001) ("We hold that under the facts of this case where the killing resulted from the lawful acts of a law enforcement officer in attempting to apprehend a co-felon, Sophophone is not criminally responsible for the resulting death of Somphone Sysoumphone, and his felony-murder conviction must be reversed"); Me. Rev. Stat. tit. 17-A, § 20; *Poole v. State*, 295 Md. 167, 174, 453 A.2d 1218, 1223 (1983); *State v. Branson*, 487 N.W.2d 880, 885 (Minn. 1992) ("The felony murder statute, Minn.Stat. § 609.19(2), does not extend to apply to a situation in which a bystander is killed during exchange of gunfire in which defendant allegedly participated but where the fatal shot was fired by someone in a group adverse to the defendant rather than by the defendant or someone associated with the defendant in committing or attempting to commit a felony"); Mont. Code Ann. § 45-5-102; N.D. Cent. Code Ann. § 12.1-16-01; State v. Quintana, 261 Neb. 38, 59, 621 N.W.2d 121, 138, opinion modified on denial of reh'g, 261 Neb. 623, 633 N.W.2d 890 (Neb. 2001) ("Causation, in the context of felony murder, requires that the death of the victim result from an act of the defendant or the defendant's accomplice"); *Jackson v. State*, 589 P.2d 1052, 1052 (NM 1979) ("The sole question presented by this petition for writ of certiorari is whether a co-perpetrator of a felony can be charged with the felony murder of a co-felon, under s 30-2-1(A)(3), N.M.S.A. 1978, (formerly s 40A-2-1(A)(3), N.M.S.A. 1953), when the killing is committed by the intended robbery victim while resisting the commission of the offense. We hold that he cannot."); N.Y. Penal Law § 125.25; Or. Rev. Stat. Ann. § 163.115; *State v. Severs*, 759 S.W.2d 935, 938 (Tenn. Crim. App. 1988) (holding that felony murder rule was inapplicable when lethal act was perpetrated by an innocent party who was thwarting the felony); *Blansett v. State*, 556 S.W.2d 322, 324–25 (Tex. Crim. App. 1977) (rev'd on other grounds) (holding that felony murder liability does not apply when death was caused by police officer acting in legal self defense); *Rivers v. Com*., 21 Va. App. 416, 422, 464 S.E.2d 549, 551 (1995); *People v. Washington*, 402 P.2d 130, 133 (Wash. 1965)(in bank) ("When a killing is not committed by a robber or by his accomplice but by his victim, malice aforethought is not attributable to the robber, for the killing is not committed by him in the perpetration or attempt to perpetrate robbery.")

not research what penalty enhancements other jurisdictions apply to voluntary manslaughter.

RCC § 22E-1102 (a). Voluntary Manslaughter.

Relation to National Legal Trends. *The above mentioned changes to current District law are not supported by state criminal codes. Although nearly all jurisdictions define voluntary manslaughter, which is analogous to the RCC's first degree manslaughter offense, as causing the death of another under circumstances that would constitute murder, no other jurisdictions integrate aggravating circumstances applicable to voluntary manslaughter into a separate aggravated manslaughter offense. However, CCRC staff did not research whether or how these other states may have separate penalty enhancements that affect second degree murder.*

RCC § 22E-1102 (b). Involuntary Manslaughter.

Relation to National Legal Trends. *The revised second degree manslaughter offense's two above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, eliminating the "misdemeanor manslaughter" form of involuntary manslaughter is generally consistent with state criminal codes. Although a slight majority of all states retain a version of "misdemeanor manslaughter" twenty of the twenty-nine reformed code jurisdictions, and the MPC,[33] do not define involuntary manslaughter to include "misdemeanor manslaughter."[34]

Second, eliminating the "criminal negligence" form of involuntary manslaughter is also consistent with state criminal codes. A majority of states do not include a criminal negligence form of involuntary manslaughter, including twenty three of the twenty nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed jurisdictions").[35]

In general, defining second degree manslaughter as recklessly causing the death of another is consistent with state criminal codes. A majority of states, the Model Penal Code

[33] MPC § 210.3.

[34] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-56; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-2-101 (note that Montana does not criminalize recklessly causing the death of another, and only includes a negligent homicide offense); N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.125; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060; Wis. Stat. Ann. § 940.06.

[35] Alaska Stat. Ann. § 11.41.120; Ariz. Rev. Stat. Ann. § 13-1103; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Fla. Stat. Ann. § 782.07; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Ind. Code Ann. § 35-42-1-4; Ky. Rev. Stat. Ann. § 507.040; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.D. Cent. Code Ann. § 12.1-16-02; Neb. Rev. Stat. Ann. § 28-305; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Ohio Rev. Code Ann. § 2903.04; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06.

(MPC)[36], and the proposed Federal Criminal Code[37] define involuntary manslaughter as recklessly causing the death of another. This is also the clear majority approach across the twenty-nine reformed jurisdictions, of which twenty-two define involuntary manslaughter as recklessly causing the death of another.[38]

RCC § 22E-1103. Negligent Homicide.

Relation to National Legal Trends. *The revised negligent homicide statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, changing the negligent homicide offense to require that the accused acted with criminal negligence and not merely civil negligence is strongly supported by state criminal codes. Only six states provide homicide liability on the basis of civil negligence.[39] The other forty-four jurisdictions do not have an analogous negligent homicide offense[40]; require gross or criminal negligence[41]; or require civil negligence plus an additional

[36] MPC § 210.3.

[37] Proposed Federal Criminal Code § 1602.

[38] Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

[39] Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903.

[40] These states are: Georgia, Illinois, Indiana, Michigan (previously had a negligent homicide offense that applied simple negligence, but that statute was repealed in 2010); Nebraska, New Jersey, Rhode Island, South Dakota, West Virginia, and Maryland.

[41] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58 ; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050 (Kentucky uses the term "recklessness" in place of "negligence"); La. Rev. Stat. Ann. 14:32; Me. Rev. Stat. tit. 17-A, § 203 (criminalized as a form of manslaughter, equivalent to recklessly causing the death of another); Mo. Ann. Stat. § 565.024; Miss. Code. Ann. § 97-3-47 (included as a form of manslaughter); Mont. Code Ann. § 45-5-104; N.C. Gen. Stat. Ann. § 14-18, *State v. Hudson*, 483 S.E.2d 436, 439 (N.C. 1997); N.D. Cent. Code Ann. § 12.1-16-03; N.H. Rev. Stat. Ann. § 630:3; N.M. Stat. Ann. § 30-2-3 (included as a form of manslaughter); N.Y. Penal Law § 125.10; Ohio Rev. Code Ann. § 2903.05 (but requires use of a firearm and ordinance); Okla. Stat. Ann. tit. 21, § 716; Or. Rev. Stat. Ann. § 163.145; 75 Pa. Cons. Stat. Ann. § 3732 (West); *Commonwealth v. Sloat*, 11 Pa. D. & C.3d 745, 747 (Pa. Com. Pl. 1979) ("the legislature has acted to fill the gap and to make punishable conduct which is more blameworthy than civil negligence yet which is not encompassed within involuntary manslaughter under the Pennsylvania Crimes Code with its requirement for acting in a reckless or grossly negligent manner while causing the death of another").; S.C. Code Ann. § 16-3-60 (included as a form of manslaughter); Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; *State v. Viens*, 144-45, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070 (included as a form of manslaughter); Wyo. Stat. Ann. § 6-2-107.

aggravating factor, such as intoxication[42], or violation of a state or local traffic law.[43] The American Law Institute's Model Penal Code negligent homicide offense also requires criminal negligence.[44]

Second, broadening the negligent homicide offense by omitting the requirement that the accused operated a vehicle is also generally supported by state criminal codes. The Model Penal Code,[45] the Proposed Federal Criminal Code[46], and twenty one of the twenty-nine states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[47] criminalize negligently causing the death of another, regardless of whether a vehicle was used.[48]

Third, replacing the "criminal negligence" version of manslaughter with the revised negligent homicide offense is consistent with national legal trends. A majority of states define involuntary manslaughter as recklessly causing the death of another.[49] A minority of states, by statute, define manslaughter to include negligently causing the death of another.[50] However, CCRC staff has not comprehensively reviewed case law in other

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[42] *E.g.,* Utah Code Ann. § 76-5-207 (West) (requiring that defendant operates a motor vehicle in a negligent manner causing the death of another *and* that the defendant had a blood alcohol concentration above .08 grams, or was under the influence of alcohol or drugs to a degree that renders the person incapable of safely operating a vehicle).

[43] *E.g.*, N.C. Gen. Stat. Ann. § 15A-1340.23 (West) (requires that the defendant was "engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic").

[44] Model Penal Code § 210.4.

[45] *Id*.

[46] Proposed Federal Criminal Code § 1603.

[47] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[48] Alaska Stat. Ann. § 11.41.130; Ala. Code § 13A-6-4; Ariz. Rev. Stat. Ann. § 13-1102; Ark. Code Ann. § 5-10-105; Colo. Rev. Stat. Ann. § 18-3-105; Conn. Gen. Stat. Ann. § 53a-58; Del. Code Ann. tit. 11, § 631; Ky. Rev. Stat. Ann. § 507.050; Minn. Stat. Ann. § 609.205; Mo. Ann. Stat. § 565.024; Mont. Code Ann. § 45-5-104; N.H. Rev. Stat. Ann. § 630:3; N.Y. Penal Law § 125.10; N.D. Cent. Code Ann. § 12.1-16-03; Ohio Rev. Code Ann. § 2903.05 (though Ohio's negligent homicide requires that the defendant used a deadly weapon or dangerous ordinance); Or. Rev. Stat. Ann. § 163.145; 18 Pa. Stat. Ann. § 2504; Tenn. Code Ann. § 39-13-212; Tex. Penal Code Ann. § 12.35; Utah Code Ann. § 76-5-206; Wash. Rev. Code Ann. § 9A.32.070.

[49] Alaska Stat. Ann. § 11.41.120; Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Ariz. Rev. Stat. Ann. § 13-1103; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.D. Cent. Code Ann. § 12.1-16-02; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; Or. Rev. Stat. Ann. § 163.118; S.C. Code Ann. § 16-3-60; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wis. Stat. Ann. § 940.06; Wyo. Stat. Ann. § 6-2-105.

[50] Fla. Stat. Ann. § 782.07; Idaho Code Ann. § 18-4006; *Cox v. State*, 534 A.2d 1333, 1335-36 (1988); Md. Code Ann., Crim. Law § 2-209; Me. Rev. Stat. tit. 17-A, § 203; *In re Gillis*, 512 N.W.2d 79, 80 (Mich. 1994); Minn. Stat. Ann. § 609.205; Miss. Code. Ann. § 97-3-27; Mo. Ann. Stat. § 565.024 (but requires operation of a motor vehicle, otherwise manslaughter requires recklessness); State v. Hudson, 483 S.E.2d 436, 439 (N.C. 1997); Okla. Stat. Ann. tit. 21, § 716; 18 Pa. Stat. Ann. § 2504; *State v. Ortiz*, 824 A.2d 473, 485-86 (R.I. 2003); S.C. Code Ann. § 16-3-60 (but negligence is defined as "reckless disregard for the safety of others"); *State v. Viens*, 978 A.2d 37, 42-43 (Vt. 2009); Wash. Rev. Code Ann. § 9A.32.070.

jurisdictions to determine how many states still recognize a criminal negligence version of manslaughter.

Chapter 12. Robbery, Assault, and Threat Offenses

RCC § 22E-1201. Robbery.

Relation to National Legal Trends. *The revised robbery statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of distinctly recognizing carjacking as a form of robbery.*

First, excluding from the revised robbery statute pickpocketing and sudden and stealthy seizures is consistent with the approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[1] (hereinafter "reformed code jurisdictions"). No reformed code jurisdictions criminalize pickpocketing as a form of robbery. Robbery statutes in all reformed code jurisdictions, as well as the MPC,[2] require either "bodily injury,"[3] force[4], threat of force,[5] violence[6], intimidation,[7] or commits or threatens to commit any felony.[8] No reformed code jurisdictions' robbery statutes include taking property from the immediate actual possession of another by sudden or stealthy seizure.[9] Commentators

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[1] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2] Model Penal Code § 222.1.

[3] Me. Rev. Stat. tit. 17-A; Mo. Ann. Stat. § 570.025; Mont. Code Ann. § 45-5-401; N.J. Stat. Ann. § 2C:15-1; N.D. Cent. Code Ann. § 12.1-22-01; Ohio Rev. Code Ann. § 2911.02; 18 Pa. Stat. Stat. Ann. § 3701; Tex. Penal Code Ann. § 29.02.

[4] Ala. Code § 13A-8-43; Alaska Stat. Ann. § 11.41.510; Ariz. Rev. Stat. Ann. § 13-1902; Ark. Code Ann. § 5-12-102; Colo. Rev. Stat. Ann. § 18-4-301; Conn. Gen. Stat. Ann. § 53a-133; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-841; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.030; Minn. Stat. Ann. § 609.245; Mo. Ann. Stat. § 570.025; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.00; Or. Rev. Stat. Ann. § 164.395; S.D. Codified Laws § 22-30-1; Utah Code Ann. § 76-6-301; Wash. Rev. Code Ann. § 9A.56.190; Wis. Stat. Ann. § 943.32. Note that Commission staff did not research case law interpreting the term "force" in each of these jurisdictions. It is possible that in at least some of these states, the "force" element can be satisfied by the most minimal degree of physical contact or jostling.

[5] Ala. Code § 13A-8-43; Alaska Stat. Ann. § 11.41.510; Ariz. Rev. Stat. Ann. § 13-1902; Ark. Code Ann. § 5-12-102; Colo. Rev. Stat. Ann. § 18-4-301; Conn. Gen. Stat. Ann. § 53a-133; Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-841; 720 Ill. Comp. Stat. Ann. 5/18-1; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.030; Me. Rev. Stat. tit. 17-A; Minn. Stat. Ann. § 609.245; Mont. Code Ann. § 45-5-401; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.00; N.D. Cent. Code Ann. § 12.1-22-01; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.395; 18 Pa. Stat. Stat. Ann. § 3701; S.D. Codified Laws § 22-30-1; Tenn. Code Ann. § 39-13-401; Tex. Penal Code Ann. § 29.02; Utah Code Ann. § 76-6-301; Wash. Rev. Code Ann. § 9A.56.190; Wis. Stat. Ann. § 943.32.

[6] Tenn. Code Ann. § 39-13-401; Wash. Rev. Code Ann. § 9A.56.190.

[7] Colo. Rev. Stat. Ann. § 18-4-301.

[8] Mont. Code Ann. § 45-5-401; 18 Pa. Stat. Stat. Ann. § 3701.

[9] Although statutes in all 29 reformed jurisdictions require at the very least, force or threats of force, it is unclear exactly how broadly robbery statutes have been interpreted by courts in other jurisdictions. Although stealthily taking property from the immediate actual possession of another without any touching would not constitute robbery in the 29 reformed jurisdictions, it is possible that a pick-pocketing that involves even a slight amount of physical contact could still satisfy the force requirement in some jurisdictions. *See,* 18 Pa. Stat. Stat. Ann. § 3701 (defining robbery as taking or removing property, *"by force however slight[.]"). See*

have noted that "[t]aking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery"; nor is it robbery "when the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking."[10] The revised criminal code's requirement of bodily injury, a criminal menace, or overpowering physical force is consistent with these reform code jurisdictions.[11]

Second, dividing robbery into multiple penalty grades and grading based on the severity of bodily injury is also consistent with national norms. Of the twenty-nine reformed code jurisdictions, only one state, Montana, uses a single penalty grade for robbery.[12] A majority of the reformed code jurisdictions, and the MPC[13], divide robbery into two penalty grades[14], ten use three penalty grades[15], and two use five or more grades.[16] Of the twenty-nine reformed jurisdictions, twenty-two states, and the MPC,[17] use the severity of injury inflicted as a grading factor.[18] However, the revised robbery statute

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also, LaFave, Wayne, 3 Subst. Crim. L. § 20.3 (2d ed.) ("Taking the owner's property by stealthily picking his pocket is not taking by force and so is not robbery;[50] but if the pickpocket or his confederate jostles the owner,[51] or if the owner, catching the pickpocket in the act, struggles unsuccessfully to keep possession,[52] the pickpocket's crime becomes robbery. To remove an article of value, attached to the owner's person or clothing, by a sudden snatching or by stealth is not robbery unless the article in question (e.g., an earring, pin or watch) is so attached to the person or his clothes as to require some force to effect its removal.") .

[10] LaFave, 3 SUBST. CRIM. L. § 20.3. In most jurisdictions, purse snatching itself does not constitute robbery. Peter G. Guthrie, *Purse Snatching as Robbery or Theft*, 42 A.L.R.3d 1381 (2014). However, depending on the specific facts, it is conceivable that a purse snatching could involve sufficient use of physical strength to constitute "overpowering physical force." However, this would be a highly fact specific inquiry, and the revised robbery statute is not intended to categorically include or bar purse snatchings.

[11] It is possible that case law in some reformed code jurisdictions would construe "force" in their statutes to include some conduct that is more severe than the incidental jostling and movements involved in sudden snatchings, but is less severe than "overpowering" physical force, the lowest standard for force recognized in the revised District statute.

[12] Mont. Code Ann. § 45-5-401.

[13] Model Penal Code § 222.1.

[14] Alaska Stat. Ann. § 11.41.500; Alaska Stat. Ann. § 11.41.510; Ark. Code Ann. § 5-12-102; Ark. Code Ann. § 5-12-103; Del. Code Ann. tit. 11, § 831; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; Haw. Rev. Stat. Ann. § 708-841; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Ky. Rev. Stat. Ann. § 515.030; Me. Rev. Stat. tit. 17-A, § 651; Mo. Ann. Stat. § 570.023; Mo. Ann. Stat. § 570.025; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; S.D. Codified Laws § 22-30-6; Tex. Penal Code Ann. § 29.02; Tex. Penal Code Ann. § 29.03; Utah Code Ann. § 76-6-301; Utah Code Ann. § 76-6-302; Wash. Rev. Code Ann. § 9A.56.200; Wash. Rev. Code Ann. § 9A.56.210; Wis. Stat. Ann. § 943.32.

[15] Ala. Code § 13A-8-41; Ala. Code § 13A-8-42; Ala. Code § 13A-8-43; Ariz. Rev. Stat. Ann. § 13-1902; Ariz. Rev. Stat. Ann. § 13-1903; Ariz. Rev. Stat. Ann. § 13-1904; Colo. Rev. Stat. Ann. § 18-4-301; Colo. Rev. Stat. Ann. § 18-4-302; Colo. Rev. Stat. Ann. § 18-4-303; Conn. Gen. Stat. Ann. § 53a-134; Conn. Gen. Stat. Ann. § 53a-135; Conn. Gen. Stat. Ann. § 53a-136; Minn. Stat. Ann. § 609.245; Minn. Stat. Ann. § 609.24; N.D. Cent. Code Ann. § 12.1-22-01; N.Y. Penal Law § 160.05; N.Y. Penal Law § 160.10; N.Y. Penal Law § 160.15; Ohio Rev. Code Ann. § 2911.02; Ohio Rev. Code Ann. § 2911.01; Ohio Rev. Code Ann. § 2913.02; Or. Rev. Stat. Ann. § 164.395; Or. Rev. Stat. Ann. § 164.405; Or. Rev. Stat. Ann. § 164.415; 18 Pa. Stat. Stat. Ann. § 3701; Tenn. Code Ann. § 39-13-401; Tenn. Code Ann. § 39-13-402; Tenn. Code Ann. § 39-13-403.

[16] 720 Ill. Comp. Stat. Ann. 5/18-1, Ind. Code Ann. § 35-42-5-1.

[17] Model Penal Code § 222.1 ("Robbery is a felony of the second degree, expect that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, purposely inflicts or attempts to inflict serious bodily injury.").

[18] Alaska Stat. Ann. § 11.41.500; Ala. Code § 13A-8-41; Ark. Code Ann. § 5-12-103; Conn. Gen. Stat. Ann. § 53a-134; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; 720 Ill. Comp. Stat. Ann. 5/18-1;

would be an outlier in distinguishing between bodily injury, serious bodily injury, and significant bodily injury in its robbery statute, consistent with the fact that few jurisdictions that have a level of harm comparable to the District's "significant bodily injury."[19]

Third, including robbery gradations based on causing injury by means of a dangerous weapon is consistent with national norms, although the District would be in the minority by requiring that the defendant actually use the weapon. Of the twenty-nine reformed jurisdictions, twenty-five states punish robbery more severely when the defendant was armed with or used a dangerous or deadly weapon.[20] A majority of these states merely require that the defendant was armed while committing the robbery, although ten states require that the defendant used or brandished the weapon during commission of the robbery in order to authorize more severe penalties.[21]

Fourth, in contrast with current law, the RCC robbery statute, through its references to harms to a "protected person," extends a new penalty enhancement to groups recognized elsewhere in the current D.C. Code as meriting special treatment: non-District government law enforcement and public safety employees in the course of their duties;[22] operators of

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Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Mo. Ann. Stat. § 570.023; N.D. Cent. Code Ann. § 12.1-22-01; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.10; Ohio Rev. Code Ann. § 2911.01; Or. Rev. Stat. Ann. § 164.415; 18 Pa. Stat. Stat. Ann. § 3701; Tenn. Code Ann. § 39-13-403; Tex. Penal Code Ann. § 29.03; Utah Code Ann. § 76-6-302; Wash. Rev. Code Ann. § 9A.56.200.

[19] As noted in the Commentary to the revised assault statute, RCC § 22A-1202, only eight states appear to provide for an intermediate gradation of assault that requires an injury similar to the District's "significant bodily injury." Ind. Code Ann. § 35-31.5-2-204.5 ("Moderate bodily injury" means any impairment of physical condition that includes substantial pain."); Haw. Rev. Stat. Ann. 707-700; Minn. Stat. Ann. 609.02; N.D. Cent. Code Ann. 12.1-01-04; Utah Code Ann. 76-1-601; Wash. Rev. Code Ann. 9A.04.110; Wis. Stat. Ann. 939.22; S.C. Code Ann. § 16-25-10.

[20] Ala. Code § 13A-8-41; Alaska Stat. Ann. § 11.41.500; Ariz. Rev. Stat. Ann. § 13-1904; Ark. Code Ann. § 5-12-103; Conn. Gen. Stat. Ann. § 53a-134; Del. Code Ann. tit. 11, § 832; Haw. Rev. Stat. Ann. § 708-840; 720 Ill. Comp. Stat. Ann. 5/18-2; Ind. Code Ann. § 35-42-5-1; Kan. Stat. Ann. § 21-5420; Ky. Rev. Stat. Ann. § 515.020; Minn. Stat. Ann. § 609.245; Mo. Ann. Stat. § 570.023; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; N.Y. Penal Law § 160.15; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.405; Wash. Rev. Code Ann. § 9A.56.200;

[21] Colo. Rev. Stat. Ann. § 18-4-302 (requires that defendant was armed with "a deadly weapon, with intent, if resisted, to kill, main, or wound the person robbed or any other person[.]");720 Ill. Comp. Stat. Ann. 5/18-2 (more severe penalties authorized if defendant "personally discharges a firearm" during commission of the crime, and more severe if this results in "great bodily harm, permanent disability, permanent disfigurement, or death[.]"); N.Y. Penal Law § 160.15 (first degree robbery requires either being armed with a "deadly weapon," or actually using or threatening to use a "dangerous instrument"); Ohio Rev. Code Ann. § 2911.01 (aggravated robbery includes possessing a "deadly weapon" and requires that the defendant "either display the weapon, brandish it, indicate that the offender possesses it, or use it"); Or. Rev. Stat. Ann. § 164.415 (first degree robbery requires that the defendant was either armed with a deadly weapon, or "uses or attempts to use a dangerous weapon"); S.D. Codified Laws § 22-30-6 (one form of first degree robbery requires that the offense be "accomplished by use of a dangerous weapon"); Tenn. Code Ann. § 39-13-402; Tenn. Code Ann. § 39-13-403; Tex. Penal Code Ann. § 29.03 (one form of aggravated robbery requires that the defendant "uses or exhibits a deadly weapon"); Utah Code Ann. § 76-6-302 (one form of aggravated robbery requires that the defendant "uses or threatens to use a dangerous weapon"); Wis. Stat. Ann. § 943.32.

[22] See commentary to RCC § 22A-1001(11) regarding the definition of a law enforcement officer.

private-vehicles-for hire in the course of their duties;[23] and vulnerable adults.[24] No reformed jurisdictions appear to enhance robbery on the basis of an individual's status as a law enforcement or public safety employee or operator of a private-vehicle-for-hire. However, several of the 29 reformed jurisdictions do enhance some or all of their gradations of robbery on the basis of the complainant's disability.[25] In addition, several reformed jurisdictions enhance robbery on the basis of the complainant's status as a senior citizen,[26] as do current District law and the RCC. Unlike current law, the RCC robbery statute does not provide a penalty enhancement for: persons robbed because of their participation in a citizen patrol (but not while on duty);[27] persons robbed because of their status as District officials or employees (but not while on duty);[28] and persons robbed because of their familial relationship to a District official or employee.[29] No reformed jurisdictions appear to enhance robbery on the basis of these categories. The MPC does not enhance robbery on the basis of the identity of the complainant.

The RCC robbery statute also limits the stacking of multiple penalty enhancements based on the categories in the definition of "protected person" and stacking of penalty enhancements for a protected person and the use of a weapon.[30] The MPC and reformed

[23] While taxicab drivers are currently the subject of a separate enhancement in § 22-3751, the enhancement was enacted in 2001, well before the ubiquity of private vehicles-for-hire. The Council recently amended certain laws applicable to taxicabs and taxicab drivers to include private vehicles-for-hire. Vehicle-for-Hire Accessibility Amendment Act of 2016.

[24] Current D.C. Code §§ 22-933 and 22-936 make it a separate offense to assault a "vulnerable adult," with penalties depending on the severity of the injury.

[25] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-669(a)(ii) ("in the course of committing or attempting to commit a felony, causes the death or inflicts serious or significant bodily injury upon another person who is . . . blind, a paraplegic, or a quadriplegic."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that the defendant has "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); 720 Ill. Comp. Stat. Ann. 5/18-1 (making robbery a Class 2 felony unless the "victim . . . is a person with a physical disability."); Tex. Penal Code § 29.03((a)(3)(B) (defining aggravated robbery, in part, as "causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is . . . a disabled person.").

[26] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-669(a)(ii) ("in the course of committing or attempting to commit a felony, causes the death or inflicts serious or significant bodily injury upon another person who is . . . sixty years of age or older."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that the defendant has "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); Del. Code Ann. tit. 11, § 832(a)(4) (defining first degree robbery, in part, as committing robbery in the second degree and, "in the course of the commission of the crime or immediate flight therefrom, the person or another participant in the crime . . . commits said crime against a person who is 62 years of age or older."); 720 Ill. Comp. Stat. Ann. 5/18-1 (making robbery a Class 2 felony unless the "victim . . . is 60 years of age or over."); Tex. Penal Code § 29.03((a)(3)(A) (defining aggravated robbery, in part, as "causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is 65 years of age or older.").

[27] D.C. Code § 22-3602(b).

[28] D.C. Code § 22-851.

[29] D.C. Code § 22-851.

[30] Current District statutory law does not prevent stacking of such enhancements, and case law has not addressed the stacking of enhancements based on the categories covered in the RCC definition of protected person. However, convictions have been upheld applying both a "while armed" enhancement under D.C. Code § 22-4502 and an enhancement based on the victim's status as a senior or minor.

jurisdictions generally do not statutorily address stacking a weapon enhancement with another enhancement, although at least one jurisdiction explicitly permits stacking.[31]

Fifth, eliminating carjacking as a separate offense is consistent with national norms, although the District would be in a small minority by continuing to recognize carjacking as a form of robbery. Of the twenty-nine reform jurisdictions, four states distinguish carjacking as a form of robbery,[32] and five include separate carjacking offenses in their codes.[33] The majority of reform jurisdictions do not appear to penalize carjacking differently than other forms of robbery. Also, requiring that the defendant acted knowingly with respect to taking a motor vehicle is consistent with national norms. No reform jurisdictions with specific statutory provisions that address carjacking apply a recklessness mental state as to taking of a motor vehicle.[34]

Sixth, eliminating the asportation element is also consistent with national norms. Although robbery traditionally required that the defendant carry away property[35], as discussed above, in nearly all of the reformed jurisdictions' robbery statutes, actually carrying away the property is not required. Twenty seven of the reformed code jurisdictions' statutes, and the MPC's robbery statute[36], can be satisfied if the defendant takes or attempts to take property.[37]

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[31] Me. Rev. Stat. tit. 17-A, § 1252 ("Subsections in this section that make the sentencing class for a crime one class higher than it would otherwise be when pled and proved may be applied successively if the subsections to be applied successively contain different class enhancement factors.").

[32] Conn. Gen. Stat. Ann. § 53a-136a; Haw. Rev. Stat. Ann. § 708-840; N.Y. Penal Law § 160.10; Utah Code Ann. § 76-6-302.

[33] N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; 720 Ill. Comp. Stat. Ann. 5/18-3; Del. Code Ann. tit. 11, § 836; Tenn. Code Ann. § 39-13-404.

[34] Del. Code Ann. tit. 11, § 835 ("A person is guilty of carjacking in the second degree when that person knowingly and unlawfully takes possession or control of a motor vehicle from another person or from the immediate presence of another person by coercion, duress or otherwise without the permission of the other person."); 720 Ill. Comp. Stat. Ann. 5/18-3 ("A person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force."); Tenn. Code Ann. § 39-13-404 ("Carjacking" is the intentional or knowing taking of a motor vehicle from the possession of another by use of: (1) A deadly weapon; or (2) Force or intimidation."); Utah Code Ann. § 76-6-302 (robbery requires that the defendant "intentionally takes or attempts to take personal property). Connecticut, and New York's robbery statutes require that the defendant commit larceny, which requires intent or knowledge. Conn. Gen. Stat. Ann. § 53a-136a; *State v. Papandrea*, 991 A.2d 617, 623 (Conn. App. Ct. 2010) ("Because larceny is a specific intent crime, the state must show that the defendant acted with the subjective desire or knowledge that his actions constituted stealing"); N.Y. Penal Law § 160.10; *People v. Almonte*, 424 N.Y.S.2d 868, 868 (Sup. Ct. 1980) ("the basic elements of the crime of robbery in the second degree, as charged here, are that: the defendant (1) stole property (2) from an owner thereof (3) by force (4) with intent to deprive the owner of the property permanently").

[35] Lafave, Wayne. Robbery, 3 Subst. Crim. L. § 20.3 (2d ed.) ("Just as larceny requires that the thief both 'take' (secure dominion over) and 'carry away' (move slightly) the property in question, so too robbery under the traditional view requires both a taking[12] and an asportation (in the sense of at least a slight movement) of the property.").

[36] Model Penal Code § 222.1 ("An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.").

[37] Ala. Code § 13A-8-40; Alaska Stat. Ann. § 11.41.510; State v. Ali, 886 A.2d 449, 451 (Conn. App. Ct. 2005); Del. Code Ann. tit. 11, § 831; Haw. Rev. Stat. Ann. § 708-842; Morgan v. Com., 730 S.W.2d 935 (Ky. 1987); Me. Rev. Stat. tit. 17-A, § 651; Mont. Code Ann. § 45-5-401; N.D. Cent. Code Ann. § 12.1-22-01; N.H. Rev. Stat. Ann. § 636:1; N.J. Stat. Ann. § 2C:15-1; Ohio Rev. Code Ann. § 2911.02; Or. Rev. Stat. Ann. § 164.395; 18 Pa. Stat. Stat. Ann. § 3701; Tex. Penal Code Ann. § 29.01; Utah Code Ann. § 76-6-301.

Seventh, eliminating the separate penalty provision for attempted robbery is consistent with national norms. None of the reformed code jurisdictions includes separate penalties for attempted robbery apart from their general rules for punishing attempts.

RCC § 22E-1202. Assault.

Relation to National Legal Trends. *The revised assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[38]

First, limiting the revised assault statute to inflicting bodily injury or using overpowering physical force is well-supported by national legal trends. A majority of the 28 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[39] limit their assault statutes to causing physical injury[40] or include intent-to-frighten assault or offensive physical contact in the lower grades of assault.[41] Similarly the MPC aggravated assault offense is limited to bodily injury, with intent-to-frighten assault included in simple assault.[42] Of these 28 reformed code jurisdictions, only six have assault statutes that include intent-to-frighten assault or offensive physical contact in the higher grades of assault.[43] An additional three states

[38] It should be noted that several jurisdictions label their physical assault offenses as "battery." In addition, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[39] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[40] Ala. Code §§ 13A-6-20, 13A-6-21(a)(1), (a)(2), (a)(3), 13A-6-22(a)(1), (a)(2), (a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(2), (a)(3), (a)(8), 5-13-202(1), (2), (3), 5-13-203; Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), (1)(b), (1)(c), 18-3-203(1)(b), (1)(d), (1)(g); Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Del. Code Ann. tit. 11, §§ 611, 612(a)(1), (a)(2), 613(a)(1), (a)(2), (a)(3); Haw. Rev. Stat. Ann. §§ 707-710, 707-711(1)(a), (1)(b), (1)(d), 707-712; Ky. Rev. Stat. Ann. §§ 508.010, 508.020, 508.030; N.H. Rev. Stat. Ann. §§ 631:1(I)(a), (I)(b), 631:2(I)(a), (I)(b), (I)(c); N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3), (b)(7); N.Y. Penal Law §§ 120.00, 120.05(1), (2), (4), 120.10; N.D. Cent. Code Ann. §§ 12.1-17-01(1)(a), (1)(b), 12.1-17-01.1, 12.1-17-02(1)(a), (1)(b), (1)(c); Ohio Rev. Code Ann. §§ 2903.11(A)(1), (A)(2), 2903.13(A), (B), 2903.14; Or. Rev. Stat. Ann. §§ 163.160, 163.165(1)(a), (b), (c), 163.175, 163.185(1)(a); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(4); Wis. Stat. Ann. §§ 940.19, 940.21, 940.23, 940.24.

[41] Alaska Stat. Ann. § 11.41.220(a)(3) (fourth degree assault prohibiting, in part, "by words or other conduct that person recklessly places another person in fear of imminent physical injury."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) (defining assault as "causes bodily injury or offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(3) (fourth degree assault statute prohibiting, in part, "places another person in apprehension of immediate physical injury" and "causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); S.D. Codified Laws § 22-18-1(4) (assault offense prohibiting, in part, "attempts by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person.").

[42] MPC § 211.1.

[43] Ariz. Rev. Stat. Ann. § 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(1), (2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "causes

include offensive physical contact in a higher grade of assault, but only when a weapon is used.[44]

Second, the revised assault statute no longer includes "assault with intent to" or "AWI" offenses, such as assault with intent to kill.[45] Instead, liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses. None of the reformed jurisdictions or the MPC have specific offenses for assault with-intent-to commit other offenses.

Third, the revised assault statute replaces the separate common law offenses of mayhem and malicious disfigurement. Instead of mayhem and malicious disfigurement, the revised assault statute has two new gradations in subsection (a)(1) and subsection (a)(2) that require purposeful, permanent injuries. Subsection (b)(1) of first degree assault also includes injuries that are currently covered by mayhem and malicious disfigurement. National legal trends support deleting mayhem and malicious disfigurement. Only two of the reformed jurisdictions have specific offenses for mayhem or malicious disfigurement,[46] although several reformed jurisdictions specifically include in the higher grades of assault purposely or intentionally disfiguring or maiming another person[47] like the revised aggravated assault statute (subsections (a)(1) and (a)(2)). The MPC does not have separate offenses for mayhem and malicious disfigurement, but does include purposely or knowingly causing serious bodily injury in aggravated assault.[48]

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serious physical injury to another" or "uses a deadly weapon or dangerous instrument."); Minn. Stat. Ann. § 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and various assault offenses in §§ 609.221(1), 609.222, 609.223(1), 609.224(1)(1), (1)(2); Mont. Code Ann. § 45-5-202 (defining aggravated assault, in part, as "causes serious bodily injury to another or purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another."); Tenn. Code Ann. § 39-13-101 (defining assault in part as "causes another to reasonably fear imminent bodily injury" or "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault" results in serious bodily injury or death to another, involved a deadly weapon, or involved strangulation or attempted strangulation); Tex. Penal Code Ann. § 22.01(a) (requiring that a person causes bodily injury to another, threatens another with imminent bodily injury, or causes offensive physical contact with another person) and § 22.02(a) (requiring a person to "commit[] assault as defined in § 22.01" and cause serious bodily injury or use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another" that includes the use of a dangerous weapon, impeding the breathing or blood circulation of another person, or other means or force likely to produce death or serious bodily injury).

[44] 720 Ill. Comp. Stat. Ann. 5/12-3(a) and 5/12-3.05(f)(1) (defining battery as "causes bodily to an individual" or "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. §35-42-2-1(c)(1), (g)(2) (defining battery, in part, as "touches another person in a rude, insolent, or angry manner" and punishing it as a Level 5 felony when committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(C) (aggravated battery offense punishing, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.").

[45] D.C. Code § 22-401.

[46] Utah Code Ann. § 76-5-107; Wis. Stat. Ann. § 940.21.

[47] Ala. Code Ann. § 13A-6-20(a)(2); Ark. Code Ann. § 5-13-201(a)(2); Colo. Rev. Stat. Ann. § 18-3-202(1)(b); Conn. Gen. Stat. Ann. § 53a-59(a)(2); Del. Code Ann. tit. 11, § 613(a)(2); Ill. Comp. Stat. Ann. 5/12-3.05(a)(1); Kan. Stat. Ann. § 21-5413(b)(1)(B); Me. Rev. Stat. tit. 17-A, § 208(A-1); N.Y. Penal Law § 120.10(2); N.D. Cent. Code Ann. § 12.1-17-02(2).

[48] MPC § 211.1(2)(a).

Fourth, in combination with the aggravated criminal menace statute in RCC § 22E-1203, the revised assault statute's enhanced penalties for use of a dangerous weapon replace the separate offense of assault with a dangerous weapon (ADW). Instead of a separate ADW offense, the revised assault statute incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" a dangerous weapon. At least 24 of the 28 reformed jurisdictions and the MPC[49] use "by means of" or similar language in the weapons gradations of their assault statutes.[50] In addition, most reformed jurisdictions do not penalize in their assault statutes use of a weapon with intent-to-frighten or use of a weapon with the use of physical force that overpowers, nor does the MPC,[51] in contrast to the District's current ADW offense. A majority of the reformed jurisdictions either limit the weapon gradations in assault to causing bodily injury[52] or include intent-to-frighten assault, with or without a weapon, in the lower grades.[53] Six reformed jurisdictions include offensive physical contact with a weapon in the higher grades of assault[54] and five

[49] MPC § 211.1(1)(b) ("with a deadly weapon") and (2)(b) ("with a deadly weapon.").

[50] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Alaska Stat. Ann. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1)(B), (a)(4), 11.41.230(a)(2); Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(1)(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), (a)(5), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-3.05 (e)(1), (f)(1); Kan. Stat. Ann. §§ 21-5413(b)(1)(B), (b)(2)(B); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.025(1)(a), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(B), 208-B(1)(A), (1)(B); Mo. Ann. Stat. §§ 565.052(1)(2), (1)(4), 565.056(1)(2); Mont. Code Ann. §§ 45-5-201(1)(b), 45-5-213(1)(a); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. §§ 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.13(A)(2), 2903.14(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. § 2701(a)(2), 2702.1(a)(4); S.D. Codified Laws §§ 22-18-1(3), 22-18-1.1(2), Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (a)(1)(B)(iii); Wis. Stat. Ann. § 940.24.

[51] Aggravated assault in the MPC requires, in part, "attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon." MPC § 211.1(2)(b). As noted previously, this commentary considers statutes with "attempt" to cause injury as still being limited to causing injury because that remains the focus of the offense and it is unclear if "attempt" in a jurisdiction is meant to encompass intent-to-frighten assault.

[52] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Wis. Stat. Ann. § 940.24.

[53] Alaska Stat. Ann. §§ 11.41.220(a)(1)(A), 11.41.230(a)(3); Mo. Ann. Stat. § 565.056(1)(2); 18 Pa. Stat. Ann. § 270(a)(3); S.D. Codified Laws § 22-18-1(4).

[54] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining

have assault statutes that include intent-to frighten assault, with or without a weapon, in the higher grades of assault.[55]

In addition, through the definition of "dangerous weapon" in RCC § 22E-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[56] as well as imitation firearms,[57] no longer results in an enhanced penalty for assault as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law, although at least one state statutorily defines "dangerous weapon" as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[58] Similarly,

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aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[55] Ariz. Rev. Stat. Ann. § 13-1203(A)(2), (A)(3) (assault statute prohibiting, in part, "placing another person in reasonable apprehension of imminent physical injury" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); Minn. Stat. Ann. § 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and § 609.221(1) (prohibiting assault with a dangerous weapon); Mont. Code Ann. § 45-5-213(1)(b) (making it a felony with a 20 year maximum term of imprisonment to cause "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon."); Tenn. Code Ann. § 39-13-101(a)(2), (a)(3) (defining assault, in part, as "causes another to reasonably fear imminent bodily injury" and "causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and § 39-13-102(a)(1)(A)(iii) (aggravated assault offense requiring that a person commits an assault "as defined in § 39-13-101, and the assault . . . involved the use or display of deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(2), (a)(3) (requiring, in part, that a person "threatens another with imminent bodily injury" and "causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2) (requiring a person to "commit[] assault as defined in § 22.01" and use or exhibit a deadly weapon); Utah Code Ann. § 76-5-103(1)(a)(ii), (1)(b)(i) (defining aggravated assault, in part, as "a threat, accompanied by a show of immediate force or violence, to do bodily harm to another . . . that includes the use of a dangerous weapon.").

[56] *See, e.g.*, *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.").

[57] *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

[58] Utah Code Ann. § 76-1-601(5)(b)(i).

two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object.[59]

The elimination of ADW as a separate offense reduces unnecessary overlap in the current D.C. Code between multiple means of enhancing assaults committed with a weapon. Due to the complexity of weapons offenses, it is impossible to generalize about overlap between similar offenses in reformed jurisdictions. The MPC does not include weapons offenses. However, as is discussed below, a significant number of reformed jurisdictions limit or eliminate overlap between a separate weapons enhancement or offense and the weapons gradations in their assault statutes.

Fifth, in combination with the aggravated criminal menace statute in RCC § 22E-1203, the revised assault statute's enhanced penalties for the use of a dangerous weapon replace the separate "while armed" penalty enhancement in current District law. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of assault-type offenses[60] "when armed with" or "having readily available" a dangerous weapon, including firearms. Instead of having a separate "while armed" enhancement, the revised assault offense incorporates into its gradations enhanced penalties for causing different types of bodily injury "by means of" the weapon. An individual who merely possesses a firearm would still have potential liability for purposely possessing a dangerous weapon in furtherance of an assault per RCC § 22E-XXXX [revised PFCOV-type offense].

Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. The requirements for the involvement of the weapon in reformed jurisdictions' assault statutes depend on whether the weapon at issue is a firearm or other weapon. The MPC does not have weapons enhancements or offenses. Seventeen of the 28 reformed jurisdictions include weapons or dangerous weapons in their weapons enhancements or separate offenses.[61] Only one of these jurisdictions has a standard that is similar to the "readily available" available standard under current District law, although it is arguably narrower, requiring the weapon be "within [the person's] immediate control."[62] Six of these jurisdictions include possessing the weapon or being "armed" with the weapon.[63] The remaining 10 states, however, require use of the

[59] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[60] Assault-type offenses subject to the enhancement in D.C. Code § 22-4502 include: aggravated assault, the collective "assault with intent to" offenses, felony assault on a police officer, assault with a dangerous weapon, malicious disfigurement, and mayhem.

[61] Ala. Code § 13A-5-6; Alaska Stat. Ann. § 12.55.125(c); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, § 1447; Haw. Rev. Stat. Ann. §§ 134-51, 134-52, 134-53; 720 Ill. Comp. Stat. Ann. 5/33A-2; Me. Rev. Stat. tit. 17-A, § 1252(4), (5); Mo. Ann. Stat. § 571.015; Mont. Code Ann. § 45-18-221; N.H. Rev. Stat. Ann. §§ 650-A:1, 159:15; N. Y. Penal Law §§ 265.08, 265.09; Wash. Rev. Code Ann. §§ 9.94A.535(3), (4); Wis. Stat. Ann. § 939.63; Utah Code Ann. § 76-3-203.8; Minn. Stat. Ann. § 609.11; N.D. Cent. Code Ann. § 12.1-32-09(1)(a).

[62] Ariz. Rev. Stat. Ann. § 13-3102(A)(1).

[63] Del. Code Ann. tit. 11, § 1447 ("in possession of a deadly weapon."); Haw. Rev. Stat. Ann. §§ 134-51; ("possesses . . . or uses or threatens to use a deadly or dangerous weapon."); 720 Ill. Comp. Stat. Ann. 5/33A-2(a) ("while armed with a dangerous weapon."); N. Y. Penal Law §§ 265.08(1), 265.09(1)(a) ("possesses a deadly weapon."); Wash. Rev. Code Ann. §§ 9.94A.535(4) ("was armed with a deadly weapon other than a firearm."); Wis. Stat. Ann. § 939.63(a) ("in possession of a deadly weapon.").

weapon.[64] Eighteen of the 28 states limit their weapons enhancements or offenses to firearms or specifically include firearms.[65] Three of these reformed jurisdictions have a standard that is similar to "readily available" under current District law, although they are arguably narrower, requiring "within the person's immediate control"[66] or "on or about" an offender's person.[67] Eight of these jurisdictions include possessing the firearm or being "armed" with the firearm.[68] In the remaining states, six require the use of the firearm,[69] and one prohibits both possession and use, but punishes use more severely.[70] Limiting the weapons gradations in the revised assault statute to use of the weapon is well-supported by national legal trends. In addition, most of the reformed jurisdictions use "by means of" a weapon or similar language[71] as does the revised assault statute.

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[64] Ala. Code § 13A-5-6(a)(5), (a)(6) ("deadly weapon was used or attempted to be used."); Alaska Stat. Ann. § 12.55.125(c)(2) ("used a dangerous instrument."); Colo. Rev. Stat. Ann. § 18-1.3-406(7) ("use of a dangerous weapon."); Me. Rev. Stat. tit. 17-A, § 1252(4) ("with the use of a dangerous weapon."); Mo. Ann. Stat. § 571.015(1) ("by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon."); Mont. Code Ann. § 45-18-221(1) ("displayed, brandished, or otherwise used . . . or other dangerous weapon."); N.H. Rev. Stat. Ann. § 159:15(I) ("uses or employs . . . or other deadly weapon."); Utah Code Ann. § 76-3-203.8(2) ("a dangerous weapon was used."); Minn. Stat. Ann. § 609.11(4) ("used . . . a dangerous weapon other than a firearm."; N.D. Cent. Code Ann. § 12.1-32-09(1)(a) ("inflicts or attempts to inflict bodily injury upon another, threatens or menaces another with imminent bodily injury with a dangerous weapon.").

[65] Alaska Stat. Ann. § 12.55.125(c)(2); Conn. Gen. Stat. Ann. § 53a-216; Del. Code Ann. tit. 11, § 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-21; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6804; Me. Rev. Stat. tit. 17-A, § 1252(5); N. H. Rev. Stat. Ann. § 650-A:1; N. J. Stat. Ann. § 2C:43-6(c); N. Y. Penal Law §§ 265.08, 265.09; 42 Pa. Stat. Ann. § 9712; Tenn. Code Ann. § 39-17-1324; Tex. Penal Code § 46.02; Wash. Rev. Code Ann. § 9.94A.553(3); Or. Rev. Stat. Ann. § 161.610; Minn. Stat. Ann. § 609.111(5); Ohio Rev. Code Ann. §§ 2929.14(B)(1)(a)(ii), (B)(1)(a)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

[66] Haw. Rev. Stat. Ann. § 134-21.

[67] Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Tex. Penal Code § 46.02(a-1).

[68] Alaska Stat. Ann. § 12.55.125(c)(2) ("possessed a firearm."); Del. Code Ann. tit. 11, § 1447A(a) ("in possession of a firearm."); N. H. Rev. Stat. Ann. § 650-A:1 ("was armed with a pistol."); N. J. Stat. Ann. § 2C:43-6(c) ("used or was in possession of a firearm."); 42 Pa. Stat. Ann. § 9712(a) ("visibly possessed a firearm."); Wash. Rev. Code Ann. § 9.94A.553(3) ("was armed with a firearm."); Minn. Stat. Ann. § 609.111(5) ("had in possession or used . . . a firearm."); N. Y. Penal Law §§ 265.19, 265.03 (offense of aggravated criminal possession of a weapon referring to an offense that prohibits "possess[ing]" certain firearms, including loaded firearms).

[69] Conn. Gen. Stat. Ann. § 53a-216(a) ("uses or threatens the use of a pistol . . . or other firearm."); Ind. Code Ann. § 35-50-2-11(d) ("used a firearm."); Kan. Stat. Ann. § 21-6804(h) ("when a firearm is used."); Me. Rev. Stat. tit. 17-A, § 1252(5) ("with the use of a firearm."); Or. Rev. Stat. Ann. § 161.610(2) ("use or threatened use of a firearm."); Ark. Code Ann. § 16-90-120(a) ("employed any firearm.").

[70] Tenn. Code Ann. § 39-17-1324(a), (g)(1) (enhancement making it a class D felony with a three year mandatory minimum sentence if a person "possess[es] a firearm with the intent to go armed during the commission of or attempt to commit a dangerous felony") and § 39-17-1324(b), (h)(1) (enhancement making it a class C felony with a six year mandatory minimum sentence if a person "employ[s] a firearm . . . during the commission of a dangerous felony . . . or an attempt to commit a dangerous felony.").

[71] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ark. Code §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3)(A), 5-13-203(a)(3); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(d), 18-3-204(a); Conn. Gen. Stat. Ann. §§ 53a-59(a)(1), 53a-60(a)(2), (a)(3), 53a-61(a)(3); Del. Code Ann. tit. 11, §§ 611(2), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); Ky. Rev. Stat. Ann. §§ 508.010(1)(a), 508.020(1)(b), 508.030(1)(b); Me. Rev. Stat. tit. 17-A, §§ 208(1)(C), 208-B(1)(A), (1)(B); Mo Ann. Stat. § 565.052(1)(2); N.H. Rev. Stat. Ann. §§ 631:1(I)(b), 631:2(I)(b), 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2), (b)(2), (b)(3); N.Y. Penal Law §§ 120.00(3), 120.05(2), (4), 120.10(1); N.D. Cent.

By incorporating the use of a weapon into the gradations of the revised assault statute, the RCC reduces unnecessary overlap between multiple means of enhancing assaults committed with a weapon under current District law. The reduction in overlap is well-supported by national legal trends. The MPC does not have weapons enhancements or offenses. However, a majority of the 28 reformed jurisdictions with enhancements or separate offenses for the involvement of weapons or firearms in offenses prohibit or largely limit overlap between the weapons gradations of assault and the separate enhancements or offenses. First, five of the reformed jurisdictions statutorily prohibit applying a weapons or firearm enhancement to an offense that requires as an element or mandatory sentencing factor a weapon or firearm.[72] An additional two reformed states limit overlap to a certain class of felony[73] or to assaults where the weapon is a firearm.[74] The remaining states appear to statutorily permit overlap between the assault gradations and the weapons enhancements or offenses only for inherently dangerous weapons and not for substances and articles that are capable of causing or likely to cause death or serious bodily injury. Nine jurisdictions have assault statutes that prohibit the use of a weapon,[75] but the jurisdictions' weapons enhancement or offense is limited to firearm.[76] In these states, it appears that the use of any dangerous weapon in an assault, other than a firearm, receives no penalty beyond the assault statute. Similarly, seven jurisdictions have assault statutes that prohibit the use of both inherently dangerous weapons, as well as substances and articles that are capable of causing or likely to cause death or serious bodily injury,[77] but the weapons enhancement

Code Ann. §§ 12.1-17-01(1)(b), 12.1-17-01.1(2), 12.1-17-02(1)(b); Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(1)(a), (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Wis. Stat. Ann. § 940.24.

[72] Ill. Comp. Stat. ann. 5/33A-2(a) (stating the enhancement applies to any felony except specified crimes against persons and "any offense that makes the possession or use of a dangerous weapon either an element of the base offense, an aggravated or enhanced version of the offense, or a mandatory sentencing factor that increases the sentencing range."); Mont. Code Ann. § 46-18-221(a) (stating the enhancement applies to "any offense other than an offense in which the use of a weapon is an element of the offense."); Tenn. Code Ann. § 39-17-1324(c) (excluding offenses "if possessing or employing a firearm is an essential element of the underlying dangerous felony as charged."); Wis. Stat. Ann. § 939.63(2) ("The increased penalty provided in this section does not apply if possessing, using or threatening to use a dangerous weapon is an essential element of the crime charged."); S.D. Codified Laws § 22-14-14 ("No offense may be charged . . . if the use of a dangerous weapon is a necessary element of the principal felony alleged to have been committed or attempted.").

[73] Alaska Stat. Ann. § 12.55.125(b), (c), (d).

[74] Me. Rev. Stat. Ann. tit. 17-A, § 1252(4), (5).

[75] Conn. Gen. Stat. Ann. §§ 53a-59(a), 53a-60, 53a-60a, 53a-61; Ind. Code Ann. § 35-42-2-1(g)(2); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (b)(2)(B); N.J. Stat. Ann. § 2C: 12-1(a)(2), (b)(2), (b)(3); 18 Pa. Stat. Ann. §§ 2701(a)(2), 2702(a)(4); Tex. Penal Code Ann. § 22.02(a)(2); Or. Rev. Stat. Ann. §§ 163.160(1)(b), 163.165(10(a), (1)(c), 163.175(1)(b), (1)(c), Ohio Rev. Code Ann. §§ 2903.11(A)(2), 2903.14; Ark. Code Ann. §§ 5-13-201(a)(1), (a)(8), 5-13-202(a)(2), (a)(3), 5-13-203(a)(3).

[76] Conn. Gen. Stat. Ann. § 53a-216; Ind. Code Ann. § 35-50-2-11; Kan. Stat. Ann. § 21-6904; N.J. Stat. Ann. § 2C:43-6(c); 42 Pa. Stat. Ann. § 9712; Tex. Penal Code Ann. § 46.02; Or. Rev. Stat. Ann. § 161.610; Ohio Rev. Code Ann. §§ 2929.14(B)(ii), (B)(iii), 2941.141, 2941.145; Ark. Code Ann. § 16-90-120.

[77] Ala. Code §§ 13A-6-20(a)(1), 13A-6-21(a)(2), (a)(3), 13A-6-22(a)(3); Ariz. Rev. Stat. Ann. § 13-1204(A)(2); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(a), 18-3-203(1)(b), (1)(c), 18-3-204(a); Del. Code Ann. tit. 11, §§ 611(1), 612(a)(2), 613(a)(1); Haw. Rev. Stat. Ann. §§ 707-711(1)(d), 707-712(1)(b); N.Y. Penal Law §§120.00(3), 120.05(2), 120.10(1); N.D. Cent. Code Ann. §§ 12.1-17-01(b), 12.1-17-01.1(2), 12.1-17-02(1)(b).

or offense is limited to firearms or other inherently dangerous weapons.[78] In these states, it appears that the use of an inherently dangerous weapon in an assault is subject to additional penalty enhancement, but any other weapon is not. In total, there are only five states, like D.C., with no statutory limitation on overlap between the weapons gradations in assault and the weapons enhancements or separate offenses.[79]

In addition, because the revised assault statute incorporates enhancements for use of a weapon in the offense gradations, it is no longer possible to enhance an assault with both a weapon enhancement and an enhancement based on the identity of the complainant,[80] or to double-stack different weapon penalties and offenses.[81] Reformed

[78] Ala. Code § 13A-5-6(a)(5), (a)(6); Ariz. Rev. Stat. Ann. § 13-3102(A)(1); Colo. Rev. Stat. Ann. § 18-1.3-406(7); Del. Code Ann. tit. 11, §§ 1447, 1447A; Haw. Rev. Stat. Ann. §§ 706-660.1, 134-51, 134-52, 134-53, 134-21; N.Y. Penal Law §§ 265.08, 265.09; N.D. Cent. Code Ann. § 12.1-32-02.1.

[79] N.H. Sat. Ann. §§ 650-A:1, 159:15; Wash. Rev. Code Ann. § 9.94A.533; Utah Code Ann. § 76-3-203.8; Minn. Sta. Ann. § 609.11; Mo. Ann. Stat. § 571.017.

[80] There are several penalty enhancements under current District law based upon the age or work status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g.*, *McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[81] Under current District law, certain crimes are considered "crimes of violence" and are subject to enhanced penalties under several overlapping provisions. First, crimes of violence are subject to enhancement under D.C. Code § 22-4502 if a person commits them "when armed with or having readily available" any dangerous weapon. D.C. Code § 22-402(a). A person so convicted with no prior convictions for certain armed crimes may be subjected to a significantly increased maximum term of imprisonment and "shall" receive a mandatory minimum prison sentence of five years if he or she committed the offense "while armed with any pistol or firearm." D.C. Code § 22-4501(a)(1). If the person has one or more prior convictions for armed offenses, he or she "shall" be subject to an increased maximum prison sentence as well as mandatory minimum sentences. D.C. Code § 22-4501(a)(2). ADW is a crime of violence, but it may not receive the "while armed" enhancement under D.C. Code § 22-4501(a)(1) because "the use of a dangerous weapon is already included as an element" of the offense. *Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000). ADW is subject to enhancement, however, under the recidivist while armed provision in D.C. Code § 22-4501(a)(2). *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982). Second, crimes of violence are subject to the additional, separate offense of possession of a firearm during a crime of violence (PFCOV) if a person possessed a "pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm" while committing the offense. PFCOV is a felony with a maximum term of imprisonment of 15 years and a mandatory minimum term of imprisonment of five years. Despite the substantial overlap in prohibited conduct, offenses enhanced with the "while armed" enhancement and PFCOV do not merge. *See Little v. United States*, 613 A.2d 880, 881 (D.C. 1992) (holding that a conviction for assault with intent to kill while armed does not merge with a conviction for PFCOV due to the holding in *Thomas v. United States*, 602 A2.d 647 (D.C. 1992)). Depending on the weapon at issue and the facts of a given case, additional offenses that may be charged include carrying dangerous weapons (D.C. Code § 22-4504) and possession of prohibited weapons (D.C. Code § 22-4514).

jurisdictions generally do not statutorily address stacking a weapon enhancement with another enhancement, although at least one jurisdiction explicitly permits stacking.[82]

Also, the revised assault statute caps the maximum penalty for an enhancement based on the use of weapons to never be greater than the most egregious type of actual harm inflicted—the purposeful infliction of a permanently disabling injury.[83] At least nine of the 28 reformed jurisdictions similarly include causing serious bodily injury by use of a weapon in the highest grades of assault with other serious harms,[84] although weapons enhancements and offenses outside of the assault statute may change the actual penalty imposed. At least an additional six reformed jurisdictions include causing bodily injury with a weapon in the same grade of assault as the most serious physical injuries.[85] At least five states make the most serious type of physical injury the highest grade of assault, and reserve the use of weapons in lower grades[86] and two states make causing serious bodily injury with a weapon the highest grade of assault.[87]

In addition, through the definition of "dangerous weapon" in RCC § 22E-1001, the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon,[88] as well as imitation firearms,[89] no longer results in an enhanced penalty for assault as it does under current District law. The MPC and reformed jurisdictions' statutes generally do not address whether a complaining witness's perception is sufficient for constituting a "dangerous weapon, presumably leaving the matter to case law. However, at least one state defines "dangerous weapon" as including "a facsimile or representation . . . if the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury."[90] Similarly,

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[82] Me. Rev. Stat. tit. 17-A, § 1252 ("Subsections in this section that make the sentencing class for a crime one class higher than it would otherwise be when pled and proved may be applied successively if the subsections to be applied successively contain different class enhancement factors.").

[83] The current mayhem and malicious disfigurement offenses in D.C. Code § 22-406 are deleted from the revised assault statute, but the conduct is covered under either aggravated assault (subsections (a)(1) and (a)(2)) or first degree assault (subsection (b)(1)). Due to the nature of the injuries required in subsections (a)(1) and (a)(2), there is no enhancement for using a dangerous weapon. However, use of a dangerous weapon would enhance conduct in subsection (b)(1), meaning it would fall under subsection (a)(2) of aggravated assault.

[84] *See, e.g.*, Ala. Code § 13A-6-20; Alaska Stat. Ann. § 11.41.200; Ark. Code Ann. § 5-13-201; Colo. Rev. Stat. Ann. § 18-3-202; Conn. Gen. Stat. Ann. § 53a-59; Del. Code Ann. tit. 11, § 613; Ky. Rev. Stat. Ann. § 508.010; N.H. Rev. Stat. Ann. § 631:1; N.Y. Penal Law § 120.10.

[85] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1204(A)(1), (A)(2), (E); Ind. Code Ann. § 35-42-2-1(g)(1), (g)(2); Ohio Rev. Code Ann. § 2903.12(A)(1), (A)(2); S.D. Codified Laws § 22-18-1.1; Tenn. Code Ann. § 39-13-102; Tex. Penal Code Ann. § 22.02.

[86] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 707-710, 707-711, 707-712; Kan. Stat. Ann. § 21-5413(b)(1)(A), (b)(1)(B), (b)(2)(A), (b)(2)(B), (g)(2); Mo. Ann. Stat. §§ 565.050, 565.052, 565.054, 565.056; N.J. Stat. Ann. § 2C:12-1(b)(1), (b)(2), (b)(3); 18 Pa. Stat. Ann. § 2702(a)(1), (a)(2), (a)(4), (b).

[87] Me. Rev. Stat. tit. 17-A, § 208-B; Or. Rev. Stat. Ann. § 163.185; Utah Code Ann. § 76-5-103.

[88] *See, e.g.*, *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.").

[89] *See, e.g.*, *Harris v. United States*, 333 A.2d 397, 400 (D.C. 1975) (finding that "an imitation or blank pistol used in an assault by pointing it at another is a 'dangerous weapon' in that it is likely to produce great bodily harm" in an ADW case); *Washington v. United States*, 135 A.3d 325, 330 (D.C. 2016) ("An imitation firearm is a gun, which is an inherently dangerous weapon for purposes of ADW, and therefore, a defendant may be appropriately charged with ADW where the defendant commits an assault using an imitation firearm.").

[90] Utah Code Ann. § 76-1-601(5)(b)(i).

two reformed jurisdictions include gradations in their assault statutes for the use of imitation weapons or a complaining witness's perception of an object as a weapon.[91]

Sixth, the revised assault statute criminalizes for the first time negligently causing bodily injury to another person by means of a what is, in fact, a "firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded" (subsection (e)(2)). At least 18 of the 28 reformed jurisdictions have assault gradations or offenses that prohibit negligently causing injury to another by negligent handling of some kind of weapon,[92] as does the MPC.[93] Of these 18 jurisdictions, two limit the category of weapons for the negligent gradation as does the RCC. One jurisdiction limits the gradation to firearms[94] and the other jurisdiction limits the negligent gradation to inherently dangerous weapons.[95] Broader categories of weapons are permitted for the other weapons gradations in these jurisdictions.[96]

Seventh, the revised assault statute's enhanced penalties for harming a law enforcement officer (LEO) replace the separate assault on a police officer (APO) offenses. The scope of conduct that receives a LEO enhancement in the revised assault statute is narrower than the current APO offenses, which include conduct that falls short of inflicting bodily injury or using overpowering physical force. The narrower scope of the revised LEO enhancement reflects national trends. The MPC does not have an APO offense or enhance assault on the basis of the identity of the complainant. Most reformed jurisdictions limit their LEO enhancements and APO offenses to bodily harm,[97] or include intent-to-

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[91] Ariz. Rev. Stat. Ann. § 13-1204(A)(11) (including as a grade of aggravated assault that a "simulated deadly weapon" was used); Mont. Code Ann. § 45-5-213 (including in assault offense causing "reasonable apprehension of serious bodily injury in another by use of a weapon or what reasonably appears to be a weapon.").

[92] Ala. Code § 13A-6-23(a)(3); Alaska Stat. Ann. § 11.41.230(a)(2); Ark. Code Ann. § 5-13-203; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-61(a)(3); Del. Code Ann. tit. 11 § 611(2); Haw. Rev. Stat. Ann. § 707-712(1)(b); Mo. Ann. Stat. § 565.056(1)(2); Mont. Code Ann. § 45-5-210(1)(b); N.H. Rev. Stat. Ann. § 631:2-a(I)(c); N.J. Stat. Ann. § 2C:12-1(a)(2); N.Y. Penal Law § 120.00(3); N.D. Cent. Code Ann. § 12.1-17-01(b); Ohio Rev. Code Ann. § 2903.14; Or. Rev. Stat. Ann. § 163.160(1)(b); Pa. Stat. Ann. § 2701(a)(2); S.D. Codified Laws § 22-18-1(3); Wis. Stat. Ann. § 940.24.

[93] MPC § 211.1(1)(b).

[94] Mo. Ann. Stat. § 565.056(1)(2).

[95] Or. Rev. Stat. Ann. §§ 163.60(1)(b), 161.015(2) (fourth degree assault offense requiring, in part, "with criminal negligence causes physical injury to another by means of a deadly weapon" and defining deadly weapon as "any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

[96] Mo. Ann. Stat. §§ 565.052(1)(2), 556.061(20), (22) (gradation of assault requiring a "deadly weapon or dangerous instrument" and defining a "dangerous instrument" as "any instrument, article, or substance, which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury" and "deadly weapon" as specific inherently dangerous weapons, such as firearms, and black jacks); Or. Rev. Stat. Ann. §§ 163.165(1)(a)(, (1)(c), 163.175(1)(b), (1)(c), 163.185(1)(a) 161.015(1), (2) (several gradations of assault requiring a "deadly or dangerous weapon" and defining "dangerous weapon" as "any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury" and "deadly weapon" as any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.").

[97] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. See, e.g., Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-

frighten or offensive physical contact APO in a lower grade or separate, lower offense.[98] Only one jurisdiction appears to punish equally assaults on LEOs resulting in bodily injury, intent-to-frighten assaults, and offensive physical contact.[99] A few jurisdictions punish intent-to-frighten APO equally with assaults resulting in bodily injury only if the intent-to-frighten assault involves a weapon.[100] The MPC does not have an APO offense, nor does it enhance the assault offense when the complainant is a LEO.

Unlike current District law, the RCC LEO enhancement applies to each type of bodily injury (bodily injury, significant bodily injury, and serious bodily injury), as well as the use of physical force that overpowers. It is difficult to generalize about the organization of the 2 reformed jurisdictions' APO offenses. However, while several states appear to

17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4.

[98] Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05.

Ind. Code Ann. §§ 35-42-2-1 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

[99] Arizona makes it a Class 5 felony to cause physical injury to a LEO, place a LEO in reasonable apprehension of imminent physical injury, or make offensive physical contact on a LEO. If physical injury results, however, it is a Class 4 felony. Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(a), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

It should be noted that Wisconsin's APO statute prohibits causing bodily harm as well as "threat[ening]" to cause bodily harm. Based upon the statute, it is unclear whether threats covers intent-to-frighten assault, and Wisconsin was not considered as punishing intent-to-frighten assault the same as physical harm. A review of reformed jurisdictions' threats statutes was not part of this assault commentary.

[100] Ark. Code Ann. §§ 5-13-211(a)(2), (b)(2) (aggravated assault upon a LEO offense making it a class Y felony "discharge[ing] a firearm with a purpose to cause serious physical injury or death to a law enforcement officer" under certain circumstances) and 5-13-201(c)(3) (battery in the first degree making it a Class Y felony if the person injured is a LEO "acting in the line of duty."); Colo. Rev. Stat. Ann. § 18-3-202(1)(e) (assault in the first degree prohibiting, in part, "[w]ith intent to cause serious bodily injury upon the person of a peace officer . . . he or she threatens with a deadly weapon a peace officer."); Kan. Stat. Ann. §§ 21-5412(a), (d)(1) (defining assault as "placing another person in reasonable apprehension of immediate bodily harm" and making it a severity level 7 person felony if committed against a LEO "with a deadly weapon") and 21-5413(c)(2), (g)(3)(B) (making battery against a LEO a ; N.Y. Penal Law §§ 120.18 (making it Class D felony to place or attempt to place a "police officer . . . in reasonable fear of physical injury or death by displaying a deadly weapon, knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm, whether operable or not") and 120.05(3) (making it a Class D felony to cause physical injury to a peace officer or police officer with intent to prevent that officer from performing a lawful duty).

apply a LEO enhancement to limited grades of the assault offense,[101] many states apply a LEO enhancement to multiple gradations of assault.[102]

Contrary to current District law, the revised assault offense requires recklessness as to the circumstance that the complainant is a law enforcement officer protected under the statute,[103] rather than negligence.[104] Due to the varying rules of construction, it is difficult to determine what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a LEO. In the reformed jurisdictions that clearly specify a culpable mental state for this element, at least five require knowledge[105] and at least three require knowledge or "should know" or other similar language.[106]

Lastly, while the current statute criminalizing assaults on LEOs does not address assaults targeting their family members because of their relation to a LEO, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[107] At least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[108]

Eighth, the revised assault statute replaces the offenses of assault and aggravated assault on a public vehicle inspection officer. Public vehicle inspection officers are covered in the revised assault statute as District officials or employees in the definition of "protected person" (RCC § 22E-1001). However, the scope of conduct that receives an enhanced penalty for public vehicle inspection officers is significantly narrowed as compared to current District law. The revised assault offense requires some type of bodily injury or using physical force that overpowers. By contrast, the current assault on public vehicle inspection officers offenses include conduct that falls short of these requirements, as well as conduct that consists merely of "imped[ing], intimidate[ing], or interfer[ing] with" a public vehicle inspection officer.

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[101] *See, e.g.*, Ala. Code § 13A-6-21(a)(4); Ariz. Rev. Stat. Ann. § 13-1204(A)(8), (F); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025(1)(a)(1); N.D. Cent. Code Ann. § 12.1-17-01(2)(a).

[102] *See, e.g.*, Ark. Code Ann. §§ Ark. Code Ann. §§ 5-13-201(a), (c)(3), 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3), (d)(4), (e)(2), (e)(6), (h); Minn. Stat. Ann. § 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); N.Y. Penal Law §§ 120.05(3), 120.08, 120.011; Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(D)(5), (D)(6); S.D.C Codified Laws § 22-18-1.05.

[103] Recklessness applies not only to the fact that the person assaulted is a "LEO" as defined by RCC § 22E-1001, but also the circumstances that the person was in the course of his or her official duties.

[104] *See, e.g.*, *Scott. v. United States*, 975 A.2d 831, 836 (D.C. 2009) ("To convict [appellant] of APO, the government was required to prove that . . . the defendant either knew or should have known [the complaining witness] was a police officer engaged in official duties."); *In re J.S.*, 19 A.3d 328, 330 (D.C. 2011) ("Generally, to prove APO the government must show 'the elements of simple assault . . . plus the additional element that the defendant knew or should have known the victim was a police officer.'") (quoting *Petway v. United States*, 420 A.2d 1211, 1213 (D.C. 1980)).

[105] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[106] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

[107] Many law enforcement officers, as "LEO" is defined in § 22E-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[108] Wis. Stat. Ann. § 943.203(2).

The narrowed scope of assaultive conduct for public vehicle inspection officers is well-supported by national legal trends. A few reformed jurisdictions' assault statutes specifically include code enforcement officers[109] and one reformed jurisdiction includes motor vehicle inspectors.[110] Jurisdictions' definitions of law enforcement officer, peace officer, and similar terms also may include public vehicle inspection officers. The MPC does not have an APO offense, nor does it enhance the assault offense based on the identity of the complainant. In the reformed jurisdictions' assault statutes that specifically include code enforcement officers or motor vehicle inspectors, all[111] but one[112] are limited to physical harm. As is discussed in the above entry for the revised LEO enhancement, the majority of LEO enhancements and APO offenses in reformed jurisdictions are limited to bodily harm,[113] or include intent-to-frighten or offensive physical contact APO in a lower grade or separate, lower offense.[114] These national trends support limiting assault on a public vehicle inspection to some type of bodily injury or use of physical force that overpowers.

In addition, none of the reformed jurisdictions' assault statutes include an automatic civil penalty of loss of license to operate public vehicles-for-hire as do the current assault on public vehicle inspection officer statutes, nor do they include any similar civil penalties. Deleting the automatic loss of license provision is supported by national legal trends. Similarly, the revised assault offense no longer includes a provision specifically barring justification and excuse defenses to resistance to a public vehicle inspection officer's civil enforcement authority, as in current District law.[115] None of the reformed jurisdictions'

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[109] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Ariz. Rev. Stat. Ann. § 13-12-4(A)(8)(g); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[110] Conn. Gen. Stat. Ann. §53a-167c.

[111] *See, e.g.*, Ark. Code Ann. § 5-13-202(4); Del. Code Ann. tit. 11, §§ 612(a)(3), (a)(5).

[112] Ariz. Rev. Stat. Ann. §§ 13-1203 (assault statute prohibiting, in part, "causing any physical injury to another person," "placing another person in reasonable apprehension of imminent physical injury," or "touching another person with the intent to injure, insult or provoke such person") and 13-1204(A)(8)(g), (F) (aggravated assault statute making it a class 5 felony to "commit assault as prescribed by § 13-1203" if the person knows or has reason to know that the complaining witness is a "peace officer" unless "physical injury" results, in which case it is a class 4 felony).

[113] Some of these jurisdictions include attempting to cause bodily harm, in addition to causing bodily harm. They were still included because the focus of the offense is bodily harm. See, e.g., Ala. Code § 13A-6-21(4); Haw. Rev. Stat. Ann. §§ 707-712.5, 707-712.6; Ky. Rev. Stat. Ann. § 508.025; N.D. Cent. Code Ann. § 12.1-17-01(2); Ohio Rev. Code Ann. §§ 2903.11(D), 2903.13(C)(5); Or. Rev. Stat. Ann. § 163.208; 18 Pa. Stat. Ann. § 2702(a)(2), (a)(3); Conn. Gen. Stat. Ann. §53a-167c(a)(1), (a)(5); Me. Rev. Stat. tit. 17-A, § 752-A; Utah Code Ann. § 76-5-102.4.

[114] Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5); 720 Ill. Comp. Stat. Ann. 5/12-1, 12-2(b)(4.1), (d), 12-3.05(a)(3), (d)(4), (h); Minn. Stat. Ann. §§ 609.02(10) (defining "assault as including "an act done with intent to cause fear in another of immediate bodily harm or death") and 609.2231(1); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Mont. Code Ann. § 45-5-210; N.J. Stat. Ann. § 2C:12-1(5); S.D. Codified Laws §§ 22-18.1-05.

Ind. Code Ann. §§ 35-42-2-1 (c), (battery offense prohibiting touching another person or placing bodily fluid or waste on another "in a rude, insolent, or angry manner") and 35-42-2-1(e)(2), (g)(5) (aggravated battery offense making it a Level 6 felony to commit battery against a public safety official and a Level 5 felony if it results in "bodily injury" to a public safety official).

[115] D.C. Code §§ 22-404.02(c), 22-404.03(c) ("It is neither justifiable nor excusable for a person to use force to resist the civil enforcement authority exercised by an individual believed to be a public vehicle inspection officer, whether or not such enforcement action is lawful.").

assault statutes appear to statutorily include prohibitions on justification and excuse defenses for civil enforcement authority.

Lastly, while the current statutes criminalizing assaults on a public vehicle inspection officer do not address assaults targeting their family members because of their relation to a public vehicle inspection officer, the revised assault statute includes liability for such conduct consistent with the general provision regarding targeting family members of District employees in D.C. Code § 22-851.[116] At least one reformed jurisdiction similarly includes family members of LEOs in its APO offense.[117]

Ninth, the "protected person" enhancement results in several changes to current District law regarding penalty enhancements for harming certain groups of people. First, through the definition of "protected person" in RCC § 22E-1001, the revised assault statute also extends enhanced penalties for assaults of drivers of private vehicles-for-hire, public safety employees, individuals that are "vulnerable adults," and District officials or employees. The MPC does not enhance assault based on the identity of the complainant, but many reformed jurisdictions do. A significant number of the 28 reformed jurisdictions enhance assaults against individuals with physical or mental disabilities that limit their ability to care for themselves.[118] Many reformed jurisdictions enhance assaults to emergency medical first responders,[119] either in the same enhanced gradation for assaults against LEOs,[120] or in a lesser gradation than an assault on a LEO.[121] At least one reformed

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[116] Many law enforcement officers, as "LEO" is defined in § 22E-1001, are District employees and therefore targeting of their families because of their relation to a LEO is already criminalized by D.C. Code § 22-851. However, there is no current provision in law prohibiting assaults with such motives against family members of other, non-District employees who fall within the definition of a "law enforcement officer."

[117] Wis. Stat. Ann. § 943.203(2).

[118] *See, e.g.*, Ark. Code Ann. § 5-13-202(a)(4)(F); Conn. Gen. Stat. Ann. § 53a-59a; Colo. Rev. Stat. Ann. § 18-6.5-103; Haw. Rev. Stat. Ann. § 707-660.2(1)(a)(ii) (authorizing an extended term of imprisonment if "in the course of committing or attempting to commit a felony" a person "causes the death or inflicts serious or substantial bodily injury upon another person who is . . . blind, a paraplegic, or a quadriplegic."); N.H. Rev. Stat. Ann. § 651:6(I)(d) (authorizing an extended term of imprisonment if a jury finds beyond a reasonable doubt that a person "committed an offense involving the use of force against a person with the intention of taking advantage of the victim's age or physical disability."); 720 Ill. Comp. Stat. Ann. 5/12-3.05(b); Ind. Code Ann. § 35-42-2-1(1)(e)(5), (1)(g)(5)(D); Del. Code Ann. tit. 11, § 1105; Minn. Stat. Ann. § 609.2231(8); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3); Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[119] The current APO statute already enhances assaults against firefighters, which is included in the definition of "public safety employee." D.C. Code § 22-405(a).

[120] *See, e.g.*, Ala. Code § 13A-6-21(4) ("emergency medical personnel."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (c.5) ("emergency medical service provider" or "emergency medical care provider."); Del. Code Ann. ti. 11, §§ 601(c), 612(a)(3), 613(a)(5) (including emergency medical technicians and paramedics); K.Y. Rev. Stat. Ann. § 508.025(1)(4) ("paid or volunteer emergency medical services personnel certified or licensed pursuant to KRS Chapter 311A, if the event occurs while personnel are performing job-related duties."); Conn. Gen. Stat. Ann. § 53a-167c(a) ("emergency medical . . . personnel."); Mo. Ann. Stat. §§ 565.052, 565.054, 565.056 and 565.002 (defining "special victim," in part, as "[e]mergency personnel, any paid or volunteer firefighter, emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted in the performance of his or her official duties or as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(b)(5)(a), (b)(5)(c) ("Any person engaged in emergency first-aid or medical services acting in the performance of his duties.").

[121] *See, e.g.*, Ark. Code Ann. §§ 5-13-201(c)(3) (enhancing first degree battery if the complainant is a "law enforcement officer acting in the line of duty" and 5-13-202(a)(4)(A), (a)(4)(E) (enhancing second degree battery when the complainant is a LEO or an emergency medical services provider); Ariz. Rev. Stat. Ann. §

jurisdiction, New York, enhances assaults against the drivers of private vehicles for hire.[122] Several reformed jurisdictions enhance assaults against state officials or employees.[123]

The revised assault statute applies a mental state of "recklessness" to whether the complaining witness is a "protected person." Due to the varying rules of construction, it is difficult to determine what culpable mental state, if any, the reformed jurisdictions apply to the fact that the complainant was a special category of individual, such as LEO, or vulnerable adult. However, in looking at the LEO enhancements, in the reformed jurisdictions that clearly specify a culpable mental state, at least five require knowledge[124] and at least three require knowledge or "should know" or other similar language.[125]

Tenth, in keeping with the special status certain categories of individuals have under current District law, the revised assault statute enhances the penalty for assaults committed against LEOs, public safety employees, participants in citizen patrols, District officials or employees, and family members of District officials or employees when the assault is committed "with the purpose of harming the complainant because of the complainant's status." Several of the 28 reformed jurisdictions enhance assaults committed against LEOs because of their status as LEOs, regardless of whether the LEO was acting in the course of official duties at the time of the offense,[126] and a few of these reformed jurisdictions extend this enhancement to fire fighters[127] or medical first responders.[128] As previously noted, several reformed jurisdictions enhance assaults against

13-1204(A)(8)(a), (A)(8)(c), (E), (F) (making aggravated assault against a peace officer either a class 5 felony, unless it results in physical injury, in which case it is a class 4 felony, and making aggravated assault against an emergency medical technician or paramedic a class 6 felony).

[122] N.Y. Penal Law § 60.07.

[123] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20(4).

[124] Ark. Code Ann. § 5-13-202(4)(A)(i); 720 Ill. Comp. Stat. Ann. 5/12-3.05(a)(3); N.D. Cent. Code Ann. § 12.1-1701(2)(a); Or. Rev. Stat. Ann. § 163.208(1); Utah Code Ann. § 76-5-102.4(2);

[125] Ariz. Rev. Stat. Ann. § 13-1204(A)(8)(a) ("knowing or having reason to know."); Colo. Rev. Stat. Ann. §§ 18-3-202(1)(e), 18-3-203(1)(c), (1)(c.5), 18-3-204(b) ("knows or reasonably should know" or "knows or should know."); Wis. Stat. Ann. § 940.203(2)(a).

[126] *See, e.g.*, Del. Code Ann. tit 11, § 612(a)(3) ("For the purposes of this subsection, if a law-enforcement officer is off duty and the nature of the assault is related to that law-enforcement officer's official position, then it shall fall within the meaning of 'official duties' of a law-enforcement officer."); 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Ky. Rev. Stat. Ann. § 508.025(a)(1) ("peace officer."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002 (several gradations of assault specific to a "special victim" and defining "special victim" to include "[a] law enforcement officer assaulted . . . as a direct result of such official duties."); N.J. Stat. Ann. § 2C:12-1(5)(a) ("Any law enforcement officer . . . or because of his status as a law enforcement officer."); Wis. Stat. Ann. § 940.203 ("The act or threat is in response to any action taken by . . . a law enforcement officer.").

[127] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 12-3.05(a)(3) ("battered in retaliation for performing his or her duties."); Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "any paid or volunteer firefighter . . . assaulted . . . as a direct result of such official duties.").

[128] *See, e.g.*, Mo. Ann. Stat. §§ 565.052(3), 565.054(2), 565.056(3), 565.002(14)(b) (several gradations of assault specific to a "special victim" and defining "special victim" to include "emergency room, hospital, or trauma center personnel, or emergency medical technician, assaulted as a direct result of such official duties.").

state officials or employees.[129] Two of these jurisdictions expand the enhancement to assaults on the basis of the complainant's status as a state official or employee,[130] but none appear to extend the enhancement to family members of the state official or employee. At least two reformed jurisdictions specifically enhance assaults on citizen patrol groups,[131] and one of these specifically addresses targeting a person for their work performing citizen patrol duties.[132]

Eleventh, the revised assault statute eliminates the separate assault offense of "willfully poisoning any well, spring, or cistern of water."[133] None of the reformed jurisdictions appears to specifically include poison specifically in their assault statutes, nor does the MPC.

Twelfth, regarding the defendant's ability to claim he or she did not act "recklessly, under circumstances manifesting extreme indifference to human life," or "purposely" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[134] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[135] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[136]

Finally, national legal trends support the recognition of a defense for assaultive conduct carried out with effective consent of the complainant under various circumstances. At least twelve recently revised criminal codes codify such a defense in their general

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[129] *See, e.g.*, Ark. Code Ann. § 5-13-202(4)(D); Del. Code Ann. tit. 11, § 612(a)(9); 720 Ill. Comp. Stat. 5/12-3.05(d)(6); Tenn. Code Ann. § 39-13-102(d); Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(A), (b)(2)(B); Wis. Stat. Ann. § 940.20.

[130] Tex. Penal Code §§ 22.01(b)(1), 22.02(b)(2)(B) ("in retaliation or on account of an exercise of official power or performance of an official duty as a public servant"; Wis. Stat. Ann. § 940.20(4) ("or as a result of any action taken within an official capacity.").

[131] Minn. Stat. Ann. § 609.2231(7); 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4).

[132] 720 Ill. Comp. Stat. Ann. 12-3.05(d)(4) ("battered in retaliation for performing his or her official duties.").

[133] D.C. Code § 22-401.

[134] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[135] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[136] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

part.[137] Such codification follows the approach of the Model Penal Code, which specifically addresses consent to bodily injury within a general provision on consent as a defense.[138] Model Penal Code § 2.11(2),[139] which the RCC assault subsection (i)(1) closely tracks, provides a broad exception for minor harms and serious harms resulting from consensual social interactions in legal activities.[140] Most jurisdictions similarly limit an effective consent-type defense to assaults involving injury less than serious bodily injury,[141] although this does not necessarily mean that most jurisdictions allow for a consent defense to significant bodily injury.[142] Many jurisdictions specifically exclude injuries resulting from legal sporting events,[143] and some extend the defense to all concerted activity.[144] Legal experts have also summarized national legal practice in a manner consistent with the RCC assault defense provisions.[145] Only two jurisdictions'

[137] *See, e.g.,* Ala. Code § 13A-2-7(b) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (1976); Me. Rev. Stat. Ann. tit. 17-A, § 109(2) (1983); Mo. Ann. Stat. § 565.010 (2017); Mont. Code Ann. § 45-2-211(1) (1983); N.D. Cent. Code § 12.1-17-08 (1976); N.H. Rev. Stat. Ann. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b) (West 1982); 18 Pa. Stat. Ann. § 311(b) (Purdon 1983); Tex. Penal Code Ann. tit. 5, § 22.06 (Vernon 1974).

[138] Model Penal Code § 2.11(2).

[139] Model Penal Code § 2.11(2) ("Consent to Bodily Injury. When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if:
(a) the bodily injury consented to or threatened by the conduct consented to is not serious; or
(b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or
(c) the consent establishes a justification for the conduct under Article 3 of the Code.").

[140] *But see* Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 Geo. Wash. L. Rev. 165, 179 (2007) (Arguing that it is unclear "whether nonhostile consensual private encounters, such as religious mortification or sadomasochistic sex, may be entitled to legal protection under the MPC."). Notwithstanding other jurisdictions' occasional practice of narrowly construing the defense for behavior considered morally questionable, the RCC assault subsection (i)(1)(B) provision should be broadly construed to include such activities.

[141] *See, e.g.,* Ala. Code § 13A-2-7(b)(1) (1982); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Me. Rev. Stat. Ann. tit. 17-A, § 109(2)(A) (1983); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979); N.H. Rev. Stat. § 626:6(II) (1974); N.J. Stat. Ann. § 2C:2-10(b)(1) (West 1982); N.D. Cent. Code § 12.1-17-08(1)(a) (1976); Tex. Penal Code Ann. tit. 5, § 22.06(1) (Vernon 1974).

[142] As noted above, only eight states appear to provide for an intermediate gradation of assault that requires an injury similar to the District's "significant bodily injury." Ind. Code Ann. § 35-31.5-2-204.5 ("Moderate bodily injury" means any impairment of physical condition that includes substantial pain."); Haw. Rev. Stat. Ann. 707-700; Minn. Stat. Ann. 609.02; N.D. Cent. Code Ann. 12.1-01-04; Utah Code Ann. 76-1-601; Wash. Rev. Code Ann. 9A.04.110; Wis. Stat. Ann. 939.22; S.C. Code Ann. § 16-25-10. While Commission staff did not research case law in these jurisdictions, in at least one instance the statutory statement of an effective consent defense to assault is limited to assaults that do "bodily harm" (not the intermediate level of "substantial bodily injury" in that jurisdiction). *See* N.D. Cent. Code Ann. § 12.1-17-08.

[143] *See, e.g.,* Ala. Code § 13A-2-7(b)(2) (2015); Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Del. Code Ann. tit. 11, § 452 (1979); Haw. Rev. Stat. Ann. § 702-234 (2015); Mo. Ann. Stat. § 565.080 (2015); and Tenn. Code Ann. § 39-13-104 (2017).

[144] *See, e.g.,* Del. Code Ann. tit. 11, § 452 (1979); N.J. Stat. Ann. § 2C:2-10(b) (West 1982).

[145] *See, e.g.,* Paul H. Robinson, 1 Criminal Law Defenses § 66, § 106 (1984) ("The general rule is that consent is ordinarily a defense to the charge of battery in cases: (1) involving sexual overtones, (2) involving reasonably foreseeable and known hazards of lawful athletic contests or competitions, lawful sports or professions, or occupations, (3) where consent establishes justification for the serious harm, (4) involving reasonable corporal punishment by a teacher upon a pupil for disobedience and where reasonably necessary

statutes appear to characterize their consent to bodily injury defenses as "affirmative" defenses,[146] while others simply refer to it as a "defense." The precise burdens of production and persuasion are not statutorily specified in either "defenses" or "affirmative defenses" of consent to bodily injury.[147]

RCC § 22E-1203. Criminal Menacing.
[Now RCC § 22E-1204. Criminal Threats.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are generally supported by national legal trends.*

First, expanding second degree criminal menace to include words, not just conduct, appears to be supported by national legal trends amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[148] Six jurisdictions clearly require some kind of physical act for their menacing offenses,[149] whereas three states explicitly include menaces by physical conduct and by words.[150] Nine jurisdictions, however, only require proof of "causing" apprehension of imminent harm, or of "creating" such apprehension,[151] implicitly including both words and conduct in menacing. Therefore, it appears[152] there is a majority trend favoring the expansion of menacing to include more than physical conduct. The Model Penal Code uses the phrase "attempts . . . to put another in fear."[153] With respect to the reformed code jurisdictions and threats, the RCC appears to be somewhat in line with national legal trends. States generally do not provide statutory guidance on whether the offense requires words, or

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for the proper education and discipline of the pupil, and (5) where the battery is not atrocious, aggravated, or fatal and does not include a breach of the public peace."). *See also* 58 A.L.R.3d 662 (1974) ("Although the cases are replete with broad general statements that consent is a defense in a prosecution for assault,2 most of these statements are drawn from cases involving sexual assaults of one kind or another,3 and in the few cases which have involved an actual battery, without sexual overtones, the courts have usually taken the view that since the offense in question involved a breach of the public peace as well as an invasion of the victim's physical security, the victim's consent would not be recognized as a defense, at least where the battery is a severe one.").

[146] Colo. Rev. Stat. § 18-1-505(2) (Cum.Supp.1982); Mo. Ann. Stat. § 565.010(1)(1) (Vernon 1979).

[147] Staff has not researched, at this time, other statutory provisions (e.g. on defenses generally) or case law in these jurisdictions to analyze trends in how the burdens of production and persuasion are allocated.

[148] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[149] Ala. Code § 13A-6-23; Conn. Gen. Stat. Ann. § 53a-62 ("by physical threat"); Del. Code Ann. tit. 11, § 602 ("by some movement of body or any instrument"); N.H. Rev. Stat. Ann. § 631:4 ("by physical conduct"); N.J. Stat. Ann. § 2C:12-1 ("by physical menace"); N.Y. Penal Law § 120.15 ("by physical menace"); 18 Pa. Stat. and Cons. Stat. Ann. § 2701 ("by physical menace").

[150] Alaska Stat. Ann. § 11.41.230 ("by words or other conduct"); Colo. Rev. Stat. Ann. § 18-3-206 ("by any threat or physical action"); Or. Rev. Stat. Ann. § 163.190 ("by word or conduct").

[151] Ark. Code Ann. § 5-13-207 ("creates"); Ariz. Rev. Stat. Ann. § 13-1203 ("placing"); Kan. Stat. Ann. § 21-5412 ("placing"); Ky. Rev. Stat. Ann. § 508.050 ("places"); Me. Rev. Stat. tit. 17-A, § 209 ("places"); Mont. Code Ann. § 45-5-201 ("causes"); N.D. Cent. Code Ann. § 12.1-17-05 ("places"); Tenn. Code Ann. § 39-13-101 ("causes"); Tex. Penal Code Ann. § 22.01 ("threatens").

[152] The CCRC did not research other jurisdiction case law corresponding to this menacing language.

[153] Model Penal Code § 221.1(1)(c).

whether it encompasses conduct, as well. The eleven states and the Model Penal Code use the open-ended term, "threatens,"[154] and an additional four use the term "communicates."[155] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[156], or when one "threatens by words or conduct" (four states).[157] And two states use other terms.[158] At the very least, therefore, the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Second, the inclusion of robbery, sexual assault, and kidnapping in criminal menacing is partially supported by national legal trends. No other jurisdiction includes any harm besides some form of bodily injury (assault) within their criminal menace statutes, and many jurisdictions include only serious bodily harms in their criminal menace statutes. Seven states and the Model Penal Code require that the menace create a reasonable fear of serious bodily injury[159] and eleven states provide liability for a menace that causes reasonable fear of any bodily injury or harm.[160] However, reformed jurisdictions do include a wider set of harms in their threats statutes. Eleven states punish threatening bodily harm or serious bodily harm;[161] nine states punish threatening to damage or destroy property;[162] and eight states punish threatening to commit a crime of violence.[163] Additionally, the exclusion of offensive physical contact also may be supported by national

[154] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020; Model Penal Code § 211.3.

[155] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[156] Ala. Code § 13A-10-15

[157] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[158] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706

[159] Ala. Code § 13A-6-23; Colo. Rev. Stat. Ann. § 18-3-206; Conn. Gen. Stat. Ann. § 53a-62; N.J. Stat. Ann. § 2C:12-1; N.D. Cent. Code Ann. § 12.1-17-05; Or. Rev. Stat. Ann. § 163.190; 18 Pa. Stat. and Cons. Stat. Ann. § 2701; Model Penal Code § 211.1(1)(c).

[160] Ark. Code Ann. § 5-13-207; Alaska Stat. Ann. § 11.41.230; Ariz. Rev. Stat. Ann. § 13-1203; Del. Code Ann. tit. 11, § 602; Kan. Stat. Ann. § 21-5412; Ky. Rev. Stat. Ann. § 508.050; Me. Rev. Stat. tit. 17-A, § 209; Mont. Code Ann. § 45-5-201; N.Y. Penal Law § 120.15; Tex. Penal Code Ann. § 22.01; Tenn. Code Ann. § 39-13-101.

[161] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[162] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[163] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

trends. Only one other jurisdiction clearly includes offensive contact as a basis for menacing.[164]

Third, it does not appear that any other reformed code jurisdiction's menacing statute statutorily provides liability based on proof that the defendant "intended to cause injury." Similarly, no reformed code jurisdiction's threat statute provides liability based on proof that the defendant "intended to cause injury." Additionally, the Model Penal Code does not provide such forms of liability.[165]

Fourth, the exclusion of victim status as a grading factor in menacing is supported by national legal trends. Only five states have menacing statutes that explicitly include the status of the victim within the grading scheme for the offense.[166] With respect to threats, five states include the status of the victim as a grading factor.[167] And the Model Penal Code's menacing provision and threats provision have no grades based on victim status.[168] Therefore, absenting menacing and threats from a victim-status grading scheme is in keeping with national legal trends.

Fifth, regarding the defendant's ability to claim he or she did not act "knowingly" or with "intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[169] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[170] Among those reform jurisdictions that

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[164] N.H. Rev. Stat. Ann. § 631:4. The New Hampshire statute allows conviction based on bodily injury or physical contact. The implication is that physical contact means something other than and less than bodily injury.

[165] See Model Penal Code § 211.1(c).

[166] Conn. Gen. Stat. Ann. § 53a-62 (threatening a person who is in certain designated places, such as houses of worship and schools); Kan. Stat. Ann. § 21-5412 (law enforcement officer); N.J. Stat. Ann. § 2C:12-1 (various occupations, including law enforcement and emergency personnel); Tex. Penal Code Ann. § 22.01 (family members of the defendant, public servants); Tenn. Code Ann. § 39-13-101 (victims of domestic abuse).

[167] Haw. Rev. Stat. Ann. § 707-716 (public servants and emergency personnel); N.H. Rev. Stat. Ann. § 631:4-a (certain government officials); Ohio Rev. Code Ann. § 2903.22 (private and public child services officers); Tex. Penal Code Ann. § 22.07 (family members of the defendant, public servants); Wash. Rev. Code Ann. § 9A.46.020 ("criminal justice participants," meaning *inter alia* law enforcement officers).

[168] Model Penal Code §§ 211.1(c), 211.3.

[169] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[170] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[171]

RCC § 22E-1204. Criminal Threats.

Relation to National Legal Trends. *The revised criminal threats offense's above-mentioned substantive changes to current District criminal threats law are partially supported by national legal trends.*

First, the RCC's gradation of threats into two offenses is generally supported by national legal trends. However, the basis for the RCC's gradations (the type of threatened harm communicated by the defendant) is not supported by the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions").[172] Of the twenty-nine reformed code jurisdictions, twelve have two or more gradations of threats.[173] Of those twelve states, only two grade their threats offenses on the basis of nature of threatened conduct.[174] The particular conduct and harms specified in the offense gradations generally comport with national legal trends. In particular, there are: eleven states that punish threatening bodily harm or serious bodily harm;[175] nine states that punish threatening to damage or destroy property;[176] and eight states that punish threatening to commit a crime of violence.[177]

Second, with respect to the requirement that the defendant "communicate" the threatening message, the RCC appears to be in line with most other jurisdictions. States

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[171] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[172] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[173] Alaska Stat. Ann. § 11.56.807; Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Haw. Rev. Stat. Ann. § 707-715; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Minn. Stat. Ann. § 609.713; Mo. Ann. Stat. § 574.115; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. § 2903.21; 18 Pa. Stat. and Cons. Stat. Ann. § 2706; Wash. Rev. Code Ann. § 9A.46.020. Like most of the reformed code jurisdictions, the Model Penal Code provides only a single grade for threats. Model Penal Code § 211.3.

[174] Ark. Code Ann. § 5-13-301; Ohio Rev. Code Ann. § 2903.21. Most jurisdictions grade the offense on the basis of the threat causing evacuation of public building, or otherwise causing (or intending to cause) disruptions to many people. E.g., Alaska Stat. Ann. § 11.56.807; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Kan. Stat. Ann. § 21-5415; Ky. Rev. Stat. Ann. § 508.075; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; N.J. Stat. Ann. § 2C:12-3; 18 Pa. Stat. and Cons. Stat. Ann. § 270; Tex. Penal Code Ann. § 22.07.

[175] Alaska Stat. Ann. § 11.56.810; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Del. Code Ann. tit. 11, § 621; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Ohio Rev. Code Ann. §§ 2903.21, 2903.22; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[176] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[177] Ala. Code § 13A-10-15; Conn. Gen. Stat. Ann. § 53a-62; Me. Rev. Stat. tit. 17-A, § 210; Minn. Stat. Ann. § 609.713; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.D. Cent. Code Ann. § 12.1-17-04; 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

generally do not provide guidance on whether the offense requires words, or whether it encompasses conduct, as well. Eleven states use the open-ended term, "threatens,"[178] and an additional four use the term "communicates."[179] A few states, however, qualify those verbs, by saying that the offense is committed when one "threatens by any means" (one state)[180], or when one "threatens by words or conduct" (four states).[181] And two states use other terms.[182] Therefore, it appears[183] the use of the word "communicates" is generally in line with the majority of states. And those states that, by statute, specify what type of communications count for threats generally have a broader view of what threats can be. Therefore, the inclusion of "communicates" and the Commentary indicating that the word is intended to include more than just words appears to be in line with national legal trends.

Third, the exclusion of threats to commit low-level property offenses is consistent with national legal trends. First, as noted above, only nine states that punish threatening to damage or destroy property.[184] Among those states, only three refer generally to property "damage,"[185] and two of those states require some further criminal intent beyond merely an intent to threaten.[186] The remaining six states require that the defendant threaten "serious damage"[187] or "substantial property damage."[188] Therefore, requiring a higher level of property damage is consistent with the approach taken by states punishing threats against property.

RCC § 22E-1205. Offensive Physical Contact.

Relation to National Legal Trends. *The offensive physical contact offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, the offensive physical contact offense punishes as a separate offense low-level conduct that previously was not distinguished from more serious assaultive conduct. Of the 29 states that have comprehensively reformed their criminal codes influenced by the

[178] Ark. Code Ann. § 5-13-301; Conn. Gen. Stat. Ann. § 53a-61aa; Del. Code Ann. tit. 11, § 621; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; N.J. Stat. Ann. § 2C:12-3; N.Y. Penal Law § 490.20; N.D. Cent. Code Ann. § 12.1-17-04; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[179] Kan. Stat. Ann. § 21-5415; Me. Rev. Stat. tit. 17-A, § 210; Mo. Ann. Stat. § 574.115; Mont. Code Ann. § 45-5-203.

[180] Ala. Code § 13A-10-15.

[181] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715; Wash. Rev. Code Ann. § 9A.46.020.

[182] Ohio Rev. Code Ann. § 2903.21 ("cause another to believe"). 18 Pa. Stat. and Cons. Stat. Ann. § 2706.

[183] The CCRC did not research other jurisdiction case law corresponding to this criminal threat language.

[184] Ala. Code § 13A-10-15; Ariz. Rev. Stat. Ann. § 13-1202; Ark. Code Ann. § 5-13-301; Haw. Rev. Stat. Ann. § 707-715; Ky. Rev. Stat. Ann. § 508.080; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07; Utah Code Ann. § 76-5-107; Wash. Rev. Code Ann. § 9A.46.020.

[185] Ala. Code § 13A-10-15; N.H. Rev. Stat. Ann. § 631:4; Tex. Penal Code Ann. § 22.07.

[186] N.H. Rev. Stat. Ann. § 631:4 ("the person threatens to commit any crime against the property of another *with a purpose to coerce or terrorize any person*"); Tex. Penal Code Ann. § 22.07 ("threatens to commit any offense involving violence to any . . . property with intent to . . . *place any person in fear of imminent serious bodily injury*" among other various intents).

[187] Ariz. Rev. Stat. Ann. § 13-1202; Haw. Rev. Stat. Ann. § 707-715.

[188] Ark. Code Ann. § 5-13-301; Ky. Rev. Stat. Ann. § 508.080; Utah Code Ann. § 76-5-107.

Model Penal Code (MPC), 11 have an offense that prohibits offensive physical contact.[189] Of these 11 jurisdictions, six grade the offensive physical contact offense less severely than assault resulting in bodily injury,[190] like the RCC. In addition, one of these reformed jurisdictions specifically includes causing contact with bodily fluid or excrement[191] and punishes it more severely than other offensive physical contact.[192] Several reformed jurisdictions also have assault offenses or gradations that specifically prohibit causing LEOs to come into contact with bodily fluids.[193]

Second, offensive physical contact is no longer subject to a penalty enhancement for the involvement of a deadly or dangerous weapon as it is under the District's current assault with a dangerous weapon (ADW) offense. Of the 11 reformed jurisdictions that have offensive physical contact offenses or include offensive physical contact in assault, six specifically penalize the conduct if a weapon is involved.[194] In these jurisdictions,

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[189] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) ("touching another person with the intent to injure, insult, or provoke such person."); Del Code Ann. tit. 11, § 601(a)(1) ("touches another person either with a member of his or her body or with any instrument, knowing that the person is likely to cause offense or alarm to such other person."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) ("makes physical contact of an insulting or provoking nature with an individual."); Ind. Code Ann. § 35-42-2-1(c)(1) ("touches another person in a rude, insolent, or angry manner."); Kan. Stat. Ann. § 21-5413(a)(2) ("causing physical contact with another person when done in a rude, insulting, or angry manner."); Me. Rev. Stat. tit. 17-A, § 207(1)(A) ("causes . . offensive physical contact."); Mo. Ann. Stat. § 565.056(1)(6) ("causes physical contact with another person knowing the other person will regard the contact as offensive or provocative."); Mont. Code Ann. § 45-5-201(1)(c) ("makes physical contact of an insulting or provoking nature with any individual."); N.H. Rev. Stat. Ann. § 631:2-a(I)("cause . . . unprivileged physical contact to another."); Tenn. Code Ann. § 39-13-101(a)(3) ("causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative."); Tex. Penal Code § 22.01(a)(3) ("causes physical contact with another when the person knows or should reasonably believe that the other person will regard the contact as offensive or provocative.").

[190] Ariz. Rev. Stat. Ann. § 13-1203(A)(B) (making an assault that causes physical injury in subsection (A)(1) either a Class 1 or Class 2 misdemeanor, depending on the defendant's culpable mental state, and making offensive physical contact in subsection (A)(3) a Class 3 misdemeanor); Del Code Ann. tit. 11, §§ 601(c) (making offensive physical contact in subsection (a)(1) an unclassified misdemeanor) and 611(1) (making an assault that causes physical injury a Class A misdemeanor); Ind. Code Ann. § 35-42-2-1(c), (d)(1) (making a battery that results in offensive physical contact under subsection (c)(1) a Class B misdemeanor, but a Class A misdemeanor if it results in bodily injury); Mo. Ann. Stat. § 565.056(2), (3) (making an assault that results in "physical injury, physical pain, or illness" a Class A misdemeanor and an assault that results in offensive physical contact a Class C misdemeanor in most situations); ."); Tenn. Code Ann. § 39-13-101(b)(1)(A) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor, and an assault that results in offensive contact under subsection (a)(3) a Class B misdemeanor in most situations); Tex. Penal Code § 22.01(b), (c) (making an assault that results in bodily injury under subsection (a)(1) a Class A misdemeanor in most situations, and an assault that results in offensive contact under subsection (a)(3) a Class C misdemeanor in most situations).

[191] Del Code Ann. tit. 11, § 601(a)(2) ("strikes another person with saliva, urine, feces or any other bodily fluid, knowing that the person is likely to cause offense or alarm to such other person.").

[192] Del Code Ann. tit. 11, § 601(c) (making offensive physical contact an unclassified misdemeanor under subsection (a)(1), but causing contact with bodily fluid a Class A misdemeanor).

[193] *See, e.g.*, Ark. Code Ann. § 5-13-211(a)(1); Colo. Rev. Stat. Ann. §§ 18-3-203(h), 18-3-204(b); Conn. Gen. Stat. Ann. § 53a-167c(5); N.J. Stat. Ann. § 2C:12-13; Mont. Code Ann. § 45-5-214; Minn. Stat. Ann. § 609.2231(1)(c)(2).

[194] Ariz. Rev. Stat. Ann. § 13-1203(A)(3) (assault statute prohibiting, in part, "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon

offensive physical contact that involves a weapon is punished the same as bodily injury that is caused by a weapon.[195] In the RCC, however, offensive physical contact that involves a deadly or dangerous weapon is still criminalized as offensive physical contact. However, if injury results, or physical force that overpowers is used, there may be liability under the revised assault statute that corresponds with the resulting harm.

Third, the conduct in the revised offensive physical contact offense no longer is a predicate for liability when an assault occurs with intent to commit another crime. In the RCC, liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses. None of the reformed jurisdictions have specific offenses for assault with-intent-to commit other offenses. The national legal trends support deleting the AWI offenses.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the

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or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a)(2) and 5/12-3.05(f)(1) (defining battery, in part, as "makes physical contact of an insulting or provoking nature with an individual" and defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1), (g)(1), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon."); Kan. Stat. Ann. § 21-5413(b)(1)(B, (b)(1)(C) (aggravated battery offense prohibiting, in part, "causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(3) (assault offense prohibiting, in part, causing "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. § 22.01(a)(3) (offense prohibiting, in part, causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

[195] Ariz. Rev. Stat. Ann. § 13-1203(A)(1), (A)(3) (assault statute prohibiting, in part, "causing any physical injury to another person" and "touching another person with the intent to injure, insult or provoke such person") and § 13-1204(A)(2) (aggravated assault statute prohibiting, in part, "commit[ing] assault as prescribed by § 13-1203" if the person "uses a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/12-3(a) (defining battery as "causes bodily harm to an individual" and "makes physical contact of an insulting or provoking nature with an individual") and 5/12-3.05(f)(1) (defining aggravated battery, in part, as committing a battery and using certain deadly weapons); Ind. Code Ann. § 35-42-2-1(c)(1) (c)(2), (g)(2) (battery offense prohibiting, in part, "touches another person in a rude, insolent, or angry manner" and making it aggravated battery if committed with a "deadly weapon); Kan. Stat. Ann. § 21-5413(b)(1)(B), (b)(1)(C), (g)(1)(B) (making it a severity level 7 person felony to cause "bodily harm to another person with a deadly weapon" and cause "physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon"); Tenn. Code Ann. §§ 39-13-101(a)(1), (a)(3) (assault offense prohibiting, in part, causing "bodily injury to another" and "physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative") and 39-13-102(a)(1)(A)(iii) (making "assault as defined in § 39-13-101" aggravated assault if it "involved the use or display of a deadly weapon."); Tex. Penal Code Ann. §§ 22.01(a)(1), (a)(3) (offense prohibiting, in part, causing "bodily injury to another" and causing "physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative") and § 22.02(a)(2), (b) (making "assault as defined in § 22.01" a felony of the second degree in most situations if the defendant "uses or exhibits a deadly weapon during the commission of the assault.").

required knowledge."[196] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[197] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[198]

[196] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[197] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[198] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

Chapter 13. Sexual Assault and Related Provisions

RCC § 22E-1301 Sexual Assault.
[Previously RCC § 22E-1304. Sexual Assault.]

Relation to National Legal Trends. *The revised sexual assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1]

First, there is strong support in the criminal codes of reformed jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury," as well as threats of an "unwanted sexual act." The current first degree[2] and third degree[3] sexual abuse statutes prohibit threatening to subject any person to "bodily injury,"[4] a defined term that differs from the levels of bodily injury codified in the District's current assault statutes. First degree and third degree of the revised sexual assault statute prohibit threats "to commit an unwanted sexual act or cause significant bodily injury to any person." "Significant bodily injury" is defined in RCC § 22E-3001.[5]

There is strong support in the criminal codes of other jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury." Only seven[6] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[7] ("reformed jurisdictions") have an intermediate level of physical harm like "significant bodily injury" in current District law. None of these jurisdictions' sex offenses prohibit threats of the intermediate level of physical harm. However, three of these reformed

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[1] Unless otherwise noted, this survey is limited to sex offenses in other jurisdictions that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[2] D.C. Code § 22-3002(a)(2).

[3] D.C. Code § 22-3004(2).

[4] 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.").

[5] The RCC definition of "significant bodily injury" also clarifies certain injuries are within the scope of the term: "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 temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation." RCC § 22E-3001

[6] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev. Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[7] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

jurisdictions[8] prohibit threats of "serious bodily injury" or a similar term that requires a higher threshold of physical harm than the current definition of "bodily injury"[9] in the District's current sex offenses. Two of these reformed jurisdictions[10] prohibit threats of "bodily injury" or "physical injury," and require a similar threshold of physical harm as the current definition of "bodily injury"[11] in the District's current sex offenses. In the remaining two reformed jurisdictions,[12] the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms.

Of the remaining 22 reformed jurisdictions, six reformed jurisdictions[13] prohibit threats of "serious bodily injury" or a similar term that requires a higher threshold of

[8] Minn. §§ 609.342(1)(c), 609.02(8) (offense of criminal sexual conduct in the first degree including sexual penetration when "circumstances existing at the time of the act case the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another" and defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); N.D. Cent. Code Ann. §§ 12.1-20-03(1)(a), 12.1-01-04(27) (prohibiting a sexual act when the actor "compels the victim to submit . . . by threat of . . . serious bodily injury . . . to be inflicted on any human being" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Utah Code Ann. §§ 76-5-405(1)(a)(ii), 76-1-601(11) (offense of aggravated sexual assault prohibiting threat of "serious bodily injury to be inflicted imminently on any person" and defining "serious bodily injury" as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.").

[9] D.C. Code Ann. § 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.").

[10] Haw. Rev. Stat. Ann. §§ 707-730(1)(a) (offense of first degree sexual assault prohibiting sexual penetration by "strong compulsion" and defining "strong compulsion" to include a threat "that places a person in fear of bodily injury to the individual or another person."), 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. §§ 9A.44.050(1)(a), 9A.44.010(6) (offense of second degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, that places a person in fear of . . . physical injury to herself or himself or another person."), 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition.").

[11] D.C. Code Ann. § 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.").

[12] Ind. Code § 35-42-4-1(1)(a)(1) (prohibiting sexual intercourse by "threat of force."); Wis. Stat. Ann. § 940.22(2)(a) (prohibiting sexual contact or sexual intercourse by "threat of force or violence.").

[13] Ala. Code §§ 13A-6-61(a)(1), 13A-6-60(8) (offense of first degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion to include "a threat, express or implied, that places a person in fear of immediate . . . serious physical injury to himself or another person."), 13A-1-2(14) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Colo. Rev. Stat. Ann. §§ 18-3-402(4)(b), 18-1-901(3)(p) (making sexual assault a class 3 felony if the "actor causes submission of the victim by threat of imminent . . . serious bodily injury . . . to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious

physical harm than the current definition of "bodily injury"[14] in the District's current sex offenses. Eight[15] of these 22 reformed jurisdictions prohibit threats of "physical injury" or

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permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Del. Code Ann. tit. 11, §§ 773(a)(2)(b) (offense of first degree rape prohibiting sexual intercourse without consent when "it was facilitated by or occurred during the course of the commission of attempted commission of . . . terroristic threatening."), 621(a)(1) (offense of terroristic threats prohibiting threats "to commit any crime likely to result in death or in serious injury to person."); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(1)(A), 251(E) (offense of gross sexual assault prohibiting a sexual act by "compulsion" and defining "compulsion" to include the use or threat of physical force that "produces in that person a reasonable fear that . . . serious bodily injury . . . might be immediately inflicted upon that person or another human being."), 2(23) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health."); S.D. Codified Laws §§ 22-22-1(2), 22-1-2(44) (offense of rape prohibiting sexual penetration by "threats of immediate and great bodily harm against the victim or other persons within the victim's presence" and defining "great bodily harm" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb."); Tex. Penal Code §§ 22.021(a)(1)(A), (a)(2)(A)(ii), 1.07(a)(46) (offense of aggravated sexual assault prohibiting sexual activity if the actor "by actors or words places the victim in fear that . . . serious bodily injury . . . will be imminently inflicted on any person" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[14] D.C. Code Ann. § 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.").

[15] Alaska Stat. Ann. §§ 11.41.420(a)(1), 11.41.470(8)(A) (offense of first degree sexual assault prohibiting sexual penetration "without consent" and defining "without consent" to include "express or implied threat of . . . imminent physical injury . . . to be inflicted on anyone."), 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ark. Code Ann. §§ 5-14-103(a)(1), 5-14-101(2) (offense of rape prohibiting sexual activity "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, of . . . physical injury to . . . any person."), 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Conn. Gen. Stat. Ann. §§ 53a-70(a)(1) (offense of sexual assault in the first degree prohibiting sexual intercourse "by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."), 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Ky. Rev. Stat. Ann. §§ 510.0401)(a) (offense of rape in the first degree prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in fear of immediate . . . physical injury to self or another person."), 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to inflict bodily injury on anyone . . . regardless of the immediacy of the threat."), 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law §§ 130.35(1), 130.00(8)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, which places a person in fear of immediate . . . physical injury to himself, herself, of another person."), 10.00(9) (defining

a similar term that require a similar or lower threshold of physical harm the current definition of "bodily injury"[16] in the District's current sex offenses. In the remaining eight reformed jurisdictions, the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms[17] or the definitions do not specifically include threats.[18]

Due to the RCC definition of "significant bodily injury," threats of impairment of a "mental faculty" are excluded from first degree and third degree of the revised sexual assault statute.[19] As is discussed in the commentary, it is unclear to what "mental faculty" refers. Regardless, there is strong support in the criminal codes of the reformed jurisdictions for excluding threats of mental injury or psychological distress from the revised sexual assault statute. Only one of the 29 reformed jurisdictions specifically includes threats of mental injury in its sexual assault offense, and it is limited to threats of "mental illness or impairment."[20] As previously discussed, eight reformed jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these

"physical injury" as "impairment of physical condition or substantial pain."); Or. Rev. Stat. Ann. §§ 163.375(1)(a), 163.305(1)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include a "threat, express or implied, that places a person in reasonable fear of immediate or future . . . physical injury to self or another person."), 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition.").

[16] D.C. Code Ann. § 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.").

[17] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[18] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[19] The current definition of "bodily injury" includes "injury involving loss or impairment of the function of a . . . mental faculty." D.C. Code § 22-3001(2). By extension, the current first degree and third degree sexual abuse statutes extend to threats that any person will be subjected to such an injury of a "mental faculty."

[20] Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.").

terms[21] or the definitions do not specifically include threats.[22] It is unclear if these jurisdictions' sexual assault statutes extend to threats of mental illness or psychological distress.

Only two of the 29 reformed jurisdictions have sexual assault statutes that specifically prohibit threats of unwanted sexual activity.[23] However, threats of unwanted sexual activity may fall under threats of physical harm, and at least eight of the reformed jurisdictions prohibit sexual assault by coercion that include threats of unwanted sexual activity.[24]

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[21] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[22] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[23] Del. Code Ann. tit. 11 §§ 772(a)(1), 761(j)(1) (offense of second degree rape prohibiting sexual intercourse without consent and defining "without consent" to include the actor "compelled the victim to submit . . . by any act of coercion as defined in §§ 791 and 792 of this title."), 791(3) ("A person is guilty of coercion when the person compels or induces a person to engage in conduct which the victim has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which the victim has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the defendant or another will . . . [e]ngage in other conduct constituting a crime."); Ky. Rev. Stat. Ann. §§ 510.040(1)(a), 510.010(2) (prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in . . . fear of any offense under this chapter."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to . . . commit any other offense.").

[24] Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent" and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a sexual act or sexual contact when the actor "[c]ompels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting" and defining "coercion" as "to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."); Ohio Rev. Code Ann. § 2907.02(A)(1) (offense prohibiting sexual conduct when the actor "coerces the other

Second, regarding the actor's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[25] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[26] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[27]

Third, there is mixed support in the criminal codes of the reformed jurisdictions for the revised sexual assault statute specifying one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Fifteen[28] of the 29 reformed

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person to submit by any means that would prevent resistance by a person of ordinary resolution."); 18 Pa. Stat. Ann. § 3121(a)(1), 3101 (prohibiting sexual intercourse by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied."); S.D. Codified Laws § 22-22-1(1) (offense of rape prohibiting sexual penetration "through the use of coercion."); Tex. Penal Code Ann. §§ 22.011(a)(1), (b)(1) (prohibiting sexual activity without consent and stating that a sexual assault is "without the consent" of the complainant if "the actor compels the other person to submit or participate by the use of . . . coercion."), 1.07(9)(A) (defining "coercion" to include a "threat, however communicated to commit an offense.").

[25] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[26] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[27] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[28] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury,

jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[29] However, it is not possible to generalize about the sentencing requirements for these penalty enhancements and gradations in these reformed jurisdictions due to the wide differences in sentencing structures.

Fourth, there is little support in the criminal codes of reformed jurisdictions for the revisions to the age-based sexual assault penalty enhancements for complainants under the age of 18 years. These revisions are as follows: 1) requiring at least a four year age gap between the actor and a complainant under the age of 12 years, and requiring strict liability for the age gap; 2) codifying a penalty enhancement for the actor recklessly disregarding that the complainant was under the age of 16 years when the actor, in fact, was at least four years older; 3) requiring at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and requiring strict liability for the age gap; 4) applying a penalty enhancement to all gradations for an actor that is 18 years of age or older and at least two years older than a complainant under 18 years of age and requiring a "recklessly" culpable mental state.

The limited support in the reformed jurisdictions for these revisions is due to the fact that most of the 29 reformed jurisdictions do not have sex offense penalty enhancements based on the age of the complainant. As few as three[30] of the 29 reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. Instead, most of the 29 reformed jurisdictions incorporate sexual assault of complainants under the age of 18 years as gradations of the

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dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[29] Alaska Stat. Ann. § 11.41.410(2).

[30] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

general sexual assault offense, and do not have separate statutes for sexual assault of the youngest complainants.[31]

Of these three reformed jurisdictions, one jurisdiction has a penalty enhancement for a complainant under the age of 16 years,[32] a second jurisdiction has an enhancement for a complainant under the age of 15 years,[33] and the third jurisdiction has a penalty enhancement for a complainant under the age of 12 years.[34]

Fifth, there is little support in the criminal codes of reformed jurisdictions for the revisions to the age-based sexual assault penalty enhancements for complainants over the age of 65 years and for vulnerable adults. Only two of the 29 reformed jurisdictions' criminal codes have penalty enhancements for the sexual assault of an elderly person.[35] A third reformed jurisdiction requires a relationship between the complainant and the actor and is limited to "frail" elderly individuals.[36] None of these reformed jurisdictions specify an age requirement for the actor, and none of them specify required culpable mental states in the penalty enhancement statutes. Only one of the 29 reformed jurisdictions' criminal

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[31] Citations indicate the subsections that codify gradations for complainants under the age of 18 years in the general sexual assault offense. Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1); Ark. Code Ann. §§ 5-14-103(a)(3)(A), 5-14-127(a)(1)(A); Colo. Rev. Stat. Ann. § 13-3-402(1)(d), (1)(e); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), 53a-71(a)(1), Del. Code Ann. tit. 11, §§ 770(a)(1), 771(a)(1), 773(a)(5); Haw. Rev. Stat. Ann. §§ 707-730(b), (c); Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b); Kan. Stat. Ann. § 21-5503(a)(3); Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(B), (1)(C); Mont. Code Ann. § 45-5-503(3), (4), (5); Minn. Stat. Ann. §§ 609.342(1)(a), (1)(b), (1)(g), (1)(h), 609.344(1)(a), (1)(b); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4), 130.96; N.D. Cent. Code Ann. § 12.1-20-03(1)(d); N.H. Rev. Stat. Ann. § 632-A:2(l); Ohio Rev Code Ann. § 2907.02(A)(1)(b); Or. Rev. Stat. Ann. §§ 163.355, 163.365, 163.366(1)(b); 18 Pa. Stat. Ann. § 3121(c); S.D. Codified Laws § 22-22-1(1), (5); Tex. Penal Code Ann. §§ 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (a)(2)(b), (b)(1).

[32] Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony).

[33] Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705).

[34] Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

[35] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(5) (offense of aggravated criminal sexual assault prohibiting criminal sexual assault "when the victim is 60 years of age or older."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(2) (aggravated sexual assault offense prohibiting sexual activity when the complainant is "an elderly individual" [person 65 years of age or older].").

[36] Wash. Rev. Code Ann. §§ 9A.44.050(1)(f) (offense of rape in the second degree prohibiting sexual intercourse with a "frail elder or vulnerable adult" when the actor had a "significant relationship" with the complainant or "was providing transportation, within the course of his or her employment, to the victim at the time of the offense."), 9A.44.010(16) (defining "frail elder or vulnerable adult" as a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.").

codes has a penalty enhancement for the sexual assault of a vulnerable adult and does not statutorily specify a culpable mental state.[37]

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for the revised sexual assault penalty enhancement for weapons requiring that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[38] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" a dangerous weapon or imitation weapon. Fourteen of the 29 reformed jurisdictions have sex-offense specific penalty enhancements for the use of dangerous weapons during sexual assault.[39] There is

[37] Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(3) (aggravated sexual assault offense prohibiting sexual activity when the complainant is "a disabled individual" and defining "disabled individual" as "a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.").

[38] D.C. Code § 22-3020(a)(6).

[39] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Ind. Code Ann. § 35-42-41 (b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the

strong support for requiring a causation requirement in the revised enhancement. Three of the 14 reformed jurisdictions explicitly require that the use or display of the dangerous weapon cause the sexual conduct[40] and an additional eight of these reformed jurisdictions require the use or display of the weapon during the course of the sexual assault,[41] which includes causation. The remaining three of these jurisdictions require that the actor was "armed with" the dangerous weapon and the scope of the enhancement and any causation requirement is unclear. [42] Eight of the 14 reformed jurisdictions specifically include

course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion when the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[40] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[41] Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion where the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon.").

[42] Ind. Code Ann. § 35-42-41(b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object.");

imitation weapons in the weapon enhancement. None 14 reformed jurisdictions specify a culpable mental state in the sex offense weapon enhancement.

Seventh, there is strong support in the criminal codes of the 29 reformed jurisdictions for omitting "extreme physical pain," rendering a complainant "unconscious," and causing impairment of a "mental faculty" from the revised penalty enhancement for causing serious bodily injury. At least 18 of the 29 reformed jurisdictions, require either

Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon.").

serious bodily injury[43] or a lower threshold of bodily injury[44] for a sexual assault offense or gradation. Of these 18 jurisdictions, three include rendering the complainant

[43] Alaska Stat. Ann. §§ 11.41.410(a)(2), 11.81.900(a)(57 (offense of sexual assault in the first degree prohibiting engaging in sexual penetration and causing "serious physical injury" and defining "serious physical injury" as "(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ariz. Rev. Stat. Ann. §§ 13-1406(D), 13-105(39) (enhancing the sentence for sexual assault if the actor inflicted "serious physical injury" and defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. §§ 18-3-402(5)(a)(II), 18-1-901(3)(p) (elevating the penalty for sexual assault if the complainant suffers "serious bodily injury" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. §§ 53a-70a(a)(3), 53a-3(4) (aggravated sexual assault requiring "under circumstances evincing an extreme indifference to human life [the actor] recklessly engages in conduct which creates a risk of death to the [complainant], and thereby causes serious physical injury to such [complainant]" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Mo. Ann. Stat. §§ 566.010(1)(a), 556.061 (defining "aggravated sexual offense" as any sexual offense, where, in the course of the offense, the actor inflicts "serious physical injury" on the complainant and defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); N.Y. Penal Law §§ 130.95(1)(a), 10.00(10) (offense of rape in the first degree requiring "serious physical injury" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Tex. Penal Code Ann. §§ 22.021(a)(2)(i), § 1.07(46) (offense of aggravated sexual assault requiring "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. §§ 76-5-402(3)(b)(i), 76-6-601(11) (enhancing the penalty for rape if the actor caused "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); Wash. Rev. Code Ann. § 9A.44.040(1)(c) (offense of first degree rape requiring "serious physical injury, including but not limited to physical injury which renders the [complainant] unconscious."); Wis. Stat. Ann. §§ 940.225(1)(a), 939.22(14) (first degree sexual assault requiring "great bodily harm" and defining "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or

unconscious[45] and two jurisdictions include extreme pain.[46] Of the 29 reformed jurisdictions, five include some kind of mental distress or mental injury in their sexual assault offenses.[47]

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which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.").

[44] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(2), 5/11-0.1 (offense of aggravated criminal sexual assault requiring "bodily harm" to the complainant and defining "bodily harm" as "physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy, and impotence."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the complainant and defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[45] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Wash. Rev. Code Ann. § 9A.44.040(1)(c) (offense of first degree rape requiring "serious physical injury, including but not limited to physical injury which renders the [complainant] unconscious.").

[46] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.")

[47] Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the complainant and defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

RCC § 22E-1302. Sexual Abuse of a Minor.
[Previously RCC § 22E-1304. Sexual Abuse of a Minor.]

Relation to National Legal Trends. *The revised sexual abuse of a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[48]

First, there is strong support in the criminal codes of other jurisdictions for separate gradations for a complainant under the age of 12 years when the actor is at least four years older. When compared to the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[49] ("reformed jurisdictions"), the District's current child sexual abuse statutes are an outlier in having only one gradation for complainants under the age of 16 years.[50] Of these 29 reformed jurisdictions,[51] only three reformed jurisdictions' sex offenses are limited to one gradation for the age of a complainant under 16 years.[52] Fifteen of the 29 reformed jurisdictions have two gradations for the age of a complainant under 16 years in their sex offenses.[53] Eight

[48] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[49] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[50] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[51] This survey only includes gradations based solely on the age of the complainant. This survey counted the number of different age categories, even if the penalties did not change, or if the penalties varied with the age of the actor or the age gap between the actor and the complainant.

[52] Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); N.D. Cent. *Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age);* Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years).

[53] *Ala. Code §§ 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years), 13A-6-62(a)(1), (b) (making it a Class B felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years but more than 12 years old); Alaska Stat. Ann. §§ 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years), 11.41.436(a)(1), (b) (making it a Class B felony for an actor 17 years of age or older to engage in sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger than the actor);* Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e), (1)(f) (2), (3) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the complainant is less than 15 years of age and the actor is at least four years older than the complainant and a class 1 misdemeanor with special sentencing requirements if the complainant is at least 15 years of age but

less than 17 years of age and the actor is at least 10 years older than the complainant); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in *sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant)*, 53a-71(a)(1), (b) (*making it a Class B felony to engage in sexual intercourse when the complainant is 13 years of age or older but under 16 years of age and the actor is more than three years older than the complainant);* Haw. Rev. Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); Ind. Code Ann. §§ 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age), 35-42-4-9(a), (a)(1) (making it a Level 5 felony to engage in sexual intercourse or other sexual conduct with a complainant at least 14 years of age but less than 16 years of age and a Level 4 felony if the actor is at least 21 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); Ohio Rev. Code Ann. §§ 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met), 2907.04(A), (B)(1) (making it a fourth degree felony for an actor 18 years of age or older to engage in sexual conduct with a complainant that is 13 years of age or older but less than 16 years of age, a first degree misdemeanor if the actor is less than four years older than the complainant, and a third degree felony if the actor is 10 or more years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3 felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); Utah Code Ann. §§ 76-5-401(1), (2)(A), (3)(A)(a) (making it a third degree felony for an actor 18 years of age or older to engage in sexual intercourse or sexual penetration with a complainant that is 14 years of age or older, but younger than 16 years of age, but a class B misdemeanor if the actor establishes by a preponderance of the evidence that the actor is less than four years older), 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met).

of the reformed jurisdictions have three gradations for the age of a complainant under 16 years in their sex offenses.[54] Two jurisdictions have four gradations for the age of a

[54] *Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years);* Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); 21-5506(b)(1), (c)(2)(A) (aggravated indecent liberties offense making it a severity level 3, person felony to engage in sexual intercourse with a complainant that is 14 or more years of age but less than 16 years of age); 21-5507(a)(1)(A), (2), (b)(1) (making it a severity level 8, person felony for an actor under 19 years of age and less than four years older than the complainant to engage in "voluntary sexual intercourse" with a complainant that is 14 or more years of age but less than 16 years of age); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (3), (4), (5) (prohibiting sexual intercourse with a complainant incapable of consent, and requiring different penalties if the complainant is under 16 years of age and the actor is four or more years older, if the complainant was 12 years of age or younger and the actor was 18 years of age or older, and if the complainant is at least 14 years of age and the actor is 18 years of age or younger); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years), 609.344(1)(a), (1)(b) (2) (requiring a term of imprisonment of not more than 15 years if the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant or if the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 24 months older than the complainant, but requiring a term of imprisonment of not more than five years if the actor was no more than 48 months but more than 24 months older than a complainant at least 13 years of age but under 16 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under 16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years); Tenn. Code Ann. § 39-13-506(a), (d)(1) (making it a Class E felony to engage in sexual penetration when the complainant is at least 15 years of age but less than 18 years of age and the actor is at least four but not more than five years older than the complainant), (b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant or when the complainant is at least 15 years of age but less than 18 years of age and the actor is more than five years but less than 10 years older than the complainant), (c), (d)(3) (making it a Class D felony to engage in sexual penetration when the complainant is at least 13 years of age but less than 18 years of age and the actor is at least 10 years older than the complainant); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant), 9A.44.076 (making it a Class A felony to engage in sexual intercourse with a complainant is at least 12 years old but less than 14 years old and the actor is at least 36 months older than the complainant), 9A.44.079 (making it a class C felony to engage in sexual intercourse with a complainant that is at least 14 years old but less than 16 years old when the actor is at least 48 months older than the complainant).

complainant under 16 years in their sex offenses[55] and one jurisdiction has five gradations for the age of a complainant under 16 years in their sex offenses.[56]

The basis for the four year age gap between the actor and a complainant under the age of 12 years in the revised sexual abuse of a minor statute is the District's current child sexual abuse statutes,[57] which require at least a four year age gap between the actor and a complainant under the age of 16 years. However, there is strong support in the criminal codes of the 29 reformed jurisdictions for requiring an age gap between the actor and the complainant in the gradation with the youngest complainant, although the number of years required varies. Eight of the 29 reformed jurisdictions require an age gap between the actor and the complainant in the gradation or sex offense with the youngest complainant.[58] An additional six reformed jurisdictions sentence the offense more leniently if there is an age

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[55] *Del. Code Ann. tit. 11, §§ 770(a)(1) (making it a class C felony to engage in sexual intercourse with a complainant under the age of 16 years), 771(a)(1) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 16 years when the actor is at least 10 years older than the complainant or with a complainant that is under the age of 14 years when the actor "has reached [his or her] nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title."),* 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

[56] Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years).

[57] *D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").*

[58] *Ala. Code § 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years); Alaska Stat. Ann. § 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years);* Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the complainant is less than 15 years of age and the actor is at least four years older than the complainant); Conn. Gen. Stat. Ann. § 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in *sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant);* Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (4)(a) (requiring a term of imprisonment of 100 years for an actor 18 years of age or older engaging in sexual intercourse with a complainant 12 years of age or younger); Tenn. Code Ann. § 39-13-506(b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant); *Del. Code Ann. tit. 11, §* 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant).

gap between the actor the youngest complainant.[59] Eleven of the reformed jurisdictions require an age gap between the actor and the complainant only in the gradations for

[59] *N.D. Cent. Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age);* Ind. Code Ann. § 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age);); Ohio Rev. Code Ann. § 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met); Utah Code Ann. § 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met); Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years).

comparatively older complainants.[60] The remaining four reformed jurisdictions do not have a required age gap in any gradation for complainants under the age of 16 years.[61]

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[60] Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Haw. Rev. Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3 felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); *Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years);* Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

[61] Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years); Ariz. Rev. Stat. Ann. § 13-1405(A), (B)

Second, there is mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap. Third degree and sixth degree of the revised sexual abuse of a minor statute require a four year gap to match the current child sexual abuse statutes[62] and the other gradations of the revised sexual abuse of a minor statute. There is mixed support in the reformed jurisdictions for requiring this age gap in third degree and sixth degree of the revised offense. At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant.[63] Five of these 14 reformed jurisdictions require an age gap between the

(prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under 16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years).

[62] D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[63] This survey was limited to offenses that required as an element that the complainant is under the age of 18 years. Alaska Stat. Ann. §§ 11.41.434(a)(2) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Ariz. Rev. Stat. Ann. § 13-1404 (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age and a class 2 felony if the complainant is under 15 years of age and the actor is in a position of trust); Ark. Code Ann. §§ 5-14-103(a)(4)(A) (prohibiting sexual intercourse or deviate sexual activity with a complainant under the age of 18 years when the actor is the complainant's guardian or specified family member), 5-14-101(6) (defining "minor" as "a person who is less than eighteen (18) years of age."); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.20(a)(3), (a)(4) (prohibiting sexual penetration when the actor is a family member of the complainant and the complainant is under the age of 18 years or the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant and the complainant is at least 13 years of age but under 18 years of age); Ind. Code Ann. § 35-42-4-7(m) (prohibiting a person at least 18 years of age who is a guardian, child care worker, custodian, or specified family member from engaging in sexual intercourse or other sexual

actor and the complainant in at least one of the offenses or gradations[64] and one jurisdiction makes the age gap an affirmative defense.[65] An additional jurisdiction narrows the offense

conduct with a complainant at least 16 years of age but less than 18 years of age), (n) (prohibiting a person who has or had a "professional relationship" with a complainant at least 16 years of age but less than 18 years when the actor uses or exerts the "professional relationship" to engage in sexual intercourse or other sexual conduct); Ky. Rev. Stat. Ann. § 510.060(1)(c) (prohibiting sexual intercourse when the actor is in a "position of authority or position of special trust" with a complaint under the age of 18 years with whom the actor comes into contact as a result of that position); Me. Rev. Stat. Ann. tit. 17-A, § 253(G), (H) (prohibiting an actor who has "instructional, supervisory or disciplinary authority" over a complainant under the age of 18 years or who is a parent, guardian, or other similar person from engaging in a sexual act with a complainant under the age of 18 years); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); N.J. Stat. Ann. § 2C:14-2(c)(3) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is a specified family member, guardian or other similar individual, or has "supervisory or disciplinary power of any nature or in any capacity over" the complainant); N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant); 18 Pa. Stat. Ann. §§ 3124.2(a.1) (prohibiting actors that are employees or agents at specified institutions from engaging in sexual intercourse or deviate sexual intercourse with complainants under the age of 18 years), 3124.3(a) (prohibiting sports officials from engaging in sexual intercourse or deviate sexual intercourse with a complainant under the age of 18 years); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

[64] Alaska Stat. Ann. §§ 11.41.434(a)(2), (b) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

[65] Ark. Code Ann. § 5-14-103(a)(4)(B) ("It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.").

not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.[66]

None of the five reformed jurisdictions that require an age gap between the actor and a complainant under the age of 18 years specifies in the sex offense statutes whether there is a culpable mental state for the required age gap. However, one jurisdiction has an affirmative defense for mistake of the complainant's age which may extend to a mistake as to the required age gap[67] and another jurisdiction provides that mistake as to the complainant's age is not a defense, which may suggest strict liability for the age gap.[68]

Third, there is mixed support in the criminal codes of the reformed jurisdictions for codifying an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years. Current District law applies strict liability to the age of complainants under the age of 16 years[69] and complainants under the age of 18 years.[70] However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[71] The revised sexual abuse of a minor statute codifies an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years.

There is mixed support in the 29 reformed jurisdictions for codifying a defense for mistake of age for complainants under the age of 18 years, particularly for the comparatively older complainants. One reformed jurisdiction codifies as an affirmative defense for mistake of age in all gradations, regardless of the age of the complainant.[72] An additional twelve reformed jurisdictions codify an affirmative defense for mistake of age

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[66] N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant);

[67] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

[68] Minn. Stat. Ann. § 609.344(1)(e) ("Neither mistake as to the complainant's age . . . is a defense."), (1)(f) ("Neither mistake as to the complainant's age . . . is a defense.");

[69] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes. In addition to D.C. Code § 22-3012, D.C. Code § 22-3011 states that "mistake of age" is not a defense to child sexual abuse. D.C. Code § 22-3011(a).

[70] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[71] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[72] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

for all age categories except the lowest age.[73] Instead of a defense, another reformed jurisdiction requires that the actor know the age of a complainant that is at least 13 years

[73] Ariz. Rev. Stat. Ann. § 13-1407(B) ("It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim."); Ark. Code Ann. § 5-14-102 (d) ("(1) When criminality of conduct depends on a child's being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be."); Ind. Code Ann. §§ 35-42-4-3(d) ("It is a defense to a prosecution under this section that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct, unless: (1) the offense is committed by using or threatening the use of deadly force or while armed with a deadly weapon; (2) the offense results in serious bodily injury; or (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge."), 35-42-4-9(c) ("It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2) [the offense is committed by the use of deadly force or while armed with a deadly weapon or if serious bodily injury occurs or the complainant is involuntary intoxicated]."); Ky. Rev. Stat. Ann. § 510.030 ("In any prosecution under this chapter in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was, at the time of the offense . . . (1) Less than sixteen (16) years old . . . the defendant may prove in exculpation that at the time of the conduct constituting the offense he or she did not know of the facts or conditions responsible for such incapacity to consent."); Me. Rev. Stat. tit. 17-A, § 254(2) ("It is a defense to a prosecution under subsection 1, paragraphs A, A-1, A-2 and F, that the actor reasonably believed the other person is at least 16 years of age."); Mo. Ann. Stat. § 566.020(2) ("Whenever in this chapter the criminality of conduct depends upon a child being less than seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older."); Mont. Code Ann. § 45-5-511(1) ("When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old."); N.D. Cent. Code Ann. § 12.1-20-01(1), (2) (stating that "[w]hen criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult" but stating there is no defense if the "child" must be below the age of fifteen); Or. Rev. Stat. Ann. § 163.325(2) ("When criminality depends on the child's being under a specified age other than 16, it is an affirmative defense for the defendant to prove that the defendant reasonably believed the child to be above the specified age at the time of the alleged offense."); 18 Pa. Stat. Ann. § 3102 ("Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age."); Minn. Stat. Ann. § 609.344(1)(b) (making it an affirmative defense, which must be proved by a preponderance of the evidence, that "the actor reasonably believes the complainant to be 16 years of age or older" to a charge of sexual penetration with a complainant that is at least 13 years but less than 16 years old when the actor is no more than 120 months older than the complainant); Wash. Rev. Code Ann. § 9A.44.030(2) ("In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.").

Arkansas also has a limited defense for the lowest age requirement. Ark. Code Ann. § 5-14-102(c) "(1)When criminality of conduct depends on a child's being below fourteen (14) years of age and the actor is under

of age but under 16 years of age or is reckless in that regard.[74] Only two of the reformed jurisdictions statutorily codify that strict liability applies to the age of the complainant.[75]

Fourth, there is mixed support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexual abuse of a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[76] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[77] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous weapon.[78] The revised sexual abuse of a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC.

There is mixed support in the criminal codes of reform jurisdictions for so limiting the application of penalty enhancements to the revised sexual abuse of a minor offense. Fifteen[79] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements,

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twenty (20) years of age, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be.")."

[74] Ohio Rev. Code Ann. § 2907.04(A). Ohio codifies strict liability for the age of a complainant that is under 13 years of age. Ohio Rev. Code Ann. § 2907.03(A)(1)(b).

[75] N.J. Stat. Ann. § 2C:14-5(c) ("It shall be no defense to a prosecution for a crime under this chapter that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable."); Tex. Penal Code §§ 22.011(a)(2), (c)(1) (prohibiting sexual activity with a complainant under the age of 17 years "regardless of whether [the actor] knows the age of [the complainant] at the time of the offense."), 22.021(a)(1)(B), (2)(B) (prohibiting sexual activity with a complainant that is under the age of 14 years "regardless of whether [the actor] knows the age of the child at the time of the offense.").

[76] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[77] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

[78] D.C. Code § 22-4502.

[79] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[80] Six of these reformed jurisdictions apply a weapons enhancement[81] to sexual assault of a minor. Five of these reformed jurisdictions apply an accomplices enhancement to sexual assault of a minor.[82] Six of these reformed jurisdictions apply an enhancement for serious bodily injury to sexual assault of a minor.[83]

Just three[84] of these reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. None of these 15 reformed jurisdictions apply the age-based enhancement to their sexual assault of a minor offenses.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[80] Alaska Stat. Ann. § 11.41.410(2).

[81] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(III); Conn. Gen. Stat. Ann. § 53a-70a(a)(1); Mo. Ann. Stat. § 566.010(1)(b); N.Y. Penal Law § 130.95(1)(b); Tex. Penal Code Ann. § (a)(2)(A)(iv); Utah Code Ann. § 76-5-405(1)(a)(i).

[82] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(I); Conn. Gen. Stat. Ann. § 53a-70a(a)(4); Mo. Ann. Stat. §§ 566.010(1)(1)(c); Tex. Penal Code Ann. § 22.021(a)(2)(A)(v); Utah Code Ann. § 76-5-405(1)(a)(iii).

[83] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(II); Conn. Gen. Stat. Ann. § 53a-70a(a)(2), (a)(3); Mo. Ann. Stat. § 566.010(1)(a); N.Y. Penal Law § 130.95(1)(a); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i); Wash. Rev. Code Ann. § 9A.44.045(1)(c).

[84] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

RCC § 22E-1303. Sexual Abuse by Exploitation.
[Previously RCC § 22E-1305. Sexual Exploitation of an Adult.]

Relation to National Legal Trends. *The RCC sexual exploitation of an adult offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[85]

First, there is strong support in the criminal codes of the reformed jurisdictions for limiting the RCC sexual exploitation of an adult statute to actors that are "healthcare provider[s] or member[s] of the clergy," or actors who "purport[] to be a healthcare provider or member of the clergy." The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust" with the complainant.[86] Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[87] ("reformed jurisdictions"), 16 of the 29 reformed jurisdictions have patient-client sex offenses or gradations[88] or include the patient-client relationship in the definition of "without

[85] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[86] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).

[87] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[88] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual

consent."[89] All 16 of these reformed jurisdictions are limited to healthcare professionals or therapists or healthcare professionals, therapists, and clergy.

Second, there is strong support in the criminal codes of the reformed jurisdictions for the RCC sexual exploitation of an adult statute no longer prohibiting "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[90] In contrast, the RCC sexual exploitation of an adult statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. None of the 16 reformed jurisdictions that have patient-client sex

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advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[89] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.");

[90] D.C. Code §§ 22-3015; 22-3016.

offenses or gradations[91] or include the patient-client relationship in the definition of "without consent"[92] have a similar provision.

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[91] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[92] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview,

Third, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the RCC sexual exploitation of an adult statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[93] The RCC sexual exploitation of an adult statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the RCC sexual exploitation of an adult statute. Fifteen[94] of the 29

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or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[93] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[94] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.
Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous

reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[95] Of these 16 reformed jurisdictions, nine have patient-client sex offenses or gradations[96] or include the patient-client relationship in the definition of "without

weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[95] Alaska Stat. Ann. § 11.41.410(2).

[96] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination.").

consent"[97] have a similar provision. Only two of these reformed jurisdictions apply the enhancements to the patient-client sex offenses or gradations.[98]

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.
[Previously RCC § 22E-1306. Sexually Suggestive Conduct with a Minor.]

Relation to National Legal Trends. *The revised sexually suggestive conduct with a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[99]

First, there is strong support in the reformed jurisdictions' criminal codes for requiring "intent to cause the sexual arousal or sexual gratification of any person." The current MSACM statute prohibits specified conduct that is "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[100] In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person." At least six of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code

[97] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[98] Both jurisdictions, Delaware and Utah, include the patient-client relationship in the definition of without consent. Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12). Delaware applies the penalty enhancements when the actor "engages in sexual intercourse," Del. Code Ann. tit. 11, § 773, which seems to include the offense of rape in Del. Code Ann. tit. 11, § 772 (sexual intercourse "without consent."). Utah defines rape as sexual intercourse without the complainant's consent, Utah Code Ann. § 76-5-402(1), and applies the penalty enhancements to the offense of rape in Utah Code Ann. § 76-5-405.

[99] This survey excluded offenses with statutorily undefined terms such as "intimate parts" or "genital area." In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[100] D.C. Code § 22-3010.01(b).

(MPC) and have a general part[101] ("reformed jurisdictions") prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks"[102] in the current MSACM statute.[103] An additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside

[101] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[102] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4) (defining "intimate parts" as "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person" and "sexual contact" as the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."), 18-3-405(1) (prohibiting sexual contact with a complainant that is less than 15 years of age when the actor is at least four years older), 18-3-405.3(1), (2)(a), (3) (prohibiting sexual contact when the actor is "in a position of trust" with the complainant if the complainant is less than 18 years of age, with different penalties depending on the age of the complainant); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.60(c)(1)(i), (c)(2)(i) (prohibiting an actor that is 17 years of age or older from committing an act of sexual conduct with a complainant under the age of 13 years and an actor that is under 17 years of age from committing an act of sexual conduct with a complainant that is under the age of nine years); Ind. Code Ann. §§ 35-42-4-3(b) (prohibiting an actor with a complainant under the age of 14 years from "peform[ing] or submit[ing] to any fondling or touching" of either the complainant or the actor, with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor), 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age), 35-42-4-9(b) (prohibiting an actor at least 18 years of age with a complainant that is at least 14 years of age but less than 16 years of age from "perform[ing] or submit[ing] to any fondling or touching" of either the actor or the complainant with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2) (prohibiting sexual contact with a complainant younger than 17 years and defining "sexual contact" as "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person" if done "with the intent to arouse or gratify the sexual desire of any person.").

[103] D.C. Code § 22-3010.01(b).

the mouth of the complainant"[104] in the current MSACM statute.[105] None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

Of these seven reformed jurisdictions that specifically prohibit conduct comparable to the current MSACM statute, five of them require an intent or purpose to sexually arouse or gratify.[106] The sixth jurisdiction consistently requires "an intent to arouse or satisfy the sexual desires" for the comparable conduct, except for the least serious offense.[107] The seventh jurisdiction requires that the conduct "can be reasonably construed as being for the purpose of sexual arousal or gratification,"[108] and still appears to require a specific purpose to sexually arouse or gratify.

Second, there is limited support in the criminal codes of the reformed jurisdictions for the revised sexually suggestive conduct with a minor statute requiring a "recklessly" culpable mental state for the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[109] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. The seven reformed jurisdictions with conduct that

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[104] N.H. Rev. Stat. Ann. §§ 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."), 632-A:3(III) (prohibiting sexual contact with a complainant under 13 years of age), 632-A:4(I)(a), (I)(b), (I)(c) (though reference to N.H. Rev. Stat. Ann. § 632-A:2, prohibiting sexual contact with a complainant that is 13 years of age or older and under 17 years of age and the actor is in a "position of trust with or authority over the complainant, as well as sexual contact with a complainant that is 13 years of age or older but less than 16 years with different age gap requirements).

[105] D.C. Code § 22-3010.01(b).

[106] Colo. Rev. Stat. Ann. §§ 18-3-401(4) (definition of "sexual contact" requiring "for the purposes of sexual arousal, gratification, or abuse."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (definition of "sexual conduct" requiring "for the purpose of sexual gratification or arousal of the victim or the accused."); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9-(b) (prohibiting "any fondling or touching" with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Ohio Rev. Code Ann. § 2907.01(B) (definition of "sexual contact" requiring "for the purpose of sexually arousing or gratifying either person."); Tex. Penal Code Ann. § 21.11(c)(2) (definition of "sexual contact" requiring "with the intent to arouse or gratify the sexual desire of any person.").

[107] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(2)(3) (offenses of indecent liberties and aggravated indecent liberties prohibiting any "lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both" with complainants of different ages under the age of 18 years); 21-5507(a)(1)(C)(2), (a)(1)(C)(3) (offense of unlawful voluntary sexual relations prohibiting "any lewd fondling or touching of the person" when the complainant is 14 or more years of age but less than 16 years of age and the actor is less than 19 years of age and less than four years of age older than the complainant).

[108] N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[109] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

is comparable to the current MSACM statute[110] generally do not statutorily specify any culpable mental states in these sex offense statutes. However, two of these reformed jurisdictions codify that strict liability applies to the age of the complainant.[111] A third reformed jurisdiction codifies a defense for a reasonable mistake of age for younger complainants,[112] but requires a "knowledge" culpable mental state for older complainants.[113]

Third, there is mixed support for the revised sexually suggestive conduct with a minor statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current MSACM statute, which requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[114] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[115] For consistency with the current provision for complainants under the age of 16 years and other RCC sex offenses, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between an actor and a complainant under the age of 18 years and requires strict liability for this age gap.

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[110] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

[111] Ohio Rev. Code Ann. §§ 2907.05(A)(4) (prohibiting "sexual contact" when the complainant is less than 13 years of age "whether or not the offender knows the age" of the complainant), 2907.06(A)(4) (prohibiting "sexual contact" when the complainant is 13 years of age or older but less than 16 years of age, "whether or not the offender knows the age" of the complainant and the actor is at least 18 years of age and four or more years older); Tex. Penal Code Ann. § 21.11(a), (c)(2) (prohibiting "sexual contact" with a complainant under the age of 17 years "regardless of whether [the actor] knows the age" of the complainant).

[112] Ind. Code Ann. § 35-42-4-3(b), (d) (making it a defense that the actor "reasonably believed" that the complainant was 16 years of age or older for an offense that prohibits fondling or touching with a complainant under 14 years of age).

[113] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant, and requiring that the actor "knows" the complainant is at least 16 years of age but under 18 years of age for the professional relationship gradation).

[114] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[115] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

There is mixed support in the criminal codes of the reformed jurisdictions because only four[116] of the seven reformed jurisdictions[117] with conduct that is comparable to the current MSACM statute include complainants under 18 years of age when the actor is in a significant relationship with the complainant. None of these four reformed jurisdictions require an age gap between the actor and the complainant. However, these four reformed jurisdictions still support narrowing the scope of the revised sexually suggestive conduct with a minor statute for complainants under the age of 18 years. Two of these four reformed jurisdictions are narrower than the District's current MSACM statute because they require the actor to use the position of authority to coerce the complainant into engaging in the sexual activity.[118] A third jurisdiction grades the offense more severely if a complainant is under the age of 15 years as opposed to under 18 years of age.[119] Only one jurisdiction is similar in scope to the current MSACM statute, requiring no age gap and permitting liability for any complainant under the age of 18 years.[120]

Of the remaining three reformed jurisdictions with conduct that is comparable to the current MSACM statute, two do not include any complainants under the age of 18

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[116] Colo. Rev. Stat. Ann. § 18-3-405.3(1) (prohibiting "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant); Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named in [section] 632-A:2, which include when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant).

[117] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

[118] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a specified individual such as a guardian, custodian, or child care worker, or has or had a "professional relationship" with the complainant and for the "professional relationship" prong requiring that the actor "uses or exerts . . . the professional relationship" to engage in the fondling or lewd touching); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named in [section] 632-A:2," which includes when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant and "uses this authority to coerce [the complainant] to submit.").

[119] Colo. Rev. Stat. Ann. § 18-3-405.3(1), (2)(a), (3) (making it a class 4 felony to engage "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant and a class 3 felony if the complainant is less than 15 years of age).

[120] 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant).

years.[121] The remaining jurisdiction applies to complainants under the age of 17 years, regardless of whether there is a relationship with the actor, and provides an affirmative defense if the actor is "not more than three years older" than the complainant.[122]

Fourth, there is limited support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[123] The revised sexually suggestive conduct with a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is limited support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[124] of the 29 reformed jurisdictions have sex-offense

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[121] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older);

[122] Tex. Penal Code Ann. § 21.11(a), (b) (prohibiting "sexual contact" with a complainant under the age of 17 years and making it an affirmative defense if the actor "was not more than three years older" than the complainant and other conditions are met).

[123] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[124] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.
Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury,

specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[125] Of these 16 reformed jurisdictions, three[126] have statutes that prohibit conduct that is comparable to the current MSACM statute. Two[127] of these three reformed jurisdictions apply the penalty enhancements to the statutes prohibiting conduct comparable to the current MSACM statute.

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dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[125] Alaska Stat. Ann. § 11.41.410(2).

[126] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b).

[127] In these jurisdictions, the relevant penalty enhancements are not codified with the penalty enhancements that apply to the sexual act or sexual intercourse offenses, but are codified separately in the relevant offenses. The first jurisdiction is Illinois. 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (offense of criminal sexual abuse prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.6(a)(1), (a)(2) (offense of aggravated criminal sexual abuse prohibiting committing criminal sexual abuse when the actor "displays, threatens to use, or uses a dangerous weapon or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon" and when the actor "causes bodily harm to the victim.").
The second jurisdiction is Indiana, and only the comparable offenses for complainants under the age of 16 years have penalty enhancements. Ind. Code Ann. §§ 35-42-4-3(b), (b)(2) (making it a Level 4 felony for an actor to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor when the complainant is under the age of 14 years, but a Level 2 felony if "it is committed while armed with a deadly weapon."), 35-42-4-9(b) (making it a Level 6 felony for an actor at least 18 years of age to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor with a complainant that is at least 14 years of age but less than 16 years of age, but making it a Level 2 felony if "it is committed by using or threatening by the use of deadly force, while armed with a deadly weapon."). Indiana does not have any penalty enhancement for the comparable offense for complainants under the age of 18 years. Ind. Code Ann. § 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age).

RCC § 22E-1305. Enticing a Minor Into Sexual Conduct.

Relation to National Legal Trends. *The revised enticing offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[128]

First, there is strong support in the criminal codes of other jurisdictions for the revised enticing statute requiring a "recklessly" culpable mental state for the age of the complainant, as opposed to strict liability under current law. Seventeen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[129] ("reformed jurisdictions") have general enticing a minor statutes.[130] Nine of these 18 reformed jurisdictions statutorily specify a culpable mental state for the age of the complainant—two jurisdictions require "knows or should know" or "knows or has reason to know"[131] and seven jurisdictions require "believes"[132] or "knows or believes."[133] Only one of the 18 reformed jurisdictions statutorily specifies that the age of the complainant is a matter of strict liability, but even in this jurisdiction strict liability is limited to the younger complainants[134] and a culpable mental state of "recklessly" is required for complainants that are 16 or 17 years of age.[135]

The remaining eight reformed jurisdictions with general enticing a minor statutes do not statutorily specify a culpable mental state for the age of the complainant in the enticing statutes.

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[128] Unless otherwise noted, this survey is limited to general enticing statutes, which may include specific provisions for online and other electronic means of enticing. Statutes that are limited to online and other electronic means of enticing were excluded. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[129] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[130] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[131] Ariz. Rev. Stat. Ann. § 13-3554(A) ("knowing or having reason to know that the other person is a minor."); Tenn. Code Ann. § 39-13-528(a)("knows, or should know, is less than eighteen (18) years of age.").

[132] Del. Code Ann. tit. 11, § 1112A(a)(1), (b)(3) (defining "child" to include "an individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) ("believes to be a child."); Ind. Code Ann. § 35-42-4-6(b) ("believes to be a child under fourteen (14) years of age."); Mont. Code Ann. § 45-5-625(1)(c) ("believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) ("believes is a child."); S.D. Codified Laws § 22-24A-5(1) ("reasonably believes is a minor.").

[133] Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1), (A)(2), (1)(B)(2) ("knows or believes" is a complainant of a certain age).

[134] Ohio Rev. Code Ann. § 2907.07(A), (B)(1) (stating "whether or not the offender knows the age of such person" for a complainant that is under the age of 13 years or at least 13 years of age but under 16 years of age).

[135] Ohio Rev. Code Ann. § 2907.07(B)(2) (prohibiting enticing a complainant that is 16 or 17 years of age when "the offender knows or has reckless disregard of the age" of the complainant).

Second, there is strong support in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element, as opposed to the current enticing statute, which does not specify any requirements for the age of the actor. Of the 17 reformed jurisdictions with general enticing a minor statutes,[136] ten have an age requirement for the actor, with a majority of these jurisdictions requiring that the actor be 18 years of age or older.[137] An additional reformed jurisdiction requires that the actor be 18 years of age or older in the gradations of the enticing offense with older complainants,[138] and has no age requirement for the actor in the gradation for the youngest complainants.[139]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the age of the actor in the general enticing statutes.

Third, there is limited supported in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current enticing statute, which requires a four year age gap between the actor and a complainant under the age of 16 years,[140] but does not have an age gap requirement when the complainant is under the age of 18 years.[141] There is limited support in the criminal codes of the reformed jurisdictions for this revision because most of the 17 reformed jurisdictions that have general enticing a minor statutes[142] do not require an age gap

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[136] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[137] Ark. Code Ann. § 5-14-110(a)(1) (requiring the actor to be 18 years of age or older); Del. Code Ann. tit. 11, §§ 1112(a)(1) (requiring the actor to be 18 years of age or older); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (requiring the actor to be 17 years of age or older); Ind. Code Ann. § 35-42-4-6(b) (requiring the actor to be 18 years of age or older); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(1), (1)(B)(1) (requiring the actor to be 16 years of age or older); Mo. Ann. Stat. § 566.151(1) (requiring the actor to be 21 years of age or older); Minn. Stat. Ann. § 609.352(2) (requiring the actor to be 18 years of age or older); N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (requiring the actor to be an "adult.") S.D. Codified Laws § 22-24A-5(1) (requiring the actor to be 18 years of age or older); Tenn. Code Ann. § 39-13-528(a) (requiring the actor to be 18 years of age or older).

[138] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that the actor be 18 years of age or older when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[139] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense applying to any "person" when the complainant is less than 13 years of age).

[140] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[141] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[142] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. §

between the actor and the complainant. However, five of these 17 reformed jurisdictions do require an age gap between the actor and the complainant, with an age gape of three or four years being the most common,[143] and a sixth jurisdiction appears to grade the offense more severely if there is an age gap between the actor and the complainant.[144] A seventh jurisdiction requires an age gap of at least four years in the gradations for older complainants,[145] and has no age gap requirement in the gradation for the youngest complainants.[146]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the required age gap in the general enticing statutes.

Fourth, there is little support in the criminal codes of the reformed jurisdictions for the revised enticing statute limiting the offense to fictitious complainants that are law enforcement officers. The basis for this revision is that the current closely-related statute for arranging sexual conduct with a real or fictitious child is limited to fictitious complainants that are law enforcement officers[147] and the legislative concerns that underlie this limitation apply equally to the enticing offense.[148] Of the 17 reformed jurisdictions

566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[143] Ark. Code Ann. § 5-14-110(a)(1) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 15 years of age); Ind. Code Ann. § 35-42-4-6(b) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 14 years of age); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A), (1)(B) (enticing offense requiring that the actor be at least 16 years of age, that the complainant be either less than 14 years of age or less than 12 years of age, and that the actor be at least three years older than the complainant); Mo. Ann. Stat. § 566.151(1) (enticing offense requiring the actor to be 21 years of age or older and the complainant be less than 15 years of age); Minn. Stat. Ann. § 609.352(1)(a), (2) (enticing offense requiring that the actor be 18 years of age or older and soliciting a "child" and defining "child" to include a person 15 years of age or younger);

[144] N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (enticing offense requiring that the actor be an "adult" and making the offense a class A misdemeanor if the compliant is a "minor"15 years of age or older, but making the offense a class C felony if the actor is at least 22 years of age and the complainant is a "minor" 15 years of age or older).

[145] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that at least a four year age gap between the actor and the complainant when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[146] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense not requiring any age gap between the actor and the complainant when the complainant is less than 13 years of age).

[147] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

[148] The legislative history for the current arranging statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

with general enticing a minor statutes,[149] nine include fictitious children.[150] Of these nine jurisdictions, only one includes fictitious children only if they are really law enforcement officers posing as children.[151]

There are 14 reformed jurisdictions with statutes that specifically prohibit online or other electronic enticing, either in either in addition to the general enticing a minor statute[152] or as the jurisdiction's only enticing statute.[153] All 14 of these jurisdictions

[149] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[150] Ark. Code Ann. § 5-14-110(a)(1) (prohibiting solicitation of a "person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age."); Del. Code Ann. tit. 11, § 1112A(b) (defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (prohibiting solicitation of a "child or one whom [the actor] believes to be a child."); Ind. Code Ann. § 35-42-4-6(b) (prohibiting solicitation of a "child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age."); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(2), (B)(2) (prohibiting solicitation when the actor "knows or believes that the other person is less than 14 years of age" or "knows or believes that the other person is less than 12 years of age."); Mont. Code Ann. § 45-5-625(1)(c) (prohibiting solicitation of a "child under 16 years of age or a person the offender believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); S.D. Codified Laws § 22-24A-5(1) (prohibiting solicitation of a "minor, or someone [the actor] reasonably believes is a minor."); Mo. Ann. Stat. § 566.151(2) ("It is not a defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.");

[758] Tenn. Code Ann. § 39-13-528(a) (prohibiting solicitation of a person who "is less than eighteen (18) years of age" or "a law enforcement officer posting as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age.").

[152] Ala. Code § 13A-6-122; Ark. Code Ann. § 5-27-306(a)(1), (a)(2); Colo. Rev. Stat. Ann. § 18-3-306; Del. Code Ann. tit. 11, § 1112A(a)(2); Kan. Stat. Ann. § 21-5509; Minn. Stat. Ann. § 609.352(2a)(1); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b); Ohio Rev. Code Ann. § 2907.07(C), (D).

[153] Alaska Stat. Ann. § 11.41.452; Conn. Gen. Stat. Ann. § 53a-90; Ky. Rev. Stat. Ann. § 510.155; N.H. Rev. Stat. Ann. § 649-B:4; Or. Rev. Stat. Ann. §§ 163.431 – 163.434; Tex. Penal Code Ann. § 33.021(c).

include fictitious children—12 include all fictitious children[154] and two are limited to fictitious children if they are law enforcement officers posing as children.[155]

Fifth, there is strong support in the criminal codes of reformed jurisdictions for limiting the revised enticing statute to persuading or enticing a child to go to another location to engage in or submit to a sexual act or sexual contact and eliminating the provision of the current enticing statute which prohibits actually taking a complainant. Of the 17 reformed jurisdictions with general enticing a minor statutes,[156] only one jurisdiction[157] includes making the complainant go somewhere for the purposes of sexual activity like the current enticing statute.

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[158] The revised enticing statute, by contrast, is not subject to

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[154] Ala. Code § 13A-6-122 (prohibiting soliciting "a child who is at least three years younger than the defendant or another person believed by the defendant to be a child at least three years younger than the defendant."); Alaska Stat. Ann. § 11.41.452 (a)(1), (a)(2) (prohibiting solicitation of a "child under 16 years of age" or a person the actor "believes" is a child under 16 years of age); Ark. Code Ann. § 5-27-306(a)(1), (a)(2) (prohibiting solicitation of a "child fifteen (15) years of age or younger" or a person the actor "believes to be fifteen (15) years of age or younger."); Colo. Rev. Stat. Ann. § 18-3-306(1) (prohibiting solicitation of a person "the actor knows or believes to be under fifteen (15) years of age."); Conn. Gen. Stat. Ann. § 53a-90(a)(1), (a)(2) (prohibiting solicitation of a person "under eighteen years or age or who the actor reasonably believes to be under eighteen years of age."); Del. Code Ann. tit. 11, §§ 1112A(a)(2), (b) and 1112B(a)(2), (b) (prohibiting solicitation of a "child" and defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); Kan. Stat. Ann. § 21-5509(a) (prohibiting solicitation of a person "whom the offender believes to be a child."); Minn. Stat. Ann. § 609.352(2a)(1) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b) (prohibiting solicitation of a "person [the actor] believes to be a minor."); N.H. Rev. Stat. Ann. § 649-B:4(I) (prohibiting solicitation of a "child or another person believed by [the actor] to be a child."); Or. Rev. Stat. Ann. §§ 163.431(1), .432(1)(a), .433(1) (prohibiting solicitation of a child and defining "child" as a "person who the defendant reasonably believes to be under 16 years of age."); Tex. Penal Code Ann. § 33.021(a)(1), (c) (prohibiting solicitation of a "minor" and defining "minor" to include "an individual whom the actor believes to be younger than 17 years of age.").

[155] Ky. Rev. Stat. Ann. § 510.155(1) (prohibiting procuring or promoting "the use of a minor, or a peace officer posing as a minor if the person believes that the piece officer is a minor or is wanton or reckless in that belief."); Ohio Rev. Code Ann. § 2907.07(C), (D) (prohibiting solicitation of a child of specified ages or a "law enforcement officer posing as a person" of the specified ages and "the offender believes that the other person [is of the specified ages] or is reckless in that regard.").

[156] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[157] Wis. Stat. Ann. § 948.07(1) ("Whoever, with intent to commit any of the following acts, causes . . . any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony: (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.").

[158] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01

any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[159] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[160] Of the 17 reformed jurisdictions with general enticing a minor statutes,[161] nine have general

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and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[159] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.
Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[160] Alaska Stat. Ann. § 11.41.410(2).

[161] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

enticing a minor statutes,[162] none applies the penalty enhancements to the general enticing a minor statutes.

Seventh, it is difficult to determine the national legal trends for prohibiting an actor from receiving a conviction for both enticing a complainant and engaging in the prohibited conduct because none of the 17 reformed jurisdictions with general enticing a minor statutes,[163] statutorily addresses convictions for both enticing and engaging in the prohibited conduct in the general enticing statutes.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.
[Previously RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.]

Relation to National Legal Trends. None of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[164] ("reformed jurisdictions") appear to have a specific offense that is comparable to the District's current[165] or revised arranging statute. The reformed jurisdictions may have offenses that prohibit arranging for a complainant under the age of 18 years to engage in a commercial sex act[166] or traveling within a state to engage in sexual conduct with such a complainant,[167] but they do not appear to have offenses prohibit merely arranging for any sexual conduct to occur.

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[162] Ariz. Rev. Stat. Ann. § 13-3554; Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Mo. Ann. Stat. § 566.151; Minn. Stat. Ann. § 609.352(2); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[163] S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[164] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[165] D.C. Code § 22-3010.02.

[166] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-404 ("Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another p-erson a child for the purpose of sexual exploitation of a child commits procurement of a child for sexual exploitation, which is a class 3 felony."), 18-6-403(3) ("A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: (a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or (b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (b.5) Possesses or controls any sexually exploitative material for any purpose; except that this subsection (3)(b.5) does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or (c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.").

[167] *See, e.g.*, Mont. Code Ann. § 45-5-625(1)("A person commits the offense of sexual abuse of children if the person . . . knowingly travels within, from, or to this state with the intention of meeting a child under 16

RCC § 22E-1307. Nonconsensual Sexual Conduct.

Relation to National Legal Trends. *The revised nonconsensual sexual conduct offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[168]

First, there is strong support in other jurisdictions' criminal codes for the revised nonconsensual sexual conduct statute having two gradations, based on whether a "sexual act" or "sexual contact" was committed. Eleven of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[169] ("reformed jurisdictions") have offenses that prohibit both sexual penetration and sexual contact without consent.[170] All 11 of these reformed jurisdictions

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years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated."); Ark. Code Ann. § 5-27-305(a) ("A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor: (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and (2) Acts with the purpose that the minor will engage in: (A) Prostitution; or (B) Sexually explicit conduct.").

[168] This survey is limited to offenses that require lack of consent, without any other requirement, such as use of force or incapacity. Offenses are included even if "consent" was not statutorily defined. Parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[169] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[170] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of

penalize sexual penetration more severely than sexual contact. An additional reformed jurisdiction makes it a felony to engage in sexual intercourse without consent but does not appear to have a similar provision for sexual contact.[171]

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. A discussion of the scope of the reformed jurisdictions' assault statutes is beyond the scope of this commentary.

Third, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to engaging in the sexual act or sexual contact. The support is limited because most of the 11 reformed jurisdictions[172] with

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consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[171] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[172] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of

comparable offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes. Three of the 11 reformed jurisdictions statutorily specify a culpable mental state for engaging in the sexual activity. Of these three jurisdictions, one jurisdiction requires an "intentionally" culpable mental state,[173] one jurisdiction requires a "knowingly" culpable mental state,[174] and the third jurisdiction has a gradation for a "knowingly" culpable mental state and a gradation for a "recklessly" culpable mental state.[175]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for engaging in the sexual activity in the sex offense statute.[176]

Fourth, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The support is limited because most of the 11 reformed jurisdictions[177] with comparable offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes.

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consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[173] Me. Rev. Stat. tit. 17-A, § 255-A(1)(A), (1)(B) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact" and the complainant has not "expressly or impliedly acquiesced.). There is no culpable mental state specified for the felony gradation that is limited to a sexual act, but it is the same class of crime. Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act.").

[174] Mont. Code Ann. §§ 45-5-502(1), (2)(a) ("A person who knowingly has sexual intercourse with another person without consent" and "[a] person who knowingly subjects another person to any sexual contact without consent.");

[175] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent.").

[176] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[177] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit.

Only two of these eleven reformed jurisdictions statutorily specify a culpable mental state for the without consent element. One jurisdiction requires a "knowing" culpable mental state for the sexual penetration gradation, but does not clearly specify a culpable mental state for the sexual contact gradation.[178] A second jurisdiction specifies "knows or has reason to know."[179]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for the lack of consent in the sex offense statute.[180]

Fifth, there is strong support in the criminal codes of reformed jurisdictions for the revised nonconsensual sexual conduct offense requiring proof that the actor lacked

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17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[178] Mo. Ann. Stat. §§ 566.031, 566.101 (prohibiting sexual intercourse "knowing that he or she does so without that person's consent" and "purposely" subjecting another person to sexual contact without consent).

[179] Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) ("knows or has reason to know" that the complainant did not consent to the sexual penetration or the sexual contact).

[180] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

effective consent. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission,"[181] which, unlike "consent,"[182] is undefined in the current sexual abuse statutes. The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[183] There is strong support in the criminal codes of the reformed jurisdictions for requiring that the actor lack "effective consent," as opposed to "permission," and for eliminating the consent defense. Of the 11 reformed jurisdictions[184] with comparable offenses, ten require that the actor lack

[181] D.C. Code § 22-3006.

[182] 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.").

[183] D.C. Code § 22-3007.

[184] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

"consent."[185] The remaining reformed jurisdiction requires that the complainant "has not expressly or impliedly acquiesced" to the sexual act or sexual contact,[186] yet uses "consent" in other sex offenses.[187] The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, requires that the actor lack "consent."[188]

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[185] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[186] Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime).

[187] Me. Rev. Stat. tit. 17-A, § 253(2)(D) ("A person is guilty of gross sexual assault if that person engages in a sexual act with another person and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act."), § 255-A(1)(C) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual contact.").

[188] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

A discussion of these reformed jurisdictions' defenses is beyond the scope of this commentary.

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[189] The revised nonconsensual sexual conduct statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised nonconsensual sexual conduct statute. Fifteen[190] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[191]

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[189] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[190] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.
Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[191] Alaska Stat. Ann. § 11.41.410(2).

Of these 16 reformed jurisdictions, five have statutes that prohibit conduct that is comparable to the current MSA statute,[192] including the jurisdiction that only prohibits sexual penetration without consent.[193] These jurisdictions take a variety of approaches to grading the MSA comparable offense and for the purpose of this analysis, the commentary will discuss only the comparable penetration offenses. Two of these jurisdictions apply the penalty enhancements to the comparable penetration offense, but also define sexual assault as sexual intercourse without consent.[194] In these jurisdictions, applying the penalty enhancements to the offense appears to distinguish a "forcible" sexual assault from a non-forcible sexual assault. The remaining three jurisdictions do not apply the penalty enhancements to the comparable penetration offense.[195]

[192] Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct.").

[193] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[194] Utah Code Ann. §§ 76-5-402(1), (3), 76-5-406(1) (defining rape as sexual intercourse without the complainant's consent and stating "without consent" includes "the victim expresses lack of consent through words or conduct."), 76-5-405(1)(a)(i), (1)(a)(iii) (applying the penalty enhancements for a dangerous weapon and accomplices to the offense of rape); Tenn. Code Ann. §§ 39-13-503(a)(2), (b) (including sexual penetration "without the consent" in the offense of rape), Tenn. Code Ann. § 39-13-502(a) (applying penalty enhancements for a dangerous weapon, bodily injury, or accomplices to "unlawful sexual penetration.").

[195] Mo. Ann. Stat. §§ 566.031 (making sexual intercourse without the complainant's consent a class D felony, without any sentencing provision for an "aggravated sexual offense."), 566.010(1)(a), (1)(b), (1)(c) (defining "aggravated sexual offense" as one that involves serious bodily injury, a dangerous weapon, or accomplices); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (including sexual intercourse without the complainant's consent in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.95(1) (applying penalty enhancements for serious physical injury or a dangerous weapon to rape in the first degree).

RCC § 22E-1308. Incest.
[Previously RCC § 22E-1312. Incest.]

Relation to National Legal Trends. *The revised incest's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[196]

First, there is mixed support in the criminal codes of other jurisdictions for limiting the revised incest statute to a "sexual act," and eliminating liability for marriage and cohabitation. Twenty-seven reformed jurisdictions have an incest statute.[197] Thirteen of the 27 reformed jurisdictions with an incest statute limit the offense to sexual activity.[198] Fourteen of the 27 reformed jurisdictions with incest statute include marriage[199] and only four include cohabitation.[200] The MPC incest statute prohibits marriage, cohabitation, or "sexual intercourse."[201]

Second, there is strong support in the reformed jurisdictions' statutes for prohibiting a sexual act between an adoptive parent or grandparent and his or her adopted child or grandchild, regardless of which party initiates the sexual act. For this survey, 24[202] of the 27 reformed jurisdictions with incest statutes were considered because the prohibited

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[196] Unless otherwise noted, this survey is limited to incest offenses that require sexual penetration, not sexual touching. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses, or whether the statute also prohibits marriage or cohabitation.

[197] Ala. Code § 13A-13-3; Alaska Stat. Ann. § 11.41.450; Ariz. Rev. Stat. Ann. § 13-3608; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Del. Code Ann. tit. 11, § 766; Haw. Rev. Stat. Ann. § 707-741; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Kan. Stat. Ann. § 21-5604; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Mo. Ann. Stat. § 568.020; Minn. Stat. Ann. § 609.365; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010; Wis. Stat. Ann. § 944.06.

[198] Alaska Stat. Ann. § 11.41.450; Del. Code Ann. tit. 11, § 766; Haw. Rev. Stat. Ann. § 707-741; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Minn. Stat. Ann. § 609.365; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010.

[199] Ala. Code § 13A-13-3; Ariz. Rev. Stat. Ann. § 13-3608; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Kan. Stat. Ann. § 21-5604; Mo. Ann. Stat. § 568.020; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; Wis. Stat. Ann. § 944.06.

[200] Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.D. Cent. Code Ann. § 12.1-20-11; 18 Pa. Stat. Ann. § 4302.

[201] MPC § 230.2.

[202] Ala. Code § 13A-13-3; Alaska Stat. Ann. § 11.41.450; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Del. Code Ann. tit. 11, § 766; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Kan. Stat. Ann. § 21-5604; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Mo. Ann. Stat. § 568.020; Minn. Stat. Ann. § 609.365; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010.

relationships in three of the 27 reformed jurisdictions are unclear.[203] At least 16 of these 24 reformed jurisdictions prohibit an adoptive parent from engaging in a sexual act with an adopted child[204] and 11 of these 24 jurisdictions specify that an adopted child cannot engage in sexual relations with an adoptive parent.[205] At least seven reformed jurisdictions

[203] These jurisdictions require reference to civil law to determine the prohibited relationships. Ariz. Rev. Stat. Ann. § 13-3608 ("Persons who are eighteen or more years of age and are within the degrees of consanguinity within which marriages are declared by law to be incestuous and void . . ."); Haw. Rev. Stat. Ann. § 707-741(1) ("A person commits the offense of incest if the person commits an act of sexual penetration with another who is within degrees of consanguinity or affinity within which marriage is prohibited."); Wis. Stat. Ann. § 944.06 ("Whoever marries or has nonmarital sexual intercourse . . . with a person he or she knows is a blood relative and such relative is in act related in a degree within which the marriage of the parties is prohibited by the law of this state.").

[204] Ala. Code § 13A-13-3(a)(1) (prohibiting an actor from marrying or engaging in sexual intercourse with "[h]is . . . descendant by blood or adoption."); Ark. Code Ann. § 5-26-202(a)(2), (a)(5) (prohibiting sexual conduct with a person that is the actor's "adopted child" or "adopted grandchild."); Colo. Rev. Stat. Ann. §§ 18-6-301(1), 18-6-302(1)(a) (incest and aggravated incest statutes prohibiting sexual conduct with "a child by adoption . . . if the person is not legally married to the child by adoption" when the child is different ages); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and his child. . . . . A male and his grandchild. . . . A female and her child. . . . A female and her grandchild" and stating that the "relationships referred to herein include . . . relationships by adoption."); 720 Ill. Comp. Stat. Ann. 5/11-11(1), (2)(ii) (prohibiting an actor from engaging in sexual penetration with another person when the actor is that other person's "[f]ather or mother, when the child . . . was adopted" and was 18 years of age or older when the offense was committed); Kan. Stat. Ann. § 21-5604(b)(2) (aggravated incest statute prohibiting sexual conduct with a person who is 16 years of age or older but under 18 years of age and who is the actor's "adoptive" child or grandchild); Ky. Rev. Stat. Ann. § 530.020(1) (including "relationship of parent and child by adoption."); Mo. Ann. Stat. § 568.020(1)(1) (prohibiting sexual conduct with a "descendant by blood or adoption."); Mont. Code Ann. § 45-5-507(1) (including "relationships of parent and child by adoption."); N.H. Rev. Stat. Ann. § 639:2(I) (including relationships of parent and child by adoption."); 18 Pa. Stat. Ann. § 4302(c) (including the "relationship of parent and child by adoption."); S.D. Codified Laws §§ 22-22A-2, 22-22A-3, 25-1-6 (incest and aggravated incest statutes referencing "within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6" and declaring void marriages "between parents and children, ancestors and descendants of every degree . . . The relationships provided for in this section include such relationships that arise through adoption."); Tenn. Code Ann. § 39-15-302(a)(1) (prohibiting sexual penetration between an actor and the actor's "parent, child . . . . adoptive parent, adoptive child."); Tex. Penal Code Ann. § 25.02(a)(1) (prohibiting sexual conduct with "the actor's . . . descendant by blood or adoption."); Utah Code Ann. § 76-7-102(1)(b)(ii) (including "the relationship of parent and child by adoption."); Wash. Rev. Code Ann. § 9A.64.020(1)(a), (3)(a) (prohibiting sexual intercourse between an actor and his or her "descendant" and defining "descendant" to include adopted children under 18 years of age).

[205] Ala. Code § 13A-13-3(a)(1) (prohibiting an actor from marrying or engaging in sexual intercourse with "[h]is ancestor . . . by blood or adoption."); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and his parent" and "A female and her parent" and stating that the "relationships referred to herein include . . . relationships by adoption."); Mo. Ann. Stat. § 568.020(1)(1) (prohibiting sexual conduct with an "[a]ncestor . . . by blood or adoption."); S.D. Codified Laws §§ 22-22A-2, 22-22A-3, 25-1-6 (incest and aggravated incest statutes referencing "within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6" and declaring void marriages "between parents and children, ancestors and descendants of every degree . . . The relationships provided for in this section include such relationships that arise through adoption."); Tenn. Code Ann. § 39-15-302(a)(1) (prohibiting sexual penetration between an actor and the actor's "parent, child . . . . adoptive parent, adoptive child."); Tex. Penal Code Ann. § 25.02(a)(1) (prohibiting sexual conduct with "the actor's ancestor . . . by blood or adoption."); Ky. Rev. Stat. Ann. § 530.020(1) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including the "relationship of parent and child by adoption."); Mont. Code Ann. § 45-5-507(1) (prohibiting an actor from engaging in sexual conduct with a person that is

prohibit an adoptive grandparent from engaging in a sexual act with an adopted grandchild[206] and four of them prohibit an adopted grandchild from engaging in a sexual act with an adoptive grandparent.[207]

The MPC incest statute prohibits an adoptive parent from engaging in a sexual act with an adopted child[208] and appears to prohibit an adopted child from engaging in a sexual act with an adoptive parent.[209] The MPC commentary notes that at the time the MPC was drafted, including adopted children in incest statutes was "relatively rare."[210] The commentary states that the "inclusion of adopted children reflects the conclusion that the incest law properly serves the function of protecting the nuclear family and that the concept of nuclear family should be extended to adoptive relations."[211]

Third, there is strong support in the reformed jurisdictions for prohibiting a person from engaging in a sexual act with his or her stepchild or step-grandchild or with his or her step-parent or step-grandparent, while the marriage creating the relationship exists. For

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the actor's "ancestor" and including the "relationships of parent and child by adoption."); N.H. Rev. Stat. Ann. § 639:2(I) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including relationships of parent and child by adoption."); 18 Pa. Stat. Ann. § 4302(a), (c) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including the "relationship of parent and child by adoption."); Utah Code Ann. § 76-7-102(1)(b)(ii), (2)(a), (2)(b) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including "the relationship of parent and child by adoption.").

[206] Ala. Code § 13A-13-3(a)(1) (prohibiting an actor from marrying or engaging in sexual intercourse with "[h]is . . . descendant by blood or adoption."); Ark. Code Ann. § 5-26-202(a)(2), (a)(5) (prohibiting sexual conduct with a person that is the actor's "adopted child" or "adopted grandchild."); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and his grandchild" and "A female and her grandchild" and stating that the "relationships referred to herein include . . . relationships by adoption."); Kan. Stat. Ann. § 21-5604(b)(2) (aggravated incest statute prohibiting sexual conduct with a person who is 16 years of age or older but under 18 years of age and who is the actor's "adoptive" child or grandchild); Mo. Ann. Stat. § 568.020(1)(1) (prohibiting sexual conduct with a "descendant by blood or adoption."); S.D. Codified Laws §§ 22-22A-2, 22-22A-3, 25-1-6 (incest and aggravated incest statutes referencing "within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6" and declaring void marriages "between parents and children, ancestors and descendants of every degree . . . The relationships provided for in this section include such relationships that arise through adoption."); Tex. Penal Code Ann. § 25.02(a)(1) (prohibiting sexual conduct with "the actor's . . . descendant by blood or adoption.").

[207] Ala. Code § 13A-13-3(a)(1) (prohibiting an actor from marrying or engaging in sexual intercourse with "[h]is ancestor . . . by blood or adoption."); Mo. Ann. Stat. § 568.020(1)(1) (prohibiting sexual conduct with an "[a]ncestor . . . by blood or adoption."); S.D. Codified Laws §§ 22-22A-2, 22-22A-3, 25-1-6 (incest and aggravated incest statutes referencing "within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6" and declaring void marriages "between parents and children, ancestors and descendants of every degree . . . The relationships provided for in this section include such relationships that arise through adoption."); Tex. Penal Code Ann. § 25.02(a)(1) (prohibiting sexual conduct with "the actor's ancestor . . . by blood or adoption.").

[208] MPC § 230.2 (prohibiting sexual intercourse "with an ancestor" and stating that the "relationships referred to herein include . . . relationship of parent and child by adoption.").

[209] MPC § 230.2 (prohibiting sexual intercourse with a "descendant" and stating that the "relationships referred to herein include . . . relationship of parent and child by adoption.").

[210] MPC § 230.2 cmt. at 416.

[211] MPC § 230.2 cmt. at 416. In addition, the MPC commentary notes, "While there is of course no genetic case for inclusion of adoptive kinsmen, the focus of the offense upon protection of the nuclear family and emphatic societal definition of the kind of relationship expected in that context justifies the conclusion that adopted children should be treated the same as natural children."

this survey, 24[212] of the 27 reformed jurisdictions with incest statutes were considered because the prohibited relationships in three of the 27 reformed jurisdictions are unclear.[213] At least 16 of these 24 reformed jurisdictions prohibit a sexual act with a stepchild[214] and eight of these 15 jurisdictions specify that a stepchild cannot engage in sexual relations with a stepparent.[215] Three of these 15 jurisdictions specifically limit this prohibition to

[212] Ala. Code § 13A-13-3; Alaska Stat. Ann. § 11.41.450; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Del. Code Ann. tit. 11, § 766; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Kan. Stat. Ann. § 21-5604; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Mo. Ann. Stat. § 568.020; Minn. Stat. Ann. § 609.365; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010.

[213] These jurisdictions require reference to civil law to determine the prohibited relationships. Ariz. Rev. Stat. Ann. § 13-3608 ("Persons who are eighteen or more years of age and are within the degrees of consanguinity within which marriages are declared by law to be incestuous and void . . ."); Haw. Rev. Stat. Ann. § 707-741(1) ("A person commits the offense of incest if the person commits an act of sexual penetration with another who is within degrees of consanguinity or affinity within which marriage is prohibited."); Wis. Stat. Ann. § 944.06 ("Whoever marries or has nonmarital sexual intercourse . . . with a person he or she knows is a blood relative and such relative is in act related in a degree within which the marriage of the parties is prohibited by the law of this state.").

[214] Ala. Code Ann. § 13A-13-3(a)(3) ("His stepchild . . . while the marriage creating the relationship exists."); Ark. Code Ann. § 526-202(a)(2); Colo. Rev. Stat. Ann. §§ 18-6-301(1), 18-6-302(1)(a) (incest statute prohibiting sexual conduct with a stepchild that is 21 years of age or older and aggravated incest statute prohibiting sexual conduct with a "stepchild" and stating that for the purposes of the offense "child" means a person that is under 21 years of age, but both offenses stating that a stepchild is not included if legally married to the actor); Conn. Gen. Stat. Ann. §§ 53a-191(a), 46b-21 (prohibiting marrying a person the actor is related to "within any of the degrees of kindred specified in 46b-21" and stating "No person may marry such person's . . . stepchild."); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and his wife's child" and "A female and her husband's child."); 720 Ill. Comp. Stat. Ann. 5/11-11(1), (2)(iii) (prohibiting an actor from engaging in sexual penetration with another person when the actor is that other person's "[s]tepfather or stepmother, when the stepchild was 18 years of age or over when the act was committed."); Kan. Stat. Ann. § 21-5604(b)(2) (aggravated incest statute prohibiting sexual conduct with a person who is 16 years of age or older but under 18 years of age and who is the actor's stepchild); Ky. Rev. Stat. Ann. § 530.020(1) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "descendant" and including the "relationship of stepparent and stepchild."); Mo. Ann. Stat. § 568.020(1)(2) (prohibiting sexual conduct with a "stepchild, while the marriage creating that relationship exists."); Mont. Code Ann. § 45-5-507(1) (prohibiting sexual conduct with "any stepson or stepdaughter."); N.H. Rev. Stat. Ann. § 639:2(I) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "descendant" and stating that the "relationships referred to herein include . . . stepchildren."); S.D. Codified Laws § 22-22A-3 (aggravated incest statute prohibiting any person from engaging in sexual penetration with a person under 18 and is the "child of a spouse or former spouse."); Tenn. Code Ann. § 39-15-302(a)(1) (prohibiting sexual conduct with a stepchild); Tex. Penal Code Ann. § 25.02(a)(2) (prohibiting sexual conduct with "the actor's current or former stepchild."); Utah Code Ann. § 76-7-102(1)(B)(iii) (prohibiting sexual conduct between an actor and a "related person" and defining "related person" to include a "descendant" and including "the relationship of stepparent and stepchild while the marriage creating the relationship . . . exists."); Wash. Rev. Code Ann. § 9A.64.020(1)(a), (3)(a) (prohibiting sexual intercourse between an actor and his or her "descendant" and defining "descendant" to include stepchildren under eighteen years of age).

[215] Ala. Code Ann. § 13A-13-3(a)(3) ("His . . . stepparent, while the marriage creating the relationship exists."); Conn. Gen. Stat. Ann. §§ 53a-191(a), 46b-21 (prohibiting marrying a person the actor is related to "within any of the degrees of kindred specified in 46b-21" and stating "No person may marry such person's

conduct that occurs when the marriage creating the stepchild-stepparent relationship exists[216] and one limits the prohibition to any stepchildren under the age of 18 years.[217] Only one jurisdiction specifically includes any stepchild/stepparent.[218] The remaining jurisdictions do not explicitly require that the marriage creating the stepchild-stepparent relationship exist. However, it is possible that these statutes impose such a requirement given that two individuals are arguably not stepchild-stepparent if the marriage that gives rise to the relationship no longer exists. Case law in these jurisdictions was not surveyed. At least five of the 24 reformed jurisdictions prohibit a sexual act with a step-grandchild[219] and one of these jurisdictions prohibits a step-grandchild from engaging in a sexual act with a step-grandparent.[220]

The MPC incest statute does not include the stepchild-stepparent relationship because the statute prohibits marriage,[221] in addition to sexual intercourse and cohabitation, and the drafters deemed it "inappropriate" to bar marriages between affinal relationships, "particularly when felony penalties are at stake."[222] The MPC commentary notes that the

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. . . stepparent."); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and his father's wife" and "A female and her mother's husband."); Ky. Rev. Stat. Ann. § 530.020(1) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including the "relationship of stepparent and stepchild."); N.H. Rev. Stat. Ann. § 639:2(I) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and stating that the "relationships referred to herein include . . . stepchildren."); Tenn. Code Ann. § 39-15-302(a)(1) (prohibiting sexual conduct with a stepparent); Tex. Penal Code Ann. § 25.02(a)(2) (prohibiting sexual conduct with "the actor's current or former . . . stepparent."); Utah Code Ann. § 76-7-102(1)(B)(iii) (prohibiting sexual conduct between an actor and a "related person" and defining "related person" to include an "ancestor" and including "the relationship of stepparent and stepchild while the marriage creating the relationship . . . exists.").

[216] Ala. Code Ann. § 13A-13-3(a)(3) ("His stepchild . . . while the marriage creating the relationship exists."); Mo. Ann. Stat. § 568.020(1)(2) (prohibiting sexual conduct with a "stepchild, while the marriage creating that relationship exists."); Utah Code Ann. § 76-7-102(1)(B)(iii) (prohibiting sexual conduct between an actor and a "related person" and defining "related person" to include a "descendant" and including "the relationship of stepparent and stepchild while the marriage creating the relationship . . . exists.").

[217] S.D. Codified Laws § 22-22A-3 (aggravated incest statute prohibiting any person from engaging in sexual penetration with a person under 18 and is the "child of a spouse or former spouse.").

[218] Tex. Penal Code Ann. § 25.02(a)(2) (prohibiting sexual conduct with "the actor's current or former stepchild.").

[219] Ark. Code Ann. § 526-202(a)(5); Del. Code Ann. tit. 11, § 766(a), (b) (prohibiting sexual intercourse between "A male and the child of his wife's son or daughter" and "A female and the child of her husband's son or daughter."); 720 Ill. Comp. Stat. Ann. 5/11-11(1), (2)(iv) (prohibiting an actor from engaging in sexual penetration with another person when the actor is that other person's "step-grandparent, when the…step-grandchild was 18 years of age or over when the act was committed."); Kan. Stat. Ann. § 21-5604(b)(2) (aggravated incest statute prohibiting sexual conduct with a person who is 16 years of age or older but under 18 years of age and who is the actor's step-grandchild); Ky. Rev. Stat. Ann. § 530.020(1) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "descendant" and including the "relationship of step-grandparent and step-grandchild.").

[220] Ky. Rev. Stat. Ann. § 530.020(1) (prohibiting an actor from engaging in sexual conduct with a person that is the actor's "ancestor" and including the "relationship of step-grandparent and step-grandchild.").

[221] MPC § 230.2.

[222] MPC § 230.2 cmt. at 414 (stating that extending the MPC incest statute to "persons related by affinity would likewise constitute a permanent bar to their marriage. Because such a bar seems inappropriate in the case of affinal relation, particularly when felony penalties are at stake," the MPC statue "does not extend that far.").

MPC sex offenses address "the problem of sexual intercourse by imposition within the family unit."[223]

Fourth, there is limited support in the reformed jurisdictions for prohibiting sexual activity between adopted siblings. For this survey, 24[224] of the 27 reformed jurisdictions with incest statutes were considered because the prohibited relationships in three of the 27 reformed jurisdictions are unclear.[225] At least six of these 24 reformed jurisdictions prohibit sexual activity between adopted siblings.[226] The MPC incest statute does not include adopted siblings.[227]

Fifth, there is limited support in the reformed jurisdictions for requiring that the defendant be at least 16 years of age. Of the 27 reformed jurisdictions with incest statutes,[228] eight statutorily require a specific age for the defendant. Five jurisdictions

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[223] MPC § 230.2 cmt. at 414.

[224] Ala. Code § 13A-13-3; Alaska Stat. Ann. § 11.41.450; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Del. Code Ann. tit. 11, § 766; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Kan. Stat. Ann. § 21-5604; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Mo. Ann. Stat. § 568.020; Minn. Stat. Ann. § 609.365; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010.

[225] These jurisdictions require reference to civil law to determine the prohibited relationships. Ariz. Rev. Stat. Ann. § 13-3608 ("Persons who are eighteen or more years of age and are within the degrees of consanguinity within which marriages are declared by law to be incestuous and void . . ."); Haw. Rev. Stat. Ann. § 707-741(1) ("A person commits the offense of incest if the person commits an act of sexual penetration with another who is within degrees of consanguinity or affinity within which marriage is prohibited."); Wis. Stat. Ann. § 944.06 ("Whoever marries or has nonmarital sexual intercourse . . . with a person he or she knows is a blood relative and such relative is in act related in a degree within which the marriage of the parties is prohibited by the law of this state.").

[226] Ala. Code § 13A-13-3(a)(2) (prohibiting sexual conduct with "[h]is brother or sister . . . by adoption."); Del. Code Ann. tit. 11, § 766 (prohibiting sexual intercourse between "A male and his brother. A male and his sister. . . . . "A female and her brother. A female and her sister" and stating that the "relationships referred to herein include . . . relationships by adoption."); Kan. Stat. Ann. § 21-5604(b)(2) (aggravated incest statute prohibiting sexual conduct with a person who is 16 years of age or older but under 18 years of age and who is the actor's "adoptive . . . brother, sister, half-brother, half-sister."); S.D. Codified Laws §§ 22-22A-2, 22-22A-3, 25-1-6 (incest and aggravated incest statutes referencing "within the degrees of consanguinity within which marriages are, by the laws of this state, declared void pursuant to § 25-1-6" and declaring void marriages "between brothers and sisters . . . The relationships provided for in this section include such relationships that arise through adoption."); Tenn. Code Ann. § 39-15-302(a)(2) (prohibiting sexual conduct with a brother or sister "by adoption."); Tex. Penal Code Ann. § 25.02(a)(4) (prohibiting sexual conduct with "the actor's brother or sister . . . by adoption.").

[227] MPC § 230.2.

[228] Ala. Code § 13A-13-3; Alaska Stat. Ann. § 11.41.450; Ariz. Rev. Stat. Ann. § 13-3608; Ark. Code Ann. § 5-26-202; Colo. Rev. Stat. Ann. §§ 18-6-301, 18-6-302, 18-6-303; Conn. Gen. Stat. Ann. § 53a-191; Del. Code Ann. tit. 11, § 766; Haw. Rev. Stat. Ann. § 707-741; 720 Ill. Comp. Stat. Ann. 5/11-11; Ind. Code Ann. § 35-46-1-3; Kan. Stat. Ann. § 21-5604; Ky. Rev. Stat. Ann. § 530.020; Me. Rev. Stat. tit. 17-A, § 566; Mo. Ann. Stat. § 568.020; Minn. Stat. Ann. § 609.365; Mont. Code Ann. § 45-5-507; N.H. Rev. Stat. Ann. § 639:2; N.Y. Penal Law §§ 255.25, 255.26, 255.27; N.D. Cent. Code Ann. § 12.1-20-11; Or. Rev. Stat. Ann. § 163.525; 18 Pa. Stat. Ann. § 4302; S.D. Codified Laws §§ 22-22A-2, 22-22A-3; Tenn. Code Ann. § 39-15-302; Tex. Penal Code Ann. § 25.02; Utah Code Ann. § 76-7-102; Wash. Rev. Code Ann. § 9A.44.010; Wis. Stat. Ann. § 944.06.

require the defendant to be 18 years of age or older[229] and one jurisdiction requires the defendant to be 16 years of age or older.[230] An additional jurisdiction bars persons under the age of 18 years from liability for incest when the other party is 18 years or older and at least three years older at the time.[231] An additional jurisdiction requires that the defendant be 18 years of age or older for incest, but permits any person to be convicted of aggravated incest.[232]

The MPC incest statute does not have any age requirement for the defendant.[233]

RCC § 22E-1309. Civil Provisions on the Duty to Report a Sex Crime.
[Previously RCC § 22E-1309, Duty to Report a Sex Crime Involving a Person Under 16 Years and RCC § 22E-1310, Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age .]

[No national legal trends section.]

RCC § 22E-1310. Admission of Evidence in Sexual Assault and Related Cases.
[Previously § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases.]

[No national legal trends section.]

[229] Alaska Stat. Ann. § 11.41.450(a); Ariz. Rev. Stat. Ann. § 13-3608; Ind. Code Ann. § 35-46-1-3(a); Me. Rev. Stat. tit. 17-A, § 556(1); Mont. Code Ann. § 45-5-507(b) ("A person who is less than 18 years of age is not legally responsible or legally accountable for the offense of incest and is considered a victim of the offense of incest if the other person in the incestuous relationship is 4 or more years older than the victim.").
[230] Ark. Code Ann. § 5-26-202(a).
[231] N.H. Rev. Stat. Ann. § 639:2(I) ("A person is guilty of a class B felony if he or she marries or engages in sexual penetration as defined in RSA 632-A:1, V, or lives together with, under the representation of being married, a person 18 years or older whom he or she knows to be his or her ancestor, descendant, brother, or sister, of the whole or half blood, or an uncle, aunt, nephew, or niece; provided, however, that no person under the age of 18 shall be liable under this section if the other party is at least 3 years older at the time of the act. The relationships referred to herein include blood relationships without regard to legitimacy, stepchildren, and relationships of parent and child by adoption.").
[232] S.D. Codified Laws §§ 22-22A-2 (prohibiting persons 18 years of age or older from engaging in consensual sexual penetration), 22-22A-3 (prohibiting any person from engaging in sexual penetration with a person under 18 years of age who is the person's child or current or former stepchild or other specified relative).
[233] MPC § 230.2.

Chapter 14. Kidnapping and Criminal Restraint

RCC § 22E-1401. Kidnapping.

RCC § 22E-1401 (a). Aggravated Kidnapping.

Relation to National Legal Trends. *Codifying an aggravated kidnapping statute based on the status of the complainant, or whether the defendant used a dangerous or imitation weapon is not supported by national legal trends.*

First, the changes to law under the RCC's kidnapping statute, which are incorporated into the RCC's aggravated kidnapping statute are consistent with most criminal codes.[1]

Second, it is unclear if barring multiple penalty enhancements from applying to a single kidnapping conviction is consistent with most criminal codes. CCRC staff has not researched whether other jurisdictions allow more than one penalty enhancement to apply to a single kidnapping conviction.

Third, including penalty enhancements based on the status of the complainant as elements of aggravated kidnapping is not consistent with most criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[2] (hereinafter "reformed code jurisdictions"), none include heightened penalty gradations based on whether the complainant was a law enforcement officer, public safety employee, member of a citizen patrol, government official or employee, family member of a government official or employee, or transportation worker. Five reformed code jurisdictions include as an element of an aggravated form of kidnapping that the complainant was a child,[3] and one includes as an element that the complainant had a "profound intellectual disability."[4]

Fourth, including as an element of aggravated kidnapping that the defendant acted with the purpose of harming the complainant due to the complainant's status as a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee is not consistent with most criminal codes. As discussed above, none of the reformed code jurisdictions include as an element of aggravated kidnapping that the complainant was a law enforcement officer, public safety employee, participant in a citizen patrol, District official or employee, or family member of a District official or employee. However, CCRC staff has not researched whether other jurisdictions' separate penalty enhancement statutes that may authorize heightened penalties for kidnapping based on the status of the complainant.

Fifth, including as an element of aggravated kidnapping that the defendant used a dangerous weapon or imitation dangerous weapon to commit the offense is not consistent

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[1] *See* the Relation to National Legal Trends section in Commentary to the RCC's Kidnapping offense.

[2] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[3] Ariz. Rev. Stat. Ann. § 13-1304 (under 15 years of age); 720 Ill. Comp. Stat. Ann. 5/10-2 (under 13 years of age); Ind. Code Ann. § 35-42-3-2 (under 14 years of age); N.J. Stat. Ann. § 2C:13-1 (under 16 years of age); Ohio Rev. Code Ann. § 2905.01 (under 13 years of age, and defendant had a sexual motivation).

[4] 720 Ill. Comp. Stat. Ann. 5/10-2.

with most criminal codes. Of the 29 reformed code jurisdictions, four include as an element of an aggravated form of kidnapping that the defendant was armed with a dangerous weapon.[5] However, CCRC staff has not researched whether other jurisdictions' criminal codes include separate while-armed enhancement provisions that may authorize heightened penalties for kidnappings committed while armed.

RCC § 22E-1401 (b). Kidnapping.

Relation to National Legal Trends. *The above mentioned changes to current District law are supported by national legal trends.*

First, requiring that the defendant acted with one of the enumerated motives is consistent with the kidnapping statutes adopted by the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[6] (hereinafter "reformed code jurisdictions"). None of the 29 states' kidnapping statutes include a catchall provision similar to the District's statute criminalizing restraints "for ransom or reward or otherwise."[7] A large majority of reformed code jurisdictions' kidnapping statutes include intent to hold another for random or reward[8]; to use the complainant as a shield or hostage[9]; to facilitate the commission of any felony or flight thereafter[10]; or to inflict bodily injury upon the complainant, or to commit

[5] Ind. Code Ann. § 35-42-3-2; 720 Ill. Comp. Stat. Ann. 5/10-2 (dangerous weapon other than a firearm); Utah Code Ann. § 76-5-302; Tenn. Code Ann. § 39-13-305 ("accomplished with a deadly weapon or by displaying of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon").
[6] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[7] D.C. Code § 22-2001.
[8] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.
[9] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.
[10] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

a sexual offense.[11] Although no reformed code jurisdictions' kidnapping statutes include intent to cause any person to believe that the complainant will not be released without suffering significant bodily injury, a majority do include a comparable "intent to terrorize the complainant or another" as an element of kidnapping.[12] However, including intent to permanently deprive a parent, legal guardian, or other lawful custodian of custody of a minor; or to hold the person in a condition of involuntary servitude are not strongly supported by national criminal codes. Only a minority of reformed jurisdictions' kidnapping statutes include intent to intent to permanently deprive a parent of legal custody[13], or to hold a person in a condition of involuntary servitude.[14]

Second, requiring that interference must be "to a substantial degree" is supported by other criminal codes. A majority of reformed code jurisdictions' kidnapping statutes require that the defendant interfere with another person's freedom of movement to a substantial degree.[15]

Third, including a relative defense to kidnapping has mixed support from other reformed criminal codes. A minority of reformed code jurisdiction includes a relative defense to kidnapping or kidnapping-related offenses.[16] The RCC's definition of "relative" differs from most reformed jurisdictions that statutorily recognize a relative defense. A slight majority of these jurisdictions define "relative" to include any "ancestor."[17]

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[11] Ala. Code § 13A-6-43; Alaska Stat. Ann. § 11.41.300; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Me. Rev. Stat. tit. 17-A, § 301; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[12] Ala. Code § 13A-6-43; Ark. Code Ann. § 5-11-102; Ariz. Rev. Stat. Ann. § 13-1304; Conn. Gen. Stat. Ann. § 53a-92; Del. Code Ann. tit. 11, § 783A; Haw. Rev. Stat. Ann. § 707-720; Kan. Stat. Ann. § 21-5408; Ky. Rev. Stat. Ann. § 509.040; Minn. Stat. Ann. § 609.25; Mo. Ann. Stat. § 565.110; Mo. Ann. Stat. § 565.110; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; N.Y. Penal Law § 135.25; Ohio Rev. Code Ann. § 2905.01; Or. Rev. Stat. Ann. § 163.235; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code Ann. § 20.04; Utah Code Ann. § 76-5-302; Wash. Rev. Code Ann. § 9A.40.020.

[13] Colo. Rev. Stat. Ann. § 18-3-302; Del. Code Ann. tit. 11, § 783A; 720 Ill. Comp. Stat. Ann. 5/10-2; Ind. Code Ann. § 35-42-3-2; Ky. Rev. Stat. Ann. § 509.040; Mo. Ann. Stat. § 565.110; N.H. Rev. Stat. Ann. § 633:1; N.J. Stat. Ann. § 2C:13-1; Tenn. Code Ann. § 39-13-304; Utah Code Ann. § 76-5-302.

[14]Ariz. Rev. Stat. Ann. § 13-1304; Haw. Rev. Stat. Ann. § 707-720; Minn. Stat. Ann. § 609.25; Mont. Code Ann. § 45-5-303; N.D. Cent. Code Ann. § 12.1-18-01; Ohio Rev. Code Ann. § 2905.01; Utah Code Ann. § 76-5-302; Wis. Stat. Ann. § 940.31.

[15] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; Haw. Rev. Stat. Ann. § 707-700; Ky. Rev. Stat. Ann. § 509.010; Me. Rev. Stat. tit. 17-A, § 301; Mo. Ann. Stat. § 565.110, Mo. Ann. Stat. § 565.120, Mo. Ann. Stat. § 565.130; N.D. Cent. Code Ann. § 12.1-18-04; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2901; S.D. Codified Laws § 22-19-1, S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[16] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

[17] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ariz. Rev. Stat. Ann. § 13-1301; Or. Rev. Stat. Ann. § 163.215; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

Fourth, barring sentences for kidnapping if the interference with the other person's freedom of movement was incidental to the commission of another criminal offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[18] or case law[19] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense.

RCC § 22E-1402. Criminal Restraint.

Relation to National Legal Trends. *Codifying an aggravated criminal restraint offense is well supported by national criminal codes, however the use of complainant-specific and weapon-based aggravators is not well supported by national criminal codes.*

Codifying a more serious gradation of criminal restraint is the majority approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereinafter "reformed code jurisdictions"). Nearly all reformed code jurisdictions codify a separate criminal restraint type offense[20], and a slight majority of these recognize more than one grade of the criminal restraint offense.[21] The MPC also codifies more than one grade of criminal restraint. However, of the states that recognize more than one penalty grade, most have followed the MPC's lead and grade their analogous criminal restraint offenses based on whether the defendant placed the complainant at "risk of serious bodily injury."[22] Only one reformed code jurisdictions grade their criminal restraint offenses based on the status

[18] Ky. Rev. Stat. Ann. § 509.050

[19] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

[20] In other jurisdictions, the analogous offenses are often labeled as felonious restraint, unlawful restraint, false imprisonment, or unlawful imprisonment.

[21] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

[22] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ark. Code Ann. § 5-11-103, Ark. Code Ann. § 5-11-104; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; N.D. Cent. Code Ann. § 12.1-18-03; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05; N.Y. Penal Law § 135.10; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; Tex. Penal Code Ann. § 20.02.

of the complainant[23], and no reformed code jurisdictions grade criminal restraint based on whether the defendant was armed with a dangerous weapon. However, some state courts have held that using or being armed with a dangerous weapon can create a risk of serious bodily injury[24], which is a widely recognized grading factor.

Relation to National Legal Trends. *Changing current District law by including a criminal restraint is supported by national criminal codes.*

First, including a separate criminal restraint offense is consistent with the approach across the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[25] (hereinafter "reformed code jurisdictions"). The Model Penal Code, as well as twenty-seven of the twenty-nine reformed code jurisdictions include a separate criminal restraint offense that is subject to less severe penalties that kidnapping.[26]

Requiring that the restraint be without consent, or with consent obtained by causing bodily injury, threat to cause bodily injury, or deception has limited support amongst other states' criminal codes. A minority of reformed jurisdictions' analogous criminal restraint offenses explicitly require lack of consent, use of force, threats, or any means if the complainant is under the age of 16.[27] However, CCRC has staff has not comprehensively researched case law in other jurisdictions to determine whether courts have interpreted analogous criminal restraint offenses to require lack of consent, use of force, threat of force, deception, or any other means when the complainant is a minor.

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[23] Tex. Penal Code Ann. § 20.02.

[24] *E.g.*, *State v. Zubhuza*, 90 A.3d 614, 618 (N.H. 2014) ("In determining whether such a risk exists, the defendant's use or brandishing of a deadly weapon is a highly relevant consideration."); *Linville v. Com.*, No. 2011-SC-000109-MR, 2012 WL 2362489, at *6 (Ky. June 21, 2012) (holding that at least certain uses of dangerous weapons create risk of serious physical injury); *State v. Ciullo*, 59 A.3d 293, 301 (2013), *aff'd*, 314 Conn. 28, 100 A.3d 779 (Ct. App. 2014) (holding that pointing guns at complainants created a risk of substantial injury).

[25] *See* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[26] Ala. Code § 13A-6-41, Ala. Code § 13A-6-42; Ariz. Rev. Stat. Ann. § 13-1303; Ark. Code Ann. § 5-11-104, Ark. Code Ann. § 5-11-103; Colo. Rev. Stat. Ann. § 18-3-303; Conn. Gen. Stat. Ann. § 53a-95, Conn. Gen. Stat. Ann. § 53a-96; Del. Code Ann. tit. 11, § 782, Del. Code Ann. tit. 11, § 781; Haw. Rev. Stat. Ann. § 707-721, Haw. Rev. Stat. Ann. § 707-722; 720 Ill. Comp. Stat. Ann. 5/10-3, 720 Ill. Comp. Stat. Ann. 5/10-3.1; Ind. Code Ann. § 35-42-3-3; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.020, Ky. Rev. Stat. Ann. § 509.030; Me. Rev. Stat. tit. 17-A, § 302; Minn. Stat. Ann. § 609.255; Mo. Ann. Stat. § 565.130 (though labeled third degree kidnapping); Mont. Code Ann. § 45-5-301; N.H. Rev. Stat. Ann. § 633:2, N.H. Rev. Stat. Ann. § 633:3; N.J. Stat. Ann. § 2C:13-2, N.J. Stat. Ann. § 2C:13-3; N.Y. Penal Law § 135.05, N.Y. Penal Law § 135.10; N.D. Cent. Code Ann. § 12.1-18-02, N.D. Cent. Code Ann. § 12.1-18-03; Ohio Rev. Code Ann. § 2905.02, Ohio Rev. Code Ann. § 2905.03; 18 Pa. Stat. Ann. § 2902, 18 Pa. Stat. Ann. § 2903; S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.040; Wis. Stat. Ann. § 940.30.

[27] Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; 720 Ill. Comp. Stat. Ann. 5/10-1 (Illinois' kidnapping offense is analogous to the RCC's criminal restraint offense); Ky. Rev. Stat. Ann. § 509.010; N.D. Cent. Code Ann. § 12.1-18-04; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

Second, requiring that interference must be "to a substantial degree" is supported by other criminal codes. A majority of reformed code jurisdictions' analogous criminal restraint offenses require that the defendant interfere with another person's freedom of movement to a substantial degree.[28]

Third, recognizing a defense if the defendant was a relative of the complainant is not consistent with most criminal codes. A minority of reformed code jurisdiction includes a relative defense to kidnapping or criminal restraint-type offenses.[29] The RCC's definition of "relative" differs from most reformed jurisdictions that statutorily recognize a relative defense. A slight majority of these jurisdictions define "relative" to include any "ancestor."[30]

Fourth, barring sentences for criminal restraint if the interference with the other person's freedom of movement was incidental to the commission of another criminal offense is consistent with reformed criminal codes. A majority of reformed code jurisdictions either by statute[31] or case law[32] bar sentences for both kidnapping and a separate offense if the kidnapping was incidental to another offense. However, CCRC staff has not researched whether the same rule specifically applies to sentencing for the lesser criminal restraint-type offenses that are incidental to other offenses.

RCC § 22E-1403. Blackmail.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

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[28] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ark. Code Ann. § 5-11-101; Ariz. Rev. Stat. Ann. § 13-1301; Conn. Gen. Stat. Ann. § 53a-91; Del. Code Ann. tit. 11, § 786; Haw. Rev. Stat. Ann. § 707-700; Ind. Code Ann. § 35-42-3-1; Kan. Stat. Ann. § 21-5411; Ky. Rev. Stat. Ann. § 509.010; Me. Rev. Stat. tit. 17-A, § 301; Mo. Ann. Stat. § 565.110, Mo. Ann. Stat. § 565.120, Mo. Ann. Stat. § 565.130; Mont. Code Ann. § 45-5-301; N.D. Cent. Code Ann. § 12.1-18-04; N.J. Stat. Ann. § 2C:13-3; Or. Rev. Stat. Ann. § 163.225; S.D. Codified Laws § 22-19-1, S.D. Codified Laws § 22-19-17; Tenn. Code Ann. § 39-13-302; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[29] Alaska Stat. Ann. § 11.41.300; Ala. Code § 13A-6-44; Ariz. Rev. Stat. Ann. § 13-1303; N.Y. Penal Law § 135.15; Or. Rev. Stat. Ann. § 163.225; 18 Pa. Stat. Ann. § 2902; Tex. Penal Code Ann. § 20.02; Wash. Rev. Code Ann. § 9A.40.030.

[30] Alaska Stat. Ann. § 11.41.370; Ala. Code § 13A-6-40; Ariz. Rev. Stat. Ann. § 13-1301; Or. Rev. Stat. Ann. § 163.215; Tex. Penal Code Ann. § 20.01; Wash. Rev. Code Ann. § 9A.40.010.

[31] Ky. Rev. Stat. Ann. § 509.050

[32] *Hurd v. State*, 22 P.3d 12, 18 (Alaska Ct. App. 2001); *Summerlin v. State*, 756 S.W.2d 908, 910 (Ark. 1988); *Apodaca v. People*, 712 P.2d 467, 475 (Colo. 1985); *Weber v. State*, 547 A.2d 948, 958 (Del. 1988); *State v. Deguair*, 384 P.3d 893, 895 (Haw. 2016); *People v. Smith*, 414 N.E.2d 1117, 1121 (Ill. App. Ct. 1980); *State v. Buggs*, 547 P.2d 720, 730–31 (Kan. 1976); *State v. Taylor*, 661 A.2d 665, 667–68 (Me. 1995); *State v. Welch*, 675 N.W.2d 615, 620 (Minn. 2004); *State v. Williams*, 860 S.W.2d 364, 366 (Mo. Ct. App. 1993); *State v. Casanova*, 63 A.3d 169, 172 (N.H. 2013); *State v. Masino*, 466 A.2d 955, 960 (N.J. 1983); *People v. Miles*, 245 N.E.2d 688, 695 (N.Y. 1969); *State v. Logan*, 397 N.E.2d 1345, 1351–52 (Ohio 1979); *State v. Garcia*, 605 P.2d 671, 676–77 (Or. 1980); *Com. v. Hook*, 512 A.2d 718, 720 (Pa. 1986); *State v. Lykken*, 484 N.W.2d 869, 876 (S.D. 1992); *State v. White*, 362 S.W.3d 559, 581 (Tenn. 2012).

Chapter 15. Abuse and Neglect of Children and Vulnerable Persons

RCC § 22E-1501. Criminal Abuse of a Minor. [Previously RCC § 22E-1501. Child Abuse.]

Relation to National Legal Trends. *The revised child abuse offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, limiting the revised child abuse statute to conduct that actually harms a child is well-supported by criminal codes in reformed jurisdictions. Twenty of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[1] ("reformed jurisdictions") have specific statutes for child abuse.[2] Fifteen of these jurisdictions limit child abuse crimes to actual harm.[3] An additional eight reformed jurisdictions include gradations in their general assault statutes for causing injury to children,[4] and in so doing, limit the offense to actually harming a child.

The Model Penal Code does not have a child abuse offense or a gradation in its assault statute for injuring a child.[5]

Second, partially grading the revised child abuse offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury" reflects trends in the criminal codes of reformed jurisdictions. DCCA case law is clear that the current child

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[1] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[2] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[3] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Minn. Stat. Ann. §§ 609.376, 609.377; Mont. Code Ann. § 45-5-212; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[4] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[5] MPC § 211.1.

cruelty statute includes mental harm,[6] but the current statute does not grade based upon the defendant's culpable mental state as to that harm.[7] Legal trends in the reformed jurisdictions strongly support grading the revised child abuse offense based, in part, on the culpable mental state. Twenty of the 29 reformed jurisdictions[8] have specific child abuse statutes.[9] Six of these 20 states grade the offense based on the defendant's culpable mental state.[10] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and purposely.[11] Only three of the 20 reformed jurisdictions with specific child abuse statutes include recklessly[12] or negligence[13] without grading the offense based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state by statute.[14]

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[6] 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).

[7] Both first degree child cruelty and second degree child cruelty require "intentionally, knowingly, or recklessly." D.C. Code § 22-1101(a), (b), (c).

[8] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[9] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[10] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[11] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[12] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[13] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

[14] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"), 9:6-3.

Notably, the six reformed jurisdictions that grade their child abuse statutes based upon the culpable mental state[15] have far lower penalties for recklessly causing injury to a child than the fifteen year maximum punishment in the District's current first degree child cruelty statute[16] or the ten year maximum punishment in the District's current second degree child cruelty statute.[17] Half of these states make recklessly injuring a child a misdemeanor,[18] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[19] In the remaining three states, the maximum possible penalties are one-and-a-half years,[20] two years,[21] or three-and-a-half years.[22]

In the three reformed jurisdictions that include recklessly or negligently culpable mental states in their child abuse statutes without grading the offense based on the culpable mental state, the penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[23] The remaining two jurisdictions only permit a reckless[24] or negligent[25] culpable mental state to be the basis for liability if a weapon is used. Despite the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[26]

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[15] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[16] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child."

[17] D.C. Code § 22-1101(b), (c)(2).

[18] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[19] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[20] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[21] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[22] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

[23] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[24] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[25] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[26] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or

A review of the 20 reformed jurisdictions with specific child abuse statutes revealed that at least five states specifically prohibit mental harm[27] and a sixth state makes causing a child mental harm a separate offense.[28] Two of these states grade the offense based on the culpable mental state[29] and two[30] require a higher culpable mental state than "recklessly" in the current child cruelty statute.[31] One of these states has a culpable mental state similar to recklessness[32] and the remaining state's statute does not specify a culpable mental state.[33]

The Model Penal Code does not have a child abuse offense.

Third, criminal codes in reformed jurisdictions support limiting child abuse to individuals of a certain age or relationship to the child, as opposed to the District's current child cruelty statute, which applies to any individual.[34] Twenty of the 29 reformed jurisdictions[35] have specific child abuse statutes.[36] Seven of these states limit their child abuse statutes to individuals that have a special relationship to the child, like a parent or

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other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[27] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5)(1); N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22(1); Tex. Penal Code Ann. § 22.04(a)(2); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).
Additional states may include mental harm through case law, especially in statutes like D.C.'s current child cruelty statute that use old, undefined terms such as "tortures" and "maltreats." *See, e.g.*, Ala. Code § 26-15-3 ("torture, willfully abuse, cruelly beat, or otherwise willfully maltreat."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("maltreats, tortures, overworks or cruelly or unlawfully punishes."); S.D. Codified Laws § 26-10-1 ("abuses, exposes, tortures, torments, or cruelly punishes.").

[28] Wis. Stat. Ann. § 948.04.

[29] Tex. Penal Code Ann. § 22.04(a)(2), (e); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).

[30] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5) (requiring a culpable mental state of "knowingly" in both gradations of the offense); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully.").

[31] D.C. Code § 22-1101.

[32] Wis. Stat. Ann. § 948.04(1) ("conduct which demonstrates substantial disregard for the mental well-being of the child.").

[33] This state does not have a culpable mental state codified in its child abuse statute, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"); 9:6-3.

[34] D.C. Code § 22-1101.

[35] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[36] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

guardian.[37] Two reformed jurisdictions limit liability to persons 18 years of age or older,[38] with one jurisdiction also requiring that the child be "under 14 years of age"[39] and the other jurisdiction also requiring that the child be "under the age of thirteen."[40] An additional eight reformed jurisdictions include gradations for assaulting children in their general assault statutes.[41]Six of these jurisdictions limit liability to persons 18 years of age or older,[42] and several require an age difference between the defendant and the child.[43]

The Model Penal Code does not have a child abuse offense.

Fourth, criminal codes of reformed jurisdictions provide mixed support for the revised offense to include a gradation requiring a culpable mental state to match the scope of the current[44] and revised[45] aggravated assault statutes, as well as the revised abuse of a

[37] Ala. Code §§ 26-15-2(4), 26-15-3, 26-15-3.1 (requiring that the defendant is a "responsible person" and defining "responsible person" as [a] child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("any person having the custody and control of any child under the age of nineteen years."); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 503.120(1) (requiring having "actual custody."); Minn. Stat. Ann. § 609.377(1) ("parent, legal guardian, or caretaker."); N.J. Stat. Ann. §§ 9:6-1; 9:6-3 (requiring "any parent, guardian, or person having the care, custody or control of any child."); N.D. Cent. Code Ann. § 14-09-22(1) ("a parent, adult family or household member, guardian, or other custodian of any child."); Or. Rev. Stat. Ann. § 163.205(b) ("in violation of a legal duty to provide care for a dependent person . . . or having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person.").

[38] Mont. Code Ann. § 45-5-212(1) ("offender is 18 years of age or older."); Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1) ("person eighteen years of age or older.").

[39] Mont. Code Ann. § 45-5-212(1).

[40] Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1).

[41] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[42] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3) (requiring that the defendant be "18 years of age or older."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more"); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (requiring that the defendant is "18 years of age or older"), 2702(a)(8), (a)(9) (requiring that the defendant be "18 years of age or older" for two gradations of aggravated assault).

[43] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i) ("while being 18 years of age or older, causes physical injury to a child under 12 years of age"), (a)(3) ("while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 12 years of age."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age" and the child be "under the age of 13 years."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age" and the child to be "less than fourteen (14) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age" and the child be "less than 6 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more" and the child be either "less than eleven years" or "less than seven years."); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (making it a misdemeanor of the first degree for a person 18 years of age or older to assault a child under 12 years of age), 2702(a)(8), (a)(9) (requiring that the defendant be 18 years of age or older for two gradations of aggravated assault and the child to be either "less than six years of age" or "less than 13 years of age.").

[44] D.C. Code § 22-404.01(a)(2).

[45] RCC § 22E-1202.

vulnerable adult or elderly person statute. Twenty of the reformed jurisdictions have specific child abuse statutes.[46] None of these states have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life," as in the revised child abuse statute. However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[47]

There is widespread support in the reformed jurisdictions, however, for including a culpable mental state higher than "recklessly" in first degree child abuse, particularly given the District's penalties. For harms inflicted with only a reckless culpable mental state, the District's current first degree child cruelty offense is the most severe in reformed jurisdictions. It has a low culpable mental state of "recklessly," requires only "bodily injury," and has a maximum term of imprisonment of 15 years.[48] Six of the 20 reformed jurisdictions with specific child abuse statutes[49] grade the offense based on the defendant's culpable mental state.[50] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and purposely.[51] Only three of the 20 reformed jurisdictions include recklessly[52] or negligence[53] without grading the offense

[46] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[47] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law § 120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

[48] D.C. Code § 22-1101(a), (c)(1).

[49] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[50] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[51] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[52] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[53] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state.[54]

The six reformed jurisdictions that grade their child abuse statutes based upon a culpable mental state[55] have far lower penalties for recklessly causing injury to a child the fifteen year maximum punishment in the District's current first degree child cruelty statute[56] or the ten year maximum punishment in the District's current second degree child cruelty statute.[57] Half of these states make recklessly injuring a child a misdemeanor,[58] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[59] In the remaining three states, the maximum possible penalties are one-and-a-half years,[60] two years,[61] or three-and-a-half years.[62]

In the three reformed jurisdictions that include recklessly or negligently in their child abuse statutes without grading the offense based on the culpable mental state, the penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[63] The remaining two states only permit a reckless[64] or negligent[65] culpable mental state to be the basis for liability if a weapon is used. Despite

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[54] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1, 9:6-3.

[55] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[56] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child.".

[57] D.C. Code § 22-1101(a), (c)(1).

[58] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[59] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[60] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[61] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[62] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

[63] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[64] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[65] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[66]

The Model Penal Code does not have a child abuse offense.

Fifth, the criminal codes in reformed jurisdictions provide general support for not further enhancing a crime limited to children because the crime involved a child. At least two of the reformed jurisdictions have general penalty enhancements for crimes against children.[67] One of these two jurisdictions does not have a separate child abuse statute or enhanced gradations for assaulting a child, but the other jurisdiction enhances gradations in its assault statute based upon the age of complaining witness.[68] Several reformed jurisdictions include the age of the victim as an aggravating factor the court may or shall consider at sentencing,[69] but do not change the statutory maximum for the offense. One of these jurisdictions specifically prohibits considering the age of the victim if it is already an element of the offense.[70]

The Model Penal Code does not have a general penalty enhancement for crimes against children.

Sixth, the criminal codes in reformed jurisdictions provide general support for not including in the child abuse offense a penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and not grading the offense by the use of a weapon. Only four[71] of the 20 reformed jurisdictions with specific

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[66] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[67] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-660.2 (codifying a mandatory minimum with the possibility of parole, the length of which varies with the class of offense, if "(a) The person, in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon another person who is . . . (iii) Eight years of age or younger; and (b) Such disability is known or reasonably should be known to the defendant."); N.H. Rev. Stat. Ann. § 651:6 ("A convicted person may be sentenced [to an extended term of imprisonment, the length of which varies with the class of offense] if the jury also finds beyond a reasonable doubt that such person . . . [h]as committed or attempted to commit any [specified crimes against persons] against a person under 13 years of age.").

[68] N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(d) (gradations in assault statutes that require causing either "serious bodily injury" or "bodily injury" to a "person under 13 years of age.")

[69] *See, e.g.*, Alaska Stat. Ann. § 12.55.155(c)(5) ("The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125 . . .the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to . . . extreme youth."); Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

[70] Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

[71] Del. Code Ann. tit. 11, § 1103A(a)(3) ("intentionally or recklessly causes physical injury to a child by means of a deadly weapon or dangerous instrument."); Mont. Code Ann. §§ 45-5-212(1), 45-5-201(1)(b)

child abuse statutes[72] have a gradation for weapons. Two of these states penalize the weapon gradation of the child abuse offense more severely than the equivalent weapon gradation in the general assault statute.[73] The remaining two states either punish the weapons gradation of the child abuse offense the same[74] or less seriously[75] than the equivalent weapon gradation in the general assault statute.

The Model Penal Code does not have a child abuse offense.

RCC § 22E-1502. Criminal Neglect of a Minor.
[Previously RCC § 22E-1502. Child Neglect.]

Relation to National Legal Trends. *The revised child neglect offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First criminal codes in reformed jurisdictions support criminalizing child abandonment separately from child abuse, although only a couple jurisdictions combine

(offense of assault on a minor prohibiting, in part, committing an assault under § 45-5-201 and defining assault to include "negligently causes bodily injury to another with a weapon."); Tenn. Code Ann. §§ 39-15-401, 39-15-402(a)(2) (offense of aggravated child abuse enhancing requiring "a deadly weapon [or] dangerous instrumentality . . . is used to accomplish the act of abuse, neglect, or endangerment."); Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1) (including in the three degrees of child assault committing first degree assault, second degree assault, and third degree assault, respectively, each of which has a gradation for assault with or use of a weapon).

[72] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[73] *Compare* Mont. Code Ann. § 45-5-212(1), (2)(a) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon) *with* § 45-5-2101(1)(b) (making it an offense with six month maximum term of imprisonment to "negligently cause[] bodily injury to another with a weapon."). *Compare* Tenn. Code Ann. §§ 39-15-401(a), 39-15-402(a)(2), (b) (making it a class B felony to knowingly inflict "injury" to a child with a "deadly weapon" or "dangerous instrumentality") *with* Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (e)(1)(A)(ii) (making it a Class C felony to knowingly or intentionally commit assault that "involved the use or display of a deadly weapon.").

[74] In Washington, the three degrees of child assault each include committing first degree assault, second degree assault, and third degree assault, respectively. Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1). The three degrees of child assault have the same penalties as the assault offenses they incorporate and the assault offenses have gradations for weapons. *Compare* Wash. Rev. Code Ann. §§ 9A.36.120(1)(a)(2), 9A.36.130(1)(a), (2), 9A.36.140(1), (2) *with* Wash Rev. Code Ann. §§ 9A.36.011(1)(a), (2), 9A.36.021(c), (2)(a), 9A.36.031(d), (2).

[75] *Compare* Del. Code Ann. tit. 11, § 1103A(a)(3) (second degree child abuse statute making it a class G felony to "intentionally or recklessly cause[] physical injury to a child by means of a deadly weapon or dangerous instrument.") *with* § 612(a)(2), (d) (general assault statute making it a class D felony to "recklessly or intentionally cause[] physical injury to another person by means of a deadly weapon or a dangerous instrument.").

such an offense with a child neglect statute. At least 19 of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[76] ("reformed jurisdictions") have separate statutes for abandoning a child, and do not include abandonment as part of child cruelty.[77] An additional two reformed jurisdictions include abandoning a child in their neglect offense,[78] like the revised criminal child neglect statute does. Only one reformed jurisdiction includes abandoning a child in the same statute as child abuse,[79] like the District's current child cruelty statute.[80]

The MPC does not have a child abandonment offense, nor does it include child abandonment in its offense for endangering the welfare of children.[81]

Second, criminal codes in reformed jurisdictions provide mixed support for integrating an offense of nonsupport of a child under 18 in a general child neglect statute. At least 27 of the 29 reformed jurisdictions have separate statutes criminalizing nonsupport of a child, ranging in breadth from failing to provide food, clothing, medical care, and other similar items, to failing to provide monetary child support.[82] At least nine of the 29 reformed jurisdictions include such failure to support provisions in their child abuse or neglect statutes,[83] like the revised criminal child neglect statute does. However, there is strong support in reformed jurisdictions for making nonsupport crimes applicable to persons under 18 years of age, the limit in the revised statute. Many of the separate nonsupport statutes do not specify the age of the child, but in those statutes that do, a

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[76] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[77] Ala. Code § 13A-3-5; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53a-23; Del. Code Ann. tit. 11, § 1101; Haw. Rev. Stat. Ann. § 709-902; 720 Ill. Comp. Stat. Ann. 5/12C-10; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. § 530.040; Me. Rev. Stat. tit. 17-A, § 533; Mo. Ann. Stat. §§ 568.030, 568.032; N.J. Stat. Ann. § 9:6-1; N.Y. Penal Law § 260.00; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Stat. Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.535; S.D. Codified Laws § 25-7-15; Wash. Rev. Code Ann. §§ 9A.42.060, 9A.42.070, 9A.42.080, 9A.42.090; Wis. Stat. Ann. § 948.20; Tex. Penal Code Ann. § 22.041.

[78] Ind. Code Ann. § 35-46-1-4(a)(2); N.J. Stat. Ann. § 9:6-1.

[79] Utah Code Ann. § 76-5-109(4).

[80] D.C. Code § 22-1101(b)(2).

[81] MPC § 230.4.

[82] Reformed jurisdictions may have separate nonsupport statutes in addition to similar provisions in their child abuse and neglect laws. For this limited survey, only the separate statutes were counted. Ala. Code § 13A-13-4; Alaska Stat. Ann. § 11.51.120; Ark. Code Ann. § 5-26-401; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53-304; Del. Code Ann. tit. 11, § 1113; Haw. Rev. Stat. Ann. § 709-903; 750 Ill. Comp. Stat. Ann. 16/15; Ind. Code Ann. § 35-46-1-5; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. §§ 530.050; Me. Rev. Stat. tit. 17-A, § 552; Mo. Ann. Stat. § 568.040; Mont. Code Ann. § 45-5-621; N.H. Rev. Stat. Ann. § 639:4; N.J. Stat. Ann. § 2C:24-5; N.Y. Penal Law §§ 260.05, 260.06; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Code Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.555; 23 Pa. Stat. Ann. § 4354; S.D. Codified Laws § 25-7-16; Tenn. Code Ann. § 39-15-101; Tex. Penal Code Ann. § 25.05; Utah Code Ann. § 76-7-201; Wash. Rev. Code Ann. § 26.20.035; Wis. Stat. Ann. § 948.22.

[83] These jurisdictions may also have a separate nonsupport offense in their civil laws. Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

majority covers children less than 18 years of age or 19 years of age.[84] Five of the reformed jurisdictions that include failure to support in their child abuse or neglect statutes apply to children under the age of 18 years.[85]

The MPC has a separate offense for "persistently fail[ing] to support a child,"[86] but it has the same penalty, a misdemeanor, as the MPC's endangering welfare of children offense.[87] The MPC's persistent nonsupport offense does not specify the required age of the child.

Third, criminal codes in reformed jurisdictions support limiting child neglect to conduct that does not actually harm a child, as opposed to the current child cruelty statute, which prohibits both a risk of harm and actual harm in the same gradation.[88] Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[89] Most of these

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[84] Ala. Code § 13A-13-4(a) ("less than 19 years of age."); Ark. Code Ann. § 5-26-401(a)(2), (a)(3) ("[l]egitimate child who is less than eighteen (18) years or age" or "[i]llegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding."); Colo. Rev. Stat. Ann. § 14-6-101 ("children under eighteen years of age."); Conn. Gen. Stat. Ann. § 53-304 ("child under the age of eighteen."); Del. Code Ann. tit. 11, § 1113(a), (k)(2) (requiring "minor child" and defining "minor child" as "any child, natural, or adopted, whether born in or out of wedlock, under 18 years of age, or over 18 years of age but not yet 19 years of age if such child is a student in high school and is likely to graduate."); Ky. Rev. Stat. Ann. §§ 530.050(1)(a), 500.080 (requiring "minor" and defining "minor" as "any person who has not reached the age of majority as defined in KRS 2.015 [for purposes of the nonsupport statute, 18 years]."); 750 Ill. Comp. Stat. Ann. 16/15(a)(1), (f), 5/505(a) ("requiring "child" and defining "child" as "any child under age 18 and any child age 19 or younger who is still attending high school."); Kan. Stat. Ann. § 21-5606(c) ("a child under the age of 18 years and includes an adopted child or a child born out of wedlock whose parentage has been judicially determined or has been acknowledged in writing by the person to be charged with the support of such child."); Or. Rev. Stat. Ann. § 163.555(1) ("child under 18 years of age."); Tex. Penal Code Ann. § 25.05(a) ("child younger than 18 years of age."); Utah Code Ann. § 76-7-201(1) ("child, or children under the age of 18 years.").

[85] These jurisdictions may also have a separate nonsupport offense in their civil laws. Ind. Code Ann. §§ 35-46-1-4(a)(3), 35-46-1-1(child endangerment and neglect offense requiring that the complaining witness be a "dependent" and defining "dependent," in part, as "an unemancipated person who is under eighteen (18) years of age."); Minn. Stat. Ann. §§ 609.376(2), 609. 378(a)(1) (child endangerment or neglect offense requiring that the complaining witness be a "child" and defining "child" as "any person under the age of 18 years."); Mo. Ann. Stat. § 568.060(1)(4), (2)(1) (neglect offense defining "neglect," in part, as a failure to provide to a "child under the age of eighteen years."); Wash. Rev. Code Ann. §§ 9A.42.010(3), 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037 (defining "child" as "a person under eighteen years of age."); Wis. Stat. Ann. §§ 948.21, 948.01(1) (defining "child" as a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the age of 17 years.").

[86] MPC § 230.5.

[87] MPC § 230.4.

[88] D.C. Code § 22-1101(b), (c)(2) (second degree child cruelty prohibiting both "maltreats" and "engages in conduct which creates a grave risk of bodily harm.").

[89] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

jurisdictions, 13, criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse.[90] Nine of the 29 reformed jurisdictions have failure to provide provisions or offenses[91] similar to third degree of the revised criminal child neglect statute (subsection (c)(1)(A)). All but three[92] of these states codify their failing to provide offenses separately from child or abuse.

The MPC does not have a child abuse offense, but does limit its offense for endangering the welfare of a child to "knowingly enander[ing] the child's welfare by violating a duty of care, protection, or support."[93]

Fourth, criminal codes in reformed jurisdictions generally do not support grading child neglect on a risk of "serious bodily injury or death" (subsection (a)(1)), "significant bodily injury" (subsection (b)(1)(A)), "or "serious mental injury" (subsection (a)(1)(B)). Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[94] Thirteen of these jurisdictions criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse. [95] Six of these jurisdictions do not grade their child endangerment offense and limit the offense to one type of risk creation.[96]

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[90] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[91] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[92] Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1.

[93] MPC § 230.4.

[94] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

[95] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[96] Conn. Gen. Stat. Ann. § 53-21(a)(1), (A), (making it a class C felony to "willfully or unlawfully cause[] or permit[] any child under the age of sixteen years to be placed in such a situation that the life or limb of such

In the remaining seven states that do grade their child endangerment offenses, only two states grade child endangerment based on the type of risk, but they both have gradations for a risk of death or serious physical injury.[97] The other five states grade the offense based on whether actual harm resulted and the type of that harm, including death or serious bodily injury.[98]

None of these 13 jurisdictions grade their child endangerment offenses based on a risk of intermediate bodily injury such as "significant bodily injury" in the revised child neglect statute or "serious mental injury." None of these 13 jurisdictions grade their child endangerment offenses based on a risk of serious mental injury. However, four of these jurisdictions specifically include endangering a child's mental welfare in the scope of the endangerment offense.[99]

The MPC offense for endangering the welfare of a child is a misdemeanor and requires "knowingly endangers the child's welfare by violating a duty of care, protection, or support."[100]

Fifth, criminal codes in the reformed jurisdictions generally support limiting liability for their neglect statutes to individuals that "know" they have a "duty of care" to

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child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be injured."); Kan. Stat. Ann. § 21-5601(a), (b) (two gradations of endangering a child depending on whether the "child's life, body or health" "may" be endangered or "is" endangered); Me. Rev. Stat. tit. 17-A, § 554(C) (making it a Class D crime to "otherwise recklessly endanger[] the health, safety or welfare of the child by violating a duty of care or protection."); Mont. Code Ann. § 45-5-622(1), (5) (making the general endangering the welfare of a child offense punishable by a maximum term of imprisonment of six months); N.H. Rev. Stat. Ann. § 639:3(I), (V) (making it a misdemeanor to "endanger[] the welfare of a child under 18 years of age . . . by violating a duty of care, protection or support he owes to such child."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[97] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); 18 Pa. Stat. Ann. § 4304(a)(1), (b)(iii) (grading the offense, in part, based on whether there was a "substantial risk of death or serious bodily injury.").

[98] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death, "serious bodily injury," "any injury other than serious bodily injury," or no death or injury results); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b), (b)(1), (b)(2), (b)(4) (grading endangering the welfare of a child based on whether death or "serious physical injury" resulted, and having a gradation for "all other cases."); 720 Ill. Comp. Stat. Ann. 5/12-C(a)1), (a)(2), (d) (grading the offense of endangering the life or health of a child based, in part, on whether the violation "is a proximate cause of the death of the child."); Ind. Code Ann. § 35-46-1-4(a)(1), (b)(1)A), (b)(2), (b)(3) (grading the offense of neglect of a dependent, in part, based on whether "bodily injury," "serious bodily injury," or death resulted); Minn. Stat. Ann. § 609.378(b)(1) (grading the offense of based on whether "substantial harm to the child's physical, mental, or emotional health" resulted).

[99] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); Del. Code Ann. tit. 11 § 1102(a)(1)(a) ("acts in a manner likely to be injurious to the physical, mental or moral welfare of the child."); Minn. Stat. Ann. § 609.378(b)(1) ("causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[100] MPC § 230.4.

the child. Ten of the eighteen reformed jurisdictions with child endangerment offenses[101] have a "duty of care" element or similar requirement.[102] However, due to the varying rules of construction amongst states, it is difficult to determine what culpable mental state, if any, applies to these elements. The nine reformed jurisdictions with failure to provide provisions or offenses all require a "duty of care" element or similar requirement,[103] but it is similarly difficult to determine what culpable mental state, if any, applies to those elements.

The MPC's endangering the welfare of children offense specifies a "knowingly" culpable mental state, but it is unclear if it applies to the fact that the accused has a "duty of care, protection or support."[104] The MPC's persistent nonsupport offense, however, requires that the accused "know[] he is legally obliged to provide to a . . . child."[105]

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person. [Previously RCC § 22E-1503. Abuse of a Vulnerable adult or Elderly Person.]

Relation to National Legal Trends. *The revised abuse of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support grading abuse of vulnerable adults and elderly persons statutes according to different degrees of harm, although only one does so with a gradation like "significant bodily injury." Sixteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[106] ("reformed jurisdictions") have specific abuse of a vulnerable adult or elderly person statutes.[107] Only one of these jurisdictions

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[101] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any.

[102] Del. Code Ann. tit. 11 § 1102(a)(1)(a); Haw. Rev. Stat. Ann. § 709-903.5(2); Ind. Code Ann. § 35-46-1-4(a)(1); Ky. Rev. Stat. Ann. §§ 508.100(1)(b), 508.110(1)(b), 508.120(1)(b); Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b); Mont. Code Ann. § 45-5-628(1); N.H. Rev. Stat. Ann. § 639:3(I); Ohio Rev. Code Ann. § 2919.22(A); 18 Pa. Stat. Ann. § 4304(a)(1).

[103] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. §14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[104] MPC § 230.4 ("knowingly endangers the child's welfare by violating a duty of care, protection or support."). The MPC's general rules of statutory construction, however, may supply a culpable mental state.

[105] MPC § 230.5.

[106] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[107] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-

incorporates an intermediate level of bodily harm into the offense similar to "significant bodily injury" in the revised abuse of a vulnerable adult or elderly person statute.[108] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes differentiate low and severe levels of injury in their gradations.[109]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Second, criminal codes in reformed jurisdictions support removal of "permanent bodily harm or death" of the vulnerable adult or elderly person as a separate basis for liability. Of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes,[110] only three grade base on whether death resulted.[111] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes have clearly differentiated levels of injury.[112]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[108] Minn. Stat. Ann. § 609.233(3)(2).

[109] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

[110] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[111] Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a); Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2); Wis. Stat. Ann. § 940.258.

[112] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

Third, criminal codes in reformed jurisdictions provide mixed support for using mental injury as a basis for liability and grading on whether such conduct is done "purposely" or "recklessly." Sixteen of the 29 reformed jurisdictions have specific abuse of a vulnerable adult or elderly person statutes.[113] At least eight of the 16 reformed jurisdictions prohibit results like mental distress as in the current abuse of a vulnerable adult or elderly person statute, or behaviors that potentially could involve mental distress, such as harassment.[114] Four of these eight states include "recklessly" as a culpable mental state,[115] while the remaining four states are limited to culpable mental states of

[113] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[114] See, e.g., Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish."); Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117; 71-6-119 (prohibiting "abuse or neglect" and defining "abuse or neglect" as including "the infliction of . . . mental anguish."); Tex. Penal Code Ann. § 22.04(a)(2) (prohibiting, in part, "serious mental deficiency, impairment, or injury."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," and defining " "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally."); Ariz. Rev. Stat. Ann. § 13-3623(D), (F)(3) (prohibiting "emotional abuse" and defining emotional abuse as "a pattern of ridiculing or demoing a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult or threatening to inflict physical or emotional harm on a vulnerable adult."); Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D) ("harasses, intimidates."); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically abus[ing]" and defining "emotional and psychological abuse" as "a caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability."); Wis. Stat. Ann. §§ 940.258; 46.90(cm) (including "emotional abuse" and defining "emotional abuse" as "language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.").

[115] Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish.");Tex. Penal Code Ann. § 22.04(a)(2), (e) (grading the offense on whether the culpable mental state was "intentionally or knowingly" or "recklessly."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," defining "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally," and grading the offense based on whether the culpable mental state was "intentionally or knowingly," "recklessly," or "criminal negligence."); Wis. Stat. Ann. § 940.258(1)(ag), (2), (b) (including "emotional abuse" in the definition of "abuse" and grading the offense, in part, based on the culpable mental state of "intentionally," "recklessly," or "negligently.").

"knowingly,"[116] or "willfully."[117] Looking at the sixteen reformed jurisdictions' grading schemes for physical harm, nine of the jurisdictions include "recklessly" as a culpable mental state.[118]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fourth, reformed jurisdictions' criminal codes provide mixed support for requiring a culpable mental state of "recklessly" or "recklessly, under circumstances manifesting extreme indifference to human life" for physical harm in abuse of a vulnerable adult or elderly person statutes. None of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes[119] have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life." However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[120]

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[116] Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117(a); 71-6-119(a); Ariz. Rev. Stat. Ann. § 13-3623(D) ("intentionally or knowingly.").

[117] Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically abus[ing]" and defining "emotional and psychological abuse" as "a caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability.")."

[118] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

[119] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[120] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law §

Nine of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes[121] include "recklessly" as a culpable mental state.[122]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fifth, criminal codes in reformed jurisdictions strongly support the elimination of a restriction on criminal abuse of a vulnerable adult or elderly person to physical harms committed by "corporal means." None of the sixteen reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes limits the offense to corporal means.[123]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

[121] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[122] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

[123] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person. [Previously RCC § 22E-1504. Neglect of a Vulnerable Adult or Elderly Person.]

Relation to National Legal Trends. *The revised neglect of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support limiting neglect of a vulnerable adult or elderly person to conduct that does not actually harm a vulnerable adult or elderly person, as opposed to the current neglect statute, which partially grades on actual harm,[124] and partially on a failure to discharge the required duty.[125] Fourteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[126] (reformed jurisdictions) have offenses for endangering a vulnerable adult or elderly person.[127] Ten of these states criminalize endangerment separately from abusing a vulnerable adult or elderly person, or criminalize endangerment but don't have a specific abuse offense.[128] Nineteen of the 29 reformed jurisdictions have provisions or offenses for failing to provide for a vulnerable adult or elderly person[129] like third degree in the revised neglect of a vulnerable adult or elderly

[124] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[125] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[126] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[127] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering of a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any.

Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[128] Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; Ind. Code Ann. § 35-46-1-4(a)(1); Me. Rev. Stat. tit. 17-A, § 555; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07.

[129] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-

person statute. In eight of these reformed jurisdictions, failing to provide is criminalized separately from abuse offenses[130] and in two of these jurisdictions it is graded differently than abuse.[131]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[132] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

Second, criminal codes in reformed jurisdictions provide mixed support for requiring a reckless culpable mental state as to whether neglected items or care are essential for the well-being of the vulnerable adult or elderly person. Due to the varying rules of construction in the 29 reformed jurisdictions, it is difficult to determine the culpable mental state, if any, for the element that the items or care are essential to the well-being of the vulnerable adult or elderly person. However, of the 19 reformed jurisdictions with failure to provide offenses or provisions,[133] only three[134] jurisdictions clearly codify a reasonable person or negligence standard for this element. One reformed jurisdiction requires

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111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[130] Alaska Stat. Ann. § 11.51.210; Colo. Rev. Stat. Ann. § 18-6.5-103(f); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; 18 Pa Stat. Ann. § 2713; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[131] Ark. Code Ann. §§ 5-28-101, 5-28-103; Kan. Stat. Ann. § 21-5417(a)(3).

[132] MPC § 230.5.

[133] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[134] Ark. Code Ann. §§ 5-28-101(11)(B), 5-28-103(c)(1), (c)(2) (prohibiting "neglect[ing]" an adult endangered person or an adult impaired person" and defining "neglect," in part, as "[a] purposeful act or omission by a caregiver responsible for the care and supervision of an adult endangered person or an adult impaired person that constitutes negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person."); Colo. Rev. Stat. Ann. §§ 18-6.5-102(6)(a), 18-6.5-103(6) (prohibiting "caretaker neglect" and defining "caretaker neglect," in part, as "neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or any other treatment necessary for the health or safety of an at-risk person is not secured for an at-risk person or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise."); Utah Code Ann. § 76-5-111(n), (3) (prohibiting "neglect" and defining "neglect," in part, as "failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise.").

knowledge for this element[135] and another jurisdiction requires "knows or reasonably should know."[136]

Three of the remaining jurisdictions do not codify a culpable mental state for this element or for any element in the offense,[137] but it is possible that case law or rules of statutory construction would provide a culpable mental state. The other 11 jurisdictions codify a culpable mental state in the statute,[138] but it is unclear whether or how the culpable mental state applies to the element that the items or care are essential to the well-being of the vulnerable adult or elderly person. Most of these 11 jurisdictions are limited to the culpable mental states of "intentionally" or "knowingly,"[139] but four include "recklessly"[140] and two include criminal negligence.[141]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[142] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

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[135] N.D. Cent. Code Ann. § 12.1-37-07(2) ("caregiver who fails to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the eligible adult.");

[136] 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(B).

[137] Alaska Stat. Ann. § 11.51.210(a); N.J. Stat. Ann. § 2C:24-8(a); S.D. Codified Laws §§ 22-46-1, 22-46-2.

[138] Ala. Code §§ 38-9-2, 38-9-7; Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[139] Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3) (defining "support" without a culpable mental state, but requiring "knowingly or intentionally deprives the dependent of necessary support."); Kan. Stat. Ann. § 21-5417(a)(3) ("knowingly committing . . . omission or deprivation of treatment, goods or services that are necessary to maintain physical or mental health of such dependent adult."); Minn. Stat. Ann. §§ 609.233(1), (2) (defining "neglect" without a culpable mental state, but requiring "intentionally neglects" in the gross misdemeanor gradation and requiring "intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision" in the felony gradation); Mo. Ann. Stat. § 565.184(2) ("intentionally fails to provide care, goods or services to an elderly person, a person with a disability, or a vulnerable person."); Tenn. Code Ann. §§ 71-6-102, 71-6-117(a), 71-6-119(a) (defining "neglect" without a culpable mental state, but requiring "knowingly" in the offense);

[140] Ala. Code §§ 38-9-2(12), 38-9-7(b), (c), (d), (e) (codifying a definition of "neglect" with culpable mental state, but grading the neglect offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ohio Rev. Code Ann § 2903.16(A), (B) (two gradations of the offense, one requiring "knowingly" and one requiring "recklessly" for "fail to provide . . . with any treatment, care, goods, or services that is necessary to maintain the health or safety."); 18 Pa Stat. Ann. § 2713(a)(1) "intentionally, knowingly, or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare."); Wis. Stat. Ann. § 940.285(1)(ag)(6), (2)(a), (b) (defining "abuse" without a culpable mental state, but grading the offense, in part, based on whether the culpable mental state was intentionally, recklessly, or negligently).

[141] Or. Rev. Stat. Ann. §§ 163.205(1)(a), 163.200(1)(a) (two gradations of the offense, one requiring "intentionally or knowingly" and one requiring "with criminal negligence" for "with[holding] necessary and adequate food, physical care or medical attention."); Wash. Rev. Code Ann. §§ 9A.42.010(1), 9A.42.020(1), 9A.42.030(1), 9A.42.035(1), 9A.42.037(1)(a), (1)(b) (defining "basic necessities of life" without a culpable mental state, but requiring "with criminal negligence" for causing specified harms or risk of harm "by withholding any of the basic necessities of life.").

[142] MPC § 230.5.

Third, criminal codes in reformed jurisdictions codify a defense to either endangering or failing to provide for a vulnerable adult or elderly person that extends beyond spiritual healing. One[143] of the 14 reformed jurisdictions with an endangering a vulnerable adult or elderly person statute[144] codifies a defense that extends to a patient

[143] Ariz. Rev. Stat. Ann. § 13-3623(E)(1) ("This section does not apply to [a] health care provider as defined in § 36-3201 who permits a patient to die or the patient's condition to deteriorate by not providing health care if that patient refuses that care directly or indirectly through a health care directive as defined in § 36-3201, through a surrogate pursuant to § 36-3231 or through a court appointed guardian as provided for in title 14, chapter 5, article 3.").

[144] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

refusing care. Three[145] of the 19 reformed jurisdictions with failure to provide offenses[146] have defenses for a vulnerable adult refusing care. An additional reformed jurisdiction has

[145] Minn. Stat. Ann. § 609.233(2) ("A vulnerable adult is not neglected or deprived under subdivision 1 or 1a for the sole reason that: (1) the vulnerable adult or a person with authority to make health care decisions for the vulnerable adult under sections 144.651, 144A.44, 253B.03, or 524.5-101 to 524.5-502, or chapter 145B, 145C, or 252A, refuses consent or withdraws consent, consistent with that authority and within the boundary of reasonable medical practice, to any therapeutic conduct, including any care, service, or procedure to diagnose, maintain, or treat the physical or mental condition of the vulnerable adult or, where permitted under law, to provide nutrition and hydration parenterally or through intubation; this paragraph does not enlarge or diminish rights otherwise held under law by: (i) a vulnerable adult or a person acting on behalf of a vulnerable adult, including an involved family member, to consent to or refuse consent for therapeutic conduct; or (ii) a caregiver to offer or provide or refuse to offer or provide therapeutic conduct."); Or. Rev. Stat. Ann. § 163.206(3) (exempting "(1) . . . a person acting pursuant to a court order, an advance directive or a power of attorney for health care pursuant to ORS 127.505 to 127.660 or a POLST, as defined in ORS 127.663; (2) . . . a person withholding or withdrawing life-sustaining procedures or artificially administered nutrition and hydration pursuant to ORS 127.505 to 127.660; (3) When a competent person refuses food, physical care or medical care."); 18 Pa. Stat. and Cons. Stat. Ann. § 2713**(e) ("**A caretaker or any other individual or facility may offer an affirmative defense to charges filed pursuant to this section if the caretaker, individual or facility can demonstrate through a preponderance of the evidence that the alleged violations result directly from: (1) the caretaker's, individual's or facility's lawful compliance with a care-dependent person's living will as provided in 20 Pa.C.S. Ch. 54 (relating to health care); (2) the caretaker's, individual's or facility's lawful compliance with the care-dependent person's written, signed and witnessed instructions, executed when the care-dependent person is competent as to the treatment he wishes to receive; (3) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's: (i) agent acting pursuant to a lawful durable power of attorney under 20 Pa.C.S. Ch. 56 (relating to powers of attorney), within the scope of that power; or (ii) health care agent acting pursuant to a health care power of attorney under 20 Pa.C.S. Ch. 54 Subch. C (relating to health care agents and representatives), within the scope of that power; (4) the caretaker's, individual's or facility's lawful compliance with a "Do Not Resuscitate" order written and signed by the care-dependent person's attending physician; or (5) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's health care representative under 20 Pa.C.S. § 5461 (relating to decisions by health care representative), provided the care-dependent person has an end-stage medical condition or is permanently unconscious as these terms are defined in 20 Pa.C.S. § 5422 (relating to definitions) as determined and documented in the person's medical record by the person's attending physician."); S.D. Codified Laws § 22-46-1.1 ("For the purposes of this chapter, the term, neglect, does not include a decision that is made to not seek medical care for an elder or disabled adult upon the expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health care; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.");

[146] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

an "informed consent" defense to the prong of "abuse" that prohibits "deprivation of life-saving treatment."[147]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[148] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC. The MPC also has a general consent defense that provides the "consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."[149] The MPC has additional requirements for the consent defense when the conduct "causes or threatens bodily injury."[150]

[147] Utah Code Ann. § 76-5-111(b)(iv)(B) (including in the definition of "abuse" "deprivation of life-sustaining treatment, except "when informed consent, as defined in this section, has been obtained.").
[148] MPC § 230.5.
[149] MPC § 2.11.
[150] MPC § 2.11(2) ("When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if: (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or (c) the consent establishes a justification for the conduct under Article 3 of the Code.").

Chapter 16. Human Trafficking

RCC § 22E-1601. Forced Labor.
[Previously RCC § 22E-1603. Forced Labor or Services.]

Relation to National Legal Trends. *The abovementioned changes to current District law have mixed support in national legal trends.*

First, omitting causing a person to provide labor or services by means of fraud or deception from the forced labor or services offense is not supported by state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[1] (reformed jurisdictions), a majority of those jurisdictions that have codified an analogous forced labor offense include causing a person to provide labor or services by means of fraud or deception.[2] Ten reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by means of fraud or deception.[3]

Second, revising forced labor to exclude causing a person to provide labor or services by facilitating access to addictive or controlled substances is not supported by national legal trends. A majority of the reformed jurisdictions' that have codified an analogous forced labor offense include controlling or facilitating access to a controlled substance.[4] Six reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by any means involving controlled substances.[5] However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by state criminal codes. None of the reformed jurisdictions' that have codified an analogous forced labor offense include limiting, facilitating, or controlling a person's access to addictive substances other than controlled substances.[6]

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[1] *See,* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[2] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

[3] Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502, Colo. Rev. Stat. Ann. § 18-3-503; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-701, Mont. Code Ann. § 45-5-703; N.Y. Penal Law § 135.35; Or. Rev. Stat. Ann. § 163.264; Or. Rev. Stat. Ann. § 163.263; Tenn. Code Ann. § 39-13-307.

[4] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.

[5] Conn. Gen. Stat. Ann. § 53a-192a, Conn. Gen. Stat. Ann. § 53a-192; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; Mo. Ann. Stat. § 566.203; Or. Rev. Stat. Ann. § 163.263, Or. Rev. Stat. Ann. § 163.264.

[6] Ala. Code § 13A-6-152; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.

Third, authorizing enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age has mixed support in other states' criminal codes. Half of the reformed jurisdictions' that have codified an analogous forced labor offense allow for enhanced penalties when the complainant was under the age of 18.[7]

RCC § 22E-1602. Forced Commercial Sex.
[Previously RCC § 22E-1604. Forced Commercial Sex.]

Relation to National Legal Trends. *It is unclear whether the above discussed changes to current District law are supported by national legal trends.*

First, explicitly criminalizing forced commercial sex acts is consistent with state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[8] (hereinafter "reformed jurisdictions") that have a forced labor offense, half explicitly criminalize forced commercial sex acts either as part of the forced labor offense[9], or through a separate offense.[10] The remaining states do not explicitly criminalize forced commercial sex acts, but similar to the current D.C. Code, are ambiguous as to whether forced labor includes forced commercial sex acts.[11]

Second, it is unclear whether the possible changes to current Chapter 27 offenses are consistent with state criminal codes. Staff has not reviewed analogous prostitution offenses and relevant case law in other jurisdictions to determine when compelling another person to engage in commercial sex acts constitutes a prostitution offense, and how such conduct is penalized.

RCC § 22E-1603. Trafficking in Labor or Services.
[Previously RCC § 22E-1605. Trafficking in Labor or Services.]

Relation to National Legal Trends. *The above discussed changes have mixed support from national legal trends.*

First, criminalizing sex trafficking under a separate offense has mixed support from state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[12]

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[7] Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; Minn. Stat. Ann. § 609.281; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.

[8] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[9] Del. Code Ann. tit. 11, § 787; Ala. Code § 13A-6-151; Conn. Gen. Stat. Ann. § 53a-192a; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012.

[10] N.D. Cent. Code Ann. § 12.1-41-04.

[11] Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-703; Tenn. Code Ann. § 39-13-307; Tex. Penal Code Ann. § 20A.02.

[12] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa,

(hereafter "reformed jurisdictions") that have a forced labor offense, a majority criminalize trafficking in labor or services and in commercial sex acts under the same statute.[13] However, three of those states' statutes provide for higher maximum sentences when trafficking in commercial sex.[14] A minority of reformed jurisdictions' codes include a separate trafficking in commercial sex acts offense.[15]

Second, changing the trafficking in labor or services offense to exclude trafficking a person with recklessness that he or she is or will be caused to provide labor or services by means of fraud or deception is not supported by state criminal codes. A majority of the reformed jurisdictions' that have codified an analogous trafficking in labor or services offense include causing a person to provide labor or services by means of fraud or deception.[16]

Third, changing the trafficking in labor and services offense to exclude trafficking a person who is or will be caused to provide labor or services by means of facilitating access to a controlled substance or addictive substance has mixed support from state criminal codes. A majority of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense include trafficking a person who will be caused to provide labor or services by means of controlling or facilitating access to a controlled substance.[17] However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by national legal trends. None of the reformed jurisdictions that have codified an analogous trafficking in services or labor offense include trafficking a person who will be caused to provide labor or serves by means of limiting, facilitating, or controlling that person's access to addictive substances other than controlled substances.

Fourth, authorizing enhanced penalties if the trafficked person is under the age of 18, or was held for 180 days or more has mixed support from state criminal codes. Nearly half of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense authorize enhanced penalties when the trafficked person is under the age of 18.[18]

Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[13] Ala. Code § 13A-6-153; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; In. St. 35–42–3.5–1; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. § 3011; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

[14] Ark. Code Ann. § 5-18-103; Mont. Code Ann. § 45-5-702; Or. Rev. Stat. Ann. § 163.266.

[15] Mo. Ann. Stat. § 566.209; N.Y. Penal Law § 230.34; Tenn. Code Ann. § 39-13-309.

[16] Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

[17] Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Ind. Code Ann. § 35-42-3.5-1; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3011; Tenn. Code Ann. § 39-13-308; Wis. Stat. Ann. § 940.302.

[18] Ark. Code Ann. § 5-18-103; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; 18 Kan. Stat. Ann. § 21-5426; 18 Ky. Rev. Stat. Ann. § 529.100; Minn. Stat. Ann. § 609.282; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; 18 S.D. Codified Laws § 22-49-2; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308.5.

RCC § 22E-1604. Trafficking in Forced Commercial Sex.
[Previously RCC § 22E-1606. Trafficking in Commercial Sex.]

Relation to National Legal Trends. *The above discussed changes have mixed support from national legal trends.*

First, criminalizing sex trafficking under a separate offense is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[19] (hereinafter "reformed jurisdictions") that have a trafficking in labor or services offense, a majority criminalize trafficking in labor or services and trafficking commercial sex acts under the same statute.[20] However, three those states' statutes provide for higher maximum sentences when trafficking in commercial sex.[21] A minority of reformed jurisdictions' codes include a separate trafficking in commercial sex acts offense.[22]

Second, changes to the trafficking in commercial sex offense made by incorporating the revised definition of coercion have mixed support in state criminal codes. Excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support from national legal trends. Only six reformed jurisdictions define "coercion" for use in their respective human trafficking offenses.[23] Of the jurisdictions that define "coercion," half do not include fraud or deception.[24] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Third, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. Of the jurisdictions that define "coercion" all but one include controlling access to a controlled substance.[25] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

Fourth, authorizing enhanced penalty for trafficking in commercial sex when the trafficked person is under the age of 18 is not supported by state criminal codes. Of the

[19] *See,* Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[20] Alaska Stat. Ann. § 11.41.360; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

[21] Kan. Stat. Ann. § 21-5426; Mont. Code Ann. § 45-5-702 (heightened penalty if trafficking involves sexual intercourse without consent); Or. Rev. Stat. Ann. § 163.266.

[22] Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-309.

[23] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; Wash. Rev. Code Ann. § 9A.40.010.

[24] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

[25] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; IN ST 35–42–3.5–0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

reformed jurisdictions that have codified an analogous trafficking in commercial sex acts offense, five include an enhancement if the trafficked person is under the age of 18.[26]

Finally, it is unclear whether changes made to the Chapter 27 offenses are supported by state criminal codes. Staff did not comprehensively research prostitution offenses in other jurisdictions to determine which specific coercive means of compelling a person to engage in commercial sex acts constitute a criminal offense. However, some reformed jurisdictions do not codify any forms of coerced or compelled prostitution offenses, and instead criminalize such conduct under human trafficking offenses.[27]

RCC § 22E-1605. Sex Trafficking of a Minor or Adult Incapable of Consenting. [Previously RCC § 22E-1607. Sex Trafficking of Minors.]

[No national legal trends section.]

RCC § 22E-1606. Benefitting from Human Trafficking. [Previously RCC § 22E-1608. Benefitting from Human Trafficking.]

Relation to National Legal Trends. *The above discussed change to District law is not supported by national legal trends.*

Dividing the benefitting from human trafficking offense into two penalty grades based on whether the accused benefitted from trafficking in labor or services, or from trafficking in commercial sex is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[28] (hereinafter "reformed jurisdictions") that have an analogous benefitting from human trafficking offense, only three[29] distinguish between benefitting from labor trafficking or sex trafficking.

RCC § 22E-1607. Misuse of Documents in Furtherance of Human Trafficking. [Previously RCC § 22E-1609. Misuse of Documents in Furtherance of Human Trafficking.

Relation to National Legal Trends. *Requiring that the revised misuse of documents offense involves a government identification document is supported by national legal trends.* Of the 29 jurisdictions that have comprehensively reformed their criminal

[26] Del. Code Ann. tit. 11, § 787; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.

[27] *E.g.,* Alaska Stat. Ann. §§ 11.66.100, 11.66.110, 11.66.120, 11.66.130, 11.66.135; Haw. Rev. Stat. Ann. §§ 712-1200, 712-1201, 712-1202; Ky. Rev. Stat. Ann. §§ 529.020, 529.040, 529.100.

[28] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[29] Kan. Stat. Ann. § 21-5426; Mo. Ann. Stat. § 566.206; Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-308, Tenn. Code Ann. § 39-13-309.

codes influenced by the Model Penal Code (MPC) and have a general part[30] (reformed jurisdictions), only four codify an analogous misuse of documents offense. However, all four specify that the offense must involve a *government* identification document.[31] In addition, nearly all of the remaining reformed jurisdictions include destroying, concealing, removing, confiscating, or possessing a *government* identification document to compel a person to provide labor or services as a form of forced labor or services.[32]

RCC § 22E-1608. Commercial Sex with a Trafficked Person.
[Previously RCC § 22E-1610. Sex Trafficking Patronage.]

Relation to National Legal Trends. *Codifying a sex trafficking patronage offense is not supported by national legal trends.*

Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part[33] only five have codified an analogous sex trafficking patronage offense.[34] The American Law Institute's September 2018 draft proposal for human trafficking offenses includes a sex trafficking patronage offense.[35]

RCC § 22E-1609. Forfeiture.
[Previously RCC § 22E-1611. Forfeiture.]

[No national legal trends section.]

RCC § 22E-1610. Reputation or Opinion Evidence.
[Previously RCC § 22E-1612. Reputation or Opinion Evidence.]

[No national legal trends section.]

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[30] *See,* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[31] Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; Ohio Rev. Code Ann. § 2905.33; 18 Pa. Stat. Ann. § 3014.

[32] Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; Ohio Rev. Code Ann. § 2905.33; Or. Rev. Stat. Ann. § 163.263; 18 Pa. Stat. Ann. § 3014; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.02; Wis. Stat. Ann. § 940.302.

[33] See Paul H. Robinson & Markus D. Dubber, The American Model Penal Code: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[34] Ark. Code Ann. § 5-18-104; Mont. Code Ann. § 45-5-705; N.D. Cent. Code Ann. § 12.1-41-05; S.D. Codified Laws § 22-49-4; Tenn. Code Ann. § 39-13-309.

[35] Model Penal Code: Sexual Assault and Related Offenses. Preliminary Draft No. 9, September 14, 2018. Section 213.9(2). The ALI project to revise the Model Penal Code's sex offenses is an ongoing project and its drafts may be subject to change.

RCC § 22E-1611. Civil Action.
[Previously RCC § 22E-1613. Civil Action.]

[No national legal trends section.]

RCC § 22E-1612. Limitations on Liability and Sentencing for RCC Chapter 16 Offenses.
[Previously RCC § 22E-1602. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses.]

Relation to National Legal Trends. *The above discussed changes to current District law are not supported by national legal trends.*

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.[36] However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

The Model Penal Code (MPC) bars multiple convictions not only where one offense is a lesser included offense of another or includes inconsistent elements, but also, more generally, "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."[37] Several states have followed the MPC in codifying such a bar to multiple offense liability.[38]

Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part[39] (reformed jurisdictions), none have

[36] *See, Ball v. United States*, 470 U.S. 856, 865 (1985) ("[A] separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.") (emphasis in original).

[37] Model Penal Code 1.07(1) ("Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.").

[38] Multiple offense limitations 1 Crim. L. Def. § 68 ("Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18- 1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).").

[39] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

specific statutory provisions that explicitly bar multiple convictions for human trafficking related offenses. However, given the variety of states' approaches to merger, it is unclear[40] how many jurisdictions permit multiple convictions for overlapping human trafficking offenses that arise from a single act or course of conduct.

Second, exempting the use of reasonable disciplinary measures to compel a child to perform household chores is not supported by other states' criminal codes. Only two reformed jurisdiction statutorily exempts the use of reasonable disciplinary measures to compel children to perform household chores from human trafficking offenses.[41] Case law on this point in other jurisdictions was not researched. Several states have codified general defenses that apply when a parent, guardian, or school official uses reasonable force to maintain discipline or to promote the welfare of a child or incompetent person.[42] It is unclear whether these general defenses would limit liability for forced labor or other human trafficking offenses.

RCC § 22E-1613. Civil Forfeiture.

[No national legal trends section.]

[40] Case law on this point in other jurisdictions was not researched.
[41] Ariz. Rev. Stat. Ann. § 13-1308; N.H. Rev. Stat. Ann. § 633:7 (b).
[42] *E.g.*, Ala. Code § 13A-3-24; Ariz. Rev. Stat. Ann. § 13-403; Conn. Gen. Stat. Ann. § 53a-18; Haw. Rev. Stat. Ann. § 703-309.

Chapter 18. Stalking, Obscenity, and Invasions of Privacy

RCC § 22E-1801. Stalking.

Relation to National Legal Trends. *The revised stalking statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Stalking is a relatively new offense, originating in California in 1990. Today, all 50 states have criminalized stalking.[1] Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[2] Many state stalking statutes have been influenced by model language published by the Department of Justice in 1993[3] and a revised model statute published by the National Center for Victims of Crime in 2007.[4] However, constitutional

[1] Reform jurisdictions: Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Ark. Code Ann. § 5-71-229; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Del. Code Ann. tit. 11, § 1312; Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); 720 Ill. Comp. Stat. Ann. 5/12-7(a); Ind. Code Ann. § 35-45-10-5; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.150; Me. Rev. Stat. tit. 17-A, § 210-A; Minn. Stat. Ann. § 609.749; Mo. Ann. Stat. § 565.227; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-1; Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Non-reform jurisdictions: Cal. Penal Code § 646.9; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90 – 92; Idaho Code Ann. §§ 18-7905 – 7906; Iowa Code Ann. § 708.11; La. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802; Mass. Gen. Laws Ann. ch. 265, § 43; Mich. Comp. Laws Ann. §§ 750.411h – i; Miss. Code. Ann. § 97-3-107; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. §§ 30-3A-3 – 3.1; N.C. Gen. Stat. Ann. § 14-277.3A; Okla. Stat. Ann. tit. 21, § 1173; 11 R.I. Gen. Laws Ann. § 11-59-2; S.C. Code Ann. § 16-3-1730; Vt. Stat. Ann. tit. 13, §§ 1061 – 1064; Va. Code Ann. § 18.2-60.3; W. Va. Code Ann. § 61-2-9a; Wyo. Stat. Ann. § 6-2-506

[2] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[3] National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, Washington, DC: U.S. Department of Justice, National Institute of Justice, October 1993, NCJ 144477.

[4] *See* The National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, *available at* https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12.

challenges on grounds of vagueness and overbreadth have been common.[5] Sixteen states are now considering legislation to amend their stalking codes.[6]

First, five states require that the accused receive a warning before stalking liability attaches.[7] Unlike these states, however, the RCC requires notice only with regard to unwanted communications; no prior warning is required when the accused physically follows, physically monitors, or commits a crime against the victim.

Second, four reform jurisdictions criminalize conduct the actor should have known *would* cause or *is likely* to cause a reasonable person to feel frightened or distressed without also requiring that the conduct *did* cause fear or distress.[8] One of those four statutes was found to be facially unconstitutional.[9] The majority of reform jurisdictions require that the offender's conduct *actually cause* fear or distress, not merely that the conduct *would be* disturbing.[10] Few reform jurisdictions have any stalking liability for simple negligence, whether or not fear or distress actually occurs.[11]

Third, it is unclear to what extent other jurisdictions' stalking statutes exclude electronic monitoring. Most jurisdictions' statutes do not precisely describe the type of

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[5] By 1996, 19 states defended their stalking statutes against facial challenges. National Institute of Justice, *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress under the Violence Against Women Act*, April 1996, at page 7. Content neutrality is an important feature of any stalking or harassment statute's ability to pass constitutional muster. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1303 (2005); *see also People v. Dietze*, 75 N.Y.2d 47, 53–54 (1989); *People v. Golb*, 23 N.Y.3d 455, 15 N.E.3d 805 (2014); *Musselman v. Com.*, 705 S.W.2d 476 (Ky. 1986); *State v. Moulton*, 991 A.2d 728, 733+, (Conn.App. Apr. 13, 2010), (NO. 29617); *State v. Reed*, 176 Conn. App. 537 (2017); *State v. LaFontaine*, 16 A.3d 1281, 1283+, (Conn.App. May 10, 2011), (NO. 31284); *State v. Nowacki*, 111 A.3d 911, 915+, (Conn.App. Mar. 10, 2015), (NO. 34577); *State v. Brown* (App. Div.2 2004) 207 Ariz. 231, 85 P.3d 109, review denied.

[6] Delaware, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. 2017 DE S.B. 209; 2017 IL H.B. 5663; 2017 IA H.F. 589; 2018 LA H.B. 282; 2017 MA S.B. 2200; 2017 MN S.F. 2940; 2018 MS H.B. 744; 2017 NH H.B. 1627; 2018 NJ A.B. 4244; 2017 NY A.B. 7662; 2017 NC H.B. 186; 2017 PA H.B. 2437; 2017 RI S.B. 340; 2017 TN S.B. 200; 2017 WA H.B. 2254; 2017 WI S.B. 568.

[7] Ala. Code § 13A-6-90.1; Conn. Gen. Stat. Ann. § 53a-181d(b)(2); N.Y. Penal Law § 120.45; S.C. Code Ann. § 16-3-1700(a)(2)(requires notice or a police report); Va. Code Ann. § 18.2-60.3; *see also* Md. Code Ann., Crim. Law § 3-803 ("Harassment").

[8] Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[9] *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017).

[10] Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Ind. Code Ann. §§ 35-45-10-5 and 35-45-10-1("Definitions"); Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. §§ 508.150 and 508.130 ("Definitions"); Minn. Stat. Ann. § 609.749; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws §§ 22-19A-1 and 22-19A-4 ("Definitions"); Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Two reform states do not expressly require fear or distress at all and instead require only harassment, annoyance, or alarm. Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); S.D. Codified Laws § 22-19A-1.

[11] *See* Minn. Stat. Ann. § 609.749; Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32; Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

misconduct that may establish the basis of a stalking charge.[12] This may be due to the fact that many jurisdictions' statutes are heavily influenced by model stalking codes that were designed to be easily implemented by every state and, therefore, do not reference specific offenses under any individual state's criminal code.

Fourth, 10 reform states include explicitly prohibit contacting the stalking victim at home, work or school.[13]

Fifth, no other jurisdiction's stalking statute expressly authorizes multiple convictions for stalking and identity theft based on the same facts.[14] Only three states include misuse of personal identifying information as a means of stalking.[15] Only Maryland addresses the issue of concurrent sentencing for stalking and another offense.[16]

Other possible changes to law in the revised stalking statute are generally supported by national legal trends.

First, most jurisdictions do not proscribe in their stalking statutes communications "about" a person. Eight reform states define "course of conduct" to include "communicating to or about a person."[17] This definition apparently was adopted from the model code stalking code published in 2007.[18]

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[12] For example, some statutes provide that a "credible threat" is a predicate for stalking liability, without explaining what the person must threaten to do. Instead, these statutes define "credible threat" as essentially any communication or conduct that expressly or impliedly threatens some other conduct that a would cause a reasonable person to feel frightened or disturbed. *See* Ala. Code § 13A-6-92(b); Colo. Rev. Stat. Ann. § 18-3-602(2)(b); S.D. Codified Laws § 22-19A-6; Tenn. Code Ann. § 39-17-315(c)(1)(D); Cal. Penal Code § 646.9(g); Fla. Stat. Ann. § 784.048(1)(c); *but see* Mich. Comp. Laws Ann. § 750.411i; Miss. Code. Ann. § 97-3-107(8)(b); W. Va. Code Ann. § 61-2-9a(f)(2).

[13] Alaska Stat. Ann. § 11.41.270(b)(3)(C); 720 Ill. Comp. Stat. Ann. 5/12-7(a)(c)(5)-(7); Kan. Stat. Ann. § 21-5427(f)(1)(C); N.H. Rev. Stat. Ann. § 633:3-a(II)(a)(3); Ohio Rev. Code Ann. §§ 2903.211(B)(2)(c) and (h); Or. Rev. Stat. Ann. § 163.730(3)(j); Tenn. Code Ann. § 39-17-315(a)(5)(C); Utah Code Ann. §§ 76-5-106.5(1)(B)(ii)(B)-(C); Wash. Rev. Code Ann. § 9A.46.110(6)(b); Wis. Stat. Ann. §§ 940.32(1)(a)(3) and (4).

[14] "A person shall not be sentenced consecutively for stalking and identity theft based on the same act or course of conduct." D.C. Code § 22-3134(d).

[15] Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); Minn. Stat. Ann. § 609.749(Subd. 2)(8); Wis. Stat. Ann. § 940.32(2m)(c).

[16] Md. Code Ann., Crim. Law § 3-802 (e) ("A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any other crime based on the acts establishing a violation of this section.").

[17] Ark. Code Ann. § 5-71-229(f)(1)(A); Del. Code Ann. tit. 11, § 1312(e)(1); 720 Ill. Comp. Stat. Ann. 5/12-7(c)(1); Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); N.J. Stat. Ann. § 2C:12-10(a)(1); Ohio Rev. Code Ann. §§ 2903.211(A)(2) and (D)(7) (making it unlawful to "post a message" about an individual); Utah Code Ann. § 76-5-106.5(1)(B)(i); Wis. Stat. Ann. § 940.32(1)(1)(7). Case law research was not conducted to determine whether phrases such as "any conduct" or "any two acts" have been understood to include communications about an individual.

[18] *See Revised Model Code* at pages 24-25. The National Center for Victims of Crime may have aimed to punish a specific type of conduct by this language. *See id.,* at page 47 ("It is also designed to cover stalking tactics in which stalkers indirectly harass victims through third parties. For example, stalkers have posted messages on the Internet suggesting that victims like to be raped and listing the victims' addresses, thereby inciting third parties to take action against victims."). Such conduct may either be protected by the First Amendment or be punishable as solicitation under RCC § 22E-302, depending on the speaker's word choice and mental state.

Second, most jurisdictions codify exceptions for protected speech and other actions undertaken with a "legitimate purpose" or "proper authority."[19] Some states provide explicit exceptions for: picketers;[20] journalists;[21] law enforcement officers and private investigators;[22] insurance investigators;[23] process servers;[24] persons authorized by a court order or monitoring compliance with a court order;[25] persons monitoring labor laws;[26] and persons engaged in lawful business activity.[27]

Third, 19 states statutorily require a continuity of purpose in the conduct constituting stalking.[28]

Fourth, only one other jurisdiction, Minnesota, has a provision that bases jurisdiction for certain stalking offenses on the victim's state of residency.[29]

Fifth, nineteen reform jurisdictions (a majority) expressly authorize an increased penalty for persons with a previous stalking conviction.[30] However, no reform states have an additional enhancement for a third time stalking offender.

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[19] Ala. Code § 13A-6-92(c); Ariz. Rev. Stat. Ann. § 13-2923(D)(1)(a)(iii); Conn. Gen. Stat. Ann. § 53a-181d(b)(1); Del. Code Ann. tit. 11, § 1312(j); Haw. Rev. Stat. Ann. § 711-1106.5(1); Kan. Stat. Ann. § 21-5427(f)(1); Ky. Rev. Stat. Ann. § 508.130(1)(a)(3); Mo. Ann. Stat. § 565.225(1); N.H. Rev. Stat. Ann. § 633:3-a(II)(a); N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(c); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-4; Tenn. Code Ann. § 39-17-315(a)(3); Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32(4)(a)(3)(b). Case law research was not performed to determine which activities courts have found to be legitimate in each state.

[20] Cal. Penal Code § 646.9(labor picketing); Del. Code Ann. tit. 11, § 1312(i) (lawful picketing); Fla. Stat. Ann. § 784.048; 720 Ill. Comp. Stat. Ann. 5/12-7(1)(ii)(labor-related picketing); Nev. Rev. Stat. Ann. § 200.575(f)(1) (labor-related picketing); N.J. Stat. Ann. § 2C:12-10l Wis. Stat. Ann. § 940.32(4)(a)(3) (peaceful picketing or patrolling); W. Va. Code Ann. § 61-2-9a(g); Wyo. Stat. Ann. § 6-2-506.

[21] Nev. Rev. Stat. Ann. § 200.575(f)(2).

[22] Del. Code Ann. tit. 11, § 1312(j); Mo. Ann. Stat. § 565.225(4); La. Stat. Ann. § 14:40.2(G)(1)("unless the investigator was retained for the purpose of harassing the victim"); S.C. Code Ann. § 16-3-1700; Va. Code Ann. § 18.2-60.3; N.D. Cent. Code Ann. § 12.1-17-07.1(4)(affirmative defense).

[23] La. Stat. Ann. §§ 14:40.2(H) and (I).

[24] S.C. Code Ann. § 16-3-1700.

[25] Nev. Rev. Stat. Ann. § 200.575(f); Md. Code Ann., Crim. Law § 3-802(b)(1).

[26] 720 Ill. Comp. Stat. Ann. 5/12-7(1)(i); Wis. Stat. Ann. § 940.32(5).

[27] Ga. Code Ann. § 16-5-92; Md. Code Ann., Crim. Law § 3-802(b)(2); Nev. Rev. Stat. Ann. § 200.575(f)(3); N.M. Stat. Ann. § 30-3A-3(B)(1).

[28] Ala. Code § 13A-6-92; Cal. Penal Code § 646.9; Colo. Rev. Stat. Ann. § 18-3-602; Fla. Stat. Ann. § 784.048; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.130; La. Stat. Ann. § 14:40.2 (a "series of acts" "evidencing an intent to inflict a continuity of emotional distress upon the person"); Mich. Comp. Laws Ann. § 750.411i(a); Miss. Code. Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1 ("continuity of conduct"); S.C. Code Ann. § 16-3-1700; S.D. Codified Laws § 22-19A-5; Tenn. Code Ann. § 39-17-315; Wis. Stat. Ann. § 940.32; Wyo. Stat. Ann. § 6-2-506.

[29] Minn. Stat. Ann. § 609.749(Subd. 1b)(b); D.C. Code § 22-3135(b) (extending jurisdiction to communications if "the specific individual lives in the District of Columbia" and "it can be electronically accessed in the District of Columbia."). By contrast, the model code from 2007 provides, "As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction. *Revised Model Code* at page 25.

[30] Alaska Stat. Ann. § 11.41.260(5); Ark. Code Ann. § 5-71-229(a)(1)(B); Conn. Gen. Stat. Ann. § 53a-181c(a)(1); Del. Code Ann. tit. 11, § 1312(g); Haw. Rev. Stat. Ann. § 711-1106.4; Ind. Code Ann. § 35-45-10-5(c)(2); Kan. Stat. Ann. § 21-5427; Me. Rev. Stat. tit. 17-A, § 210-A(1)(C); Minn. Stat. Ann. § 609.749; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law §§ 120.50 and 120.55; Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732(2)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1;

RCC § 22E-1802. Electronic Stalking.

Relation to National Legal Trends. *The revised electronic stalking statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Stalking is a relatively new offense, originating in California in 1990. Today, all 50 states have criminalized stalking.[31] Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[32] Many state stalking statutes have been influenced by model language published by the Department of Justice in 1993[33] and a revised model statute published by the National Center for Victims of Crime in 2007.[34]

Tenn. Code Ann. § 39-17-315; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110(5)(b); Wis. Stat. Ann. § 940.32. Some penalty provisions require the previous conviction to involve the same victim or to have occurred within five years.

[31] Reform jurisdictions: Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Ark. Code Ann. § 5-71-229; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Del. Code Ann. tit. 11, § 1312; Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); 720 Ill. Comp. Stat. Ann. 5/12-7(a); Ind. Code Ann. § 35-45-10-5; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.150; Me. Rev. Stat. tit. 17-A, § 210-A; Minn. Stat. Ann. § 609.749; Mo. Ann. Stat. § 565.227; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-1; Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Non-reform jurisdictions: Cal. Penal Code § 646.9; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90 – 92; Idaho Code Ann. §§ 18-7905 – 7906; Iowa Code Ann. § 708.11; La. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802; Mass. Gen. Laws Ann. ch. 265, § 43; Mich. Comp. Laws Ann. §§ 750.411h – i; Miss. Code. Ann. § 97-3-107; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. §§ 30-3A-3 – 3.1; N.C. Gen. Stat. Ann. § 14-277.3A; Okla. Stat. Ann. tit. 21, § 1173; 11 R.I. Gen. Laws Ann. § 11-59-2; S.C. Code Ann. § 16-3-1730; Vt. Stat. Ann. tit. 13, §§ 1061 – 1064; Va. Code Ann. § 18.2-60.3; W. Va. Code Ann. § 61-2-9a; Wyo. Stat. Ann. § 6-2-506

[32] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[33] National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, Washington, DC: U.S. Department of Justice, National Institute of Justice, October 1993, NCJ 144477.

[34] *See* The National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, *available at* https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12.

However, constitutional challenges on grounds of vagueness and overbreadth have been common.[35] Sixteen states are now considering legislation to amend their stalking codes.[36]

First, most jurisdictions' statutes do not precisely describe the type of misconduct that may establish the basis of a stalking charge.[37] This may be due to the fact that many jurisdictions' statutes are heavily influenced by model stalking codes that were designed to be easily implemented by every state and, therefore, do not reference specific offenses under any individual state's criminal code.

Second, four reform jurisdictions criminalize conduct the actor should have known *would* cause or *is likely* to cause a reasonable person to feel frightened or distressed without also requiring that the conduct *did* cause fear or distress.[38] One of those four statutes was found to be facially unconstitutional.[39] The majority of reform jurisdictions require that the offender's conduct *actually cause* fear or distress, not merely that the

[35] By 1996, 19 states defended their stalking statutes against facial challenges. National Institute of Justice, *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress under the Violence Against Women Act*, April 1996, at page 7. Content neutrality is an important feature of any stalking or harassment statute's ability to pass constitutional muster. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1303 (2005); *see also People v. Dietze*, 75 N.Y.2d 47, 53–54 (1989); *People v. Golb*, 23 N.Y.3d 455, 15 N.E.3d 805 (2014); *Musselman v. Com.*, 705 S.W.2d 476 (Ky. 1986); *State v. Moulton*, 991 A.2d 728, 733+, (Conn.App. Apr. 13, 2010), (NO. 29617); *State v. Reed*, 176 Conn. App. 537 (2017); *State v. LaFontaine*, 16 A.3d 1281, 1283+, (Conn.App. May 10, 2011), (NO. 31284); *State v. Nowacki*, 111 A.3d 911, 915+, (Conn.App. Mar. 10, 2015), (NO. 34577); *State v. Brown* (App. Div.2 2004) 207 Ariz. 231, 85 P.3d 109, review denied.

[36] Delaware, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. 2017 DE S.B. 209; 2017 IL H.B. 5663; 2017 IA H.F. 589; 2018 LA H.B. 282; 2017 MA S.B. 2200; 2017 MN S.F. 2940; 2018 MS H.B. 744; 2017 NH H.B. 1627; 2018 NJ A.B. 4244; 2017 NY A.B. 7662; 2017 NC H.B. 186; 2017 PA H.B. 2437; 2017 RI S.B. 340; 2017 TN S.B. 200; 2017 WA H.B. 2254; 2017 WI S.B. 568.

[37] For example, some statutes provide that a "credible threat" is a predicate for stalking liability, without explaining what the person must threaten to do. Instead, these statutes define "credible threat" as essentially any communication or conduct that expressly or impliedly threatens some other conduct that a would cause a reasonable person to feel frightened or disturbed. *See* Ala. Code § 13A-6-92(b); Colo. Rev. Stat. Ann. § 18-3-602(2)(b); S.D. Codified Laws § 22-19A-6; Tenn. Code Ann. § 39-17-315(c)(1)(D); Cal. Penal Code § 646.9(g); Fla. Stat. Ann. § 784.048(1)(c); *but see* Mich. Comp. Laws Ann. § 750.411i; Miss. Code. Ann. § 97-3-107(8)(b); W. Va. Code Ann. § 61-2-9a(f)(2).

[38] Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[39] *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017).

conduct *would be* disturbing.[40] Few reform jurisdictions have any stalking liability for simple negligence, whether or not fear or distress actually occurs.[41]

Third, no other jurisdiction's stalking statute expressly authorizes multiple convictions for stalking and identity theft based on the same facts.[42] Only three reform jurisdictions include misuse of personal identifying information as a means of stalking.[43] Only Maryland addresses the issue of concurrent sentencing for stalking and another offense.[44]

Other possible changes to law in the revised electronic stalking statute are generally supported by national legal trends.

First, 19 out of 50 states statutorily require a continuity of purpose in the conduct constituting stalking.[45]

Second, only one other jurisdiction, Minnesota, has a provision that bases jurisdiction for certain stalking offenses on the victim's state of residency.[46]

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[40] Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Ind. Code Ann. §§ 35-45-10-5 and 35-45-10-1("Definitions"); Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. §§ 508.150 and 508.130 ("Definitions"); Minn. Stat. Ann. § 609.749; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws §§ 22-19A-1 and 22-19A-4 ("Definitions"); Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Two reform states do not expressly require fear or distress at all and instead require only harassment, annoyance, or alarm. Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); S.D. Codified Laws § 22-19A-1.

[41] *See* Minn. Stat. Ann. § 609.749; Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32; Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[42] "A person shall not be sentenced consecutively for stalking and identity theft based on the same act or course of conduct." D.C. Code § 22-3134(d).

[43] Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); Minn. Stat. Ann. § 609.749(Subd. 2)(8); Wis. Stat. Ann. § 940.32(2m)(c).

[44] Md. Code Ann., Crim. Law § 3-802 (e) ("A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any other crime based on the acts establishing a violation of this section.").

[45] Ala. Code § 13A-6-92; Cal. Penal Code § 646.9; Colo. Rev. Stat. Ann. § 18-3-602; Fla. Stat. Ann. § 784.048; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.130; La. Stat. Ann. § 14:40.2 (a "series of acts" "evidencing an intent to inflict a continuity of emotional distress upon the person"); Mich. Comp. Laws Ann. § 750.411i(a); Miss. Code. Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1 ("continuity of conduct"); S.C. Code Ann. § 16-3-1700; S.D. Codified Laws § 22-19A-5; Tenn. Code Ann. § 39-17-315; Wis. Stat. Ann. § 940.32; Wyo. Stat. Ann. § 6-2-506.

[46] Minn. Stat. Ann. § 609.749(Subd. 1b)(b); D.C. Code § 22-3135(b) (extending jurisdiction to communications if "the specific individual lives in the District of Columbia" and "it can be electronically accessed in the District of Columbia."). By contrast, the model code from 2007 provides, "As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction. *Revised Model Code* at page 25.

Third, 19 reform jurisdictions (a majority) expressly authorize an increased penalty for persons with a previous stalking conviction.[47] However, no reform jurisdictions have an additional enhancement for a third time stalking offender.

RCC § 22E-1803. Voyeurism.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

Relation to National Legal Trends. For more than 100 years, there has been a recognition that the law must afford some remedy for the unauthorized circulation of portraits of private persons.[48]

The overwhelming majority of state legislatures have enacted laws criminalizing the nonconsensual dissemination of private sexual images.[49] In 2004, New Jersey was the first state to enact such a statute.[50] By 2013, only Alaska and Texas followed suit. However, between 2013 and 2017, 36 additional states enacted criminal statutes, bringing the total to 39.[51] These statutes "vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties."[52] The mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem.[53]

Most of these states provide elaborate descriptions of malice, such as "the intent to harass, intimidate, threaten, humiliate, embarrass, or coerce"[54] or "the intent to annoy, terrify, threaten, intimidate, harass, offend, humiliate or degrade"[55] or "the intent to harass,

[47] Alaska Stat. Ann. § 11.41.260(5); Ark. Code Ann. § 5-71-229(a)(1)(B); Conn. Gen. Stat. Ann. § 53a-181c(a)(1); Del. Code Ann. tit. 11, § 1312(g); Haw. Rev. Stat. Ann. § 711-1106.4; Ind. Code Ann. § 35-45-10-5(c)(2); Kan. Stat. Ann. § 21-5427; Me. Rev. Stat. tit. 17-A, § 210-A(1)(C); Minn. Stat. Ann. § 609.749; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law §§ 120.50 and 120.55; Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732(2)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; Tenn. Code Ann. § 39-17-315; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110(5)(b); Wis. Stat. Ann. § 940.32. Some penalty provisions require the previous conviction to involve the same victim or to have occurred within five years.

[48] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

[49] *People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019) (internal citations omitted).

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*.

[54] *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing W. Va. Code § 61-8-28a(b) (2019); see N.M. Stat. Ann. § 30-37A-1(A) (2019)).

[55] *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing Idaho Code § 18-6609(3)(a) (2019)).

intimidate, or coerce."[56] Other states describe simply the intent to "harm"[57] or "harass."[58] In contrast, the legislatures of four states have chosen not to expressly include "malice" as a distinct element of the offense.[59]

RCC § 22E-1805. Distribution of an Obscene Image.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints. Only seven jurisdictions do not have an obscenity offense.[60] With the exception of Maryland and the District of Columbia, which do not define obscenity in their statute, every state offense banning promotion or distribution of obscene material to adults defines obscenity to include at least the first and third elements of the *Miller* criteria: the material must appeal to the "prurient" interest" in sex, and it must lack "serious literary, artistic, political, or scientific value."[61]

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor.

[No national legal trends section.]

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

[No national legal trends section.]

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

[No national legal trends section.]

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[56] *Id*. (citing Colo. Rev. Stat. § 18-7-801(1)(a) (2019); Mo. Rev. Stat. § 573.110(2); Okla. Stat. tit. 21, § 1040.13b(B)(2) (2019); Va. Code Ann. § 18.2-386.2(A) (2019)).
[57] *Id*. (citing Ohio Rev. Code Ann. § 2917.211(B)(5) (West 2019); Tex. Penal Code Ann. § 21.16(b)(3) (West 2019)).
[58] *Id*. (citing Minn. Stat. § 617.261(2)(b)(5) (2018)).
[59] *Id*. (citing 720 ILCS 5/11-23.5 (West 2016); Wis. Stat. § 942.09 (2017-18); N.J. Stat. Ann. § 2C:14-9 (West 2019); Del. Code Ann. tit. 11, § 1335 (2017)).
[60] Alaska, Maine, New Mexico, Oregon, South Dakota, Vermont, and West Virginia. Paul H. Robinson and Tyler Scot Williams, Mapping American Criminal Law: variations across the 50 states (2018) at page 255 (noting these states may have offenses that criminalize the promotion, distribution, or display of obscenity to minors or depicting minors).
[61] *Id*. at page 253; *see also Miller v. California*, 413 U.S. 15 (1973).

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

[No national legal trends section.]

Subtitle III. Property Offenses.

Chapter 20. Property Offense Subtitle Provisions.

RCC § 22E-2001. Aggregation To Determine Property Offense Grades.
[Previously RCC § 22E-2002. Aggregation to Determine Property Offense Grades.]

Relation to National Legal Trends. The revised aggregation statute follows many jurisdictions[1] which have statutes that closely follow the Model Penal Code (MPC)[2] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[3] However, many other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[4] offense explicitly provide for aggregation.

RCC § 22E-2003. Limitation on Convictions for Multiple Related Property Offenses.
[Now addressed in RCC § 22E-214. Merger of Related Offenses.]

Relation to National Legal Trends. *The RCC limitation on multiple convictions statute's above-mentioned substantive changes to current District law have mixed support under national legal trends.*

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.[5] However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

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[1] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann., Crim. Law § 7-103; Me. Rev. Stat. Ann., tit. 17-A, § 352; Neb. Rev. St. § 28-518; N. H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N. D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; 18 Pa. Stat. Ann. § 3903; S. D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[2] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.").

[3] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[4] Model Penal Code § 220.3.

[5] *See Ball v. United States*, 470 U.S. 856, 865 (1985) ("[A] separate *conviction,* apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.") (emphasis in original).

The MPC bars multiple convictions not only where one offense is a lesser included offenses of another or includes inconsistent elements, but also, more generally, "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."[6] Several states have followed the MPC in codifying such a bar to multiple offense liability.[7]

Some jurisdictions by statute bar multiple convictions arising out of the same act or course of conduct for most or all crimes.[8] Inversely, some jurisdictions specifically allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[9]

For theft and overlapping offenses like RSP and UUV, liability for both offenses for the same act or course of conduct is generally limited by either statute or case law specific to those offenses. In several states, multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense.[10] In many other states, these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[11] or case law bars such liability.[12] The

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[6] Model Penal Code 1.07(1) ("Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.").

[7] § 68 Multiple offense limitations 1 Crim. L. Def. § 68 ("Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18-1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).").

[8] Minn. Stat. Ann. § 609.035; 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. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.").

[9] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[10] The following define RSP as a means of committing theft: Alaska Stat. Ann. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2401; Iowa Code Ann. § 714.1; 720 Ill. Comp. Stat. Ann. 5/16-1; Kan. Stat. Ann. § 21-5801; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-517; Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.D. Cent. Code Ann. § 12.1-23-02; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-101; Tex. Penal Code Ann. § 31.02; Utah Code Ann. § 76-6-403. Similarly, the following states define UUV as a type of theft: Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360, or merger at sentencing, Md. Code Ann., Crim. Law § 7-105(2).

[11] The following states have statutory provisions that prevent convictions for theft and RSP for the same property involved in the same transaction: Del. Code Ann. tit. 11, § 856; Cal. Penal Code § 496; Fla. Stat. Ann. § 812.025; La. Civ. Code Ann. r.P. art. 482.

[12] The following states prohibit convictions for theft and RSP for the same property involved in the same transaction through case law: *Com. v. Corcoran*, 69 Mass. App. Ct. 123, 125, 866 N.E.2d 948, 950 (2007); *State v. Perry*, 305 N.C. 225, 236–37, 287 S.E.2d 810, 817 (1982*) overruled on other grounds by State v.*

MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[13] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[14] and the Proposed Federal Criminal Code,[15] prohibit a defendant from being convicted of both RSP and theft in regards to the same property involved in a single act or course of conduct.

For other property offenses, statutory provisions generally do not bar multiple convictions for the same act or course of conduct.[16]

There is no consensus expert opinion on how to handle multiple convictions arising out of the same act or course of conduct. As the American Law Institute (ALI) Sentencing Project Commentary recently stated: "No American jurisdiction has formulated a satisfactory approach to the punishment of offenders convicted of multiple current offenses, in large part because of the complexity of the task."[17] The ALI Sentencing Project's new recommendations are that sentencing guideline regimes shall include a general presumption in favor of concurrent sentences,[18] but the ALI does not specifically address multiple convictions for substantially overlapping offenses.

Mumford, 364 N.C. 394, 699 S.E.2d 911 (2010); *Jackson v. Com.*, 670 S.W.2d 828, 832–33 (Ky. 1984) *disapproved of on other grounds by Cooley v. Com.*, 821 S.W.2d 90 (Ky. 1991); *State v. Bleau*, 139 Vt. 305, 308–09, 428 A.2d 1097, 1099 (1981); *State v. Melick*, 131 Wash. App. 835, 840–41, 129 P.3d 816, 818–19 (2006); *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 244, 344 N.E.2d 133, 137 (1976); *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1304 CHECK CITE; *State v. Taylor*, 176 W. Va. 671, 676, 346 S.E.2d 822, 827 (1986); *Starks v. Com.*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).In five states views UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[13] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[14] MPC § 223.6 (defining RSP as a theft).

[15] Proposed Federal Criminal Code § 1732(c) (including RSP in theft).

[16] Research was not performed to determine whether these other jurisdictions' statutes were structured as lesser included offenses of one another which would bar multiple convictions.

[17] American Law Institute, Model Penal Code: Sentencing, Commentary to § 6B.08 (Proposed Final Draft, April 2017).

[18] American Law Institute, Model Penal Code: Sentencing, § 6B.08(2) (Proposed Final Draft, April 2017).

Chapter 21. Theft Offenses

RCC § 22E-2101. Theft.

Relation to National Legal Trends. *The revised theft offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, eliminating dual liability for theft by deception under the current theft and fraud statutes follows a strong majority of jurisdictions' nationwide. Most jurisdictions,[1] including nearly all jurisdictions with reformed criminal codes, as well as the American Law Institute's Model Penal Code (MPC),[2] consolidate theft-type offenses such that a theft by deception can only result in one conviction. The Proposed Federal Criminal Code includes deceptive theft as a type of theft, but does not have a broad fraud statute that overlaps with it.[3] The RCC's specific manner of eliminating the dual liability for theft by deception—by removing such liability from the revised theft statute and transferring it to the revised fraud statute—is unusual. However, few jurisdictions have separate fraud statutes of general applicability[4] like the District's current fraud statute[5] and, as noted above, most jurisdictions rely on a sweeping consolidation of all theft-type offenses. However, the RCC solves the problem of dual liability without instituting a broader change to current District law to consolidate theft-type offenses.

Second, limiting the offense to "with intent to deprive the other of the property" and deleting "with intent to appropriate" as an alternative basis of liability in the revised theft offense is broadly supported by law in other jurisdictions. The equivalent theft laws in the 50 states, the MPC,[6] and the Proposed Federal Criminal Code[7] overwhelmingly require intent or purpose to "deprive" in their theft offenses, and have definitions of "deprive" that require permanent or substantial interference with the property. There appear to be just three states with theft statutes that clearly include an intent or purpose to

[1] Alaska Stat. Ann. § 11.46.100; Ala. Code § 13A-8-2; Ark. Code Ann. § 5-36-103; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, §§ 843 and 844; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. §§ 35-43-4-1 and -2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, §§ 351 and 354; Md. Code Ann., Crim. Law § 7-104; Mass. Gen. Laws Ann. ch. 266, § 30; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-512; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.02; Okla. Stat. Ann. tit. 21, § 1701; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tenn. Code Ann. §§ 39-11-106 and 39-14-103; Tex. Penal Code Ann. §§ 31.01 and 31.03; Utah Code Ann. § 76-6-405; Wash. Rev. Code Ann. § 9A.56.020; Wis. Stat. Ann. § 943.20.

[2] MPC § 223.1.

[3] Proposed Federal Criminal Code § 1732.

[4] Alaska Stat. Ann. § 11.46.600; Ariz. Rev. Stat. Ann. § 13-2310; Fla. Stat. Ann. § 817.034; Mich. Comp. Laws Ann. § 750.218; N.M. Stat. Ann. § 30-16-6; N.Y. Penal Law § 190.65. Colorado has an offense called "Charitable Fraud", though it is defined broadly enough that it could arguably be construed as a general fraud offense. Colo. Rev. Stat. Ann. § 6-16-111.

[5] D.C. Code § 22-3221.

[6] MPC § 223.2.

[7] Proposed Federal Criminal Code § 1732.

temporarily interfere with property.[8] Limiting the revised theft offense to "with purpose to deprive" and eliminating "with intent to appropriate" will conform D.C.'s revised theft statute to the national trend, as well as improve the proportionality of the revised offense.

Third, regarding the bar on multiple convictions for the revised theft offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised theft offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[9] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[10] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[11]

Specifically, regarding theft, unauthorized use of a motor vehicle (UUV), and receiving stolen property (RSP), a majority of American jurisdictions prohibit multiple convictions arising from the same act or course of conduct, as well as the Model Penal Code (MPC) and the Proposed Federal Criminal Code. In several states, multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense.[12] In many other states, these overlapping theft-type offenses are statutorily barred from providing liability for multiple convictions,[13] or case

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[8] Fla. Stat. § 812.014 ("A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently" deprive or appropriate."); Ga. Code Ann. § 16-8-12; 13; -1 (requiring intent to deprive for theft by taking and theft by deception, but defining "deprive," in part, as "to withhold property of another permanently or temporarily."); *State v. Crittenden*, 146 Wash. App. 361, 370, 189 P.3d 849, 853 (2008) (stating that the crime of theft in Wash. Rev. Code Ann. § 9A.56.020 requires as an element an "intent to deprive," but that it is not an intent to permanently deprive).

[9] D.C. Code § 22-3203.

[10] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[11] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[12] The following define RSP as a means of committing theft: Alaska Stat. Ann. § 11.46.100; Ariz. Rev. Stat. Ann. § 13-1802; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2401; Iowa Code Ann. § 714.1; 720 Ill. Comp. Stat. Ann. 5/16-1; Kan. Stat. Ann. § 21-5801; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-517; Nev. Rev. Stat. Ann. § 205.0832; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.D. Cent. Code Ann. § 12.1-23-02; Or. Rev. Stat. Ann. § 164.015; 18 Pa. Stat. and Cons. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-101; Tex. Penal Code Ann. § 31.02; Utah Code Ann. § 76-6-403.
Similarly, the following states define UUV as a type of theft: Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360.

[13] The following states have statutory provisions that prevent convictions for theft and RSP for the same property involved in the same transaction: Del. Code Ann. tit. 11, § 856; Cal. Penal Code § 496; Fla. Stat. Ann. § 812.025; La. Civ. Code Ann. r.P. art. 482. One state prohibits convictions for both UUV and theft for the same property involved in the same transaction through merger at sentencing. Md. Code Ann., Crim. Law § 7-105(2).

law bars such liability.[14] The MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[15] recognizes that UUV is necessary to punish conduct that falls short of theft. Similarly, the MPC[16] and the Proposed Federal Criminal Code,[17] prohibit a defendant from being convicted of both RSP and theft in regards to the same property involved in a single act or course of conduct.

Fourth, the revised theft offense's expansion to five gradations, ranging to a value of $250,000 or more and including a provision effectively elevating the worth of low-value cars, reflect national trends. The overwhelming majority of the 50 states[18] as well as the MPC[19] and Proposed Federal Criminal Code[20] have more than two grades of penalties for theft, unlike the current District theft statute, which is limited to two grades. Amongst the 50 states, four or five gradations are the most common numbers.[21] A recent study by the

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[14] The following states prohibit convictions for theft and RSP for the same property involved in the same transaction through case law: *Com. v. Corcoran*, 69 Mass. App. Ct. 123, 125, 866 N.E.2d 948, 950 (2007); *State v. Perry*, 305 N.C. 225, 236–37, 287 S.E.2d 810, 817 (1982*) overruled on other grounds by State v. Mumford*, 364 N.C. 394, 699 S.E.2d 911 (2010); *Jackson v. Com.*, 670 S.W.2d 828, 832–33 (Ky. 1984) *disapproved of on other grounds by Cooley v. Com.*, 821 S.W.2d 90 (Ky. 1991); *State v. Bleau*, 139 Vt. 305, 308–09, 428 A.2d 1097, 1099 (1981); *State v. Melick*, 131 Wash. App. 835, 840–41, 129 P.3d 816, 818–19 (2006); *City of Maumee v. Geiger*, 45 Ohio St. 2d 238, 244, 344 N.E.2d 133, 137 (1976); *Hammon v. State*, 1995 OK CR 33, 898 P.2d 1287, 1304; *State v. Taylor*, 176 W. Va. 671, 676, 346 S.E.2d 822, 827 (1986); *Starks v. Com.*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983).
Five states view UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[15] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[16] MPC § 223.6 (defining RSP as a theft).

[17] Proposed Federal Criminal Code § 1732(c) (including RSP in theft).

[18] Only 9 states' theft offenses are limited to two grades based on value. Mass. Gen. Laws Ann. ch. 266, § 30(1); Mont. Code Ann. § 45-6-301; N.C. Gen. Stat. Ann. § 14-73.1; Okla. Stat. Ann. tit. 21, § 1704 and § 1705; 11 R.I. Gen. Laws Ann. § 11-41-5 and § 11-41-7; Vt. Stat. Ann. tit. 13 § 2501, § 2502, § 2503; Va. Code Ann. § 18.2-95 and -96; W.Va. Code Ann. § 61-3-13; Wyo. Stat. Ann. § 6-3-402. However, most of these states have additional grades or additional qualifications within the two grades, such as theft of a firearm, theft of a motor vehicle, etc., further emphasizing that D.C.'s two grade system is one of the narrowest in the country.

[19] MPC § 223.1(2) (establishing 3 grades of theft).

[20] Proposed Federal Criminal Code § 1735 (establishing 5 grades of theft).

[21] In determining how many "grades" a state has, enhancements were excluded as were separate offenses for theft of a motor vehicle or theft from a person. Ala. Code §§ 13A-8-3, -4, -4.1-5; Alaska Stat. Ann. § 11.46.120, .130, .140, .150; Ark. Code Ann. § 5-36-103; Del. Code Ann. tit. 11, §§ 841, 841A; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat. Ann. §§ 708-830.5, -831, -832, -833; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.030; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 353; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws §§ 750.356, .357; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.030; Neb. Rev. Stat. Ann. § 28-518; N.J. Stat. Ann. § 2C:20-2; N.M. Stat. Ann. § 30-16-1; N.Y. Penal Law §§ 155.25, .30, .35, .40, .42; N.D. Cent. Code Ann. § 12.1-23-05; Or. Rev. Stat. Ann. §§ 164.043, .045, .055, .057; Utah Code Ann. § 76-6-412; Wis. Stat. Ann. § 943.20.

Pew Charitable Trusts found that since 2001, at least 35 states have raised the amount of their felony thresholds for theft in order to "prioritize costly prison space for more serious offenders and ensure that value-based penalties take inflation into account.[22] States "that increased their thresholds reported roughly the same average decrease in crime as the 22 states that did not change their theft laws."[23] The study further found that raising the felony theft threshold did not affect the "overall" property crime or larceny rates, and that the amount of a state's felony threshold "is not correlated with its property crime and larceny rates."[24] As a whole, there has been a "long nationwide decline in property crime and larceny rates that began in the early 1990s."[25]

The gradations in the revised theft offense for theft of a motor vehicle of differing values also reflect national trends. At least 21 of the 50 states[26] as well as the MPC[27] and the Proposed Federal Criminal Code[28] have a gradation of theft specifically for a car, or a separate offense that penalizes theft of car. Fourteen of these states and the MPC grade theft of a motor vehicle without regard to the motor vehicle's value.[29] The remaining states that do grade theft of a motor vehicle on the basis of its value generally grade theft of motor vehicle more seriously than the theft of other property.[30]

Fifth, the deletion of the current theft recidivist penalty[31] would further bring the revised theft offense into conformity with national trends. Most states, the MPC, and the Proposed Federal Criminal Code do not have a theft-specific recidivist penalty, and of those states that do have a theft-specific recidivist penalty, the District's current statute is the most severe in the nation. Of the 23 states with theft-specific recidivist penalties,[32] the

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[22] *The Effects of Changing State Theft Penalties*, PEW CHARITABLE TRUSTS, http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/02/the-effects-of-changing-state-theft-penalties, (last updated February 24, 2017).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] For this survey, statutes that allow either a temporary or permanent intent to interfere with property or a temporary or permanent interference were included. Ala. Code § 13A-8-3(b); Cal. Penal Code § 487 (d)(1); Conn. Gen. Stat. Ann. § 53a-122 through § 53a-124; Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Iowa Code Ann. § 714.2(2); La. Stat. Ann. § 14:67.26; Minn. Stat. Ann. § 609.52(3)(3)(d); Mo. Ann. Stat. § 570.030(3)(3)(a); Nev. Rev. Stat. Ann. § 205.228; N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.Y. Penal Law § 155.30(8); N.D. Cent. Code Ann. §12.1-23-05(3)(d); Ohio Rev. Code Ann. § 2913.02(B)(5); Okla. Stat. Ann. tit. 21, § 1720; 18 Pa. Stat. Ann. § 3903(a.1); S.C. Code Ann. § 16.1-21-60(B); Utah Code Ann. § 76-6-412(1)(a)(ii); Fla. Stat. Ann. § 812.014(2)(c)(6); Miss. Code Ann. § 97-17-42; Wash. Rev. Code Ann. § 9A.56.050.

[27] MPC § 223.1(2)(a).

[28] Proposed Federal Criminal Code §1735(2)(d).

[29] Cal. Penal Code § 487 (d)(1); Del. Code Ann. tit. 11, § 841A; Ind. Code Ann. § 35-43-4-2.5; Ohio Rev. Code Ann. § 2913.02(B)(5); S.C. Code Ann. § 16.1-21-60(B); Fla. Stat. Ann. § 812.014(2)(c)(6); N.J. Stat. Ann. § 2C:20-2(b)(2)(b); N.D. Cent. Code Ann. §12.1-23-05(3)(d); 18 Pa. Stat. Ann. § 3903(a.1); Mo. Ann. Stat. § 570.030(3)(3)(a); Ala. Code § 13A-8-3(b); Okla. Stat. Ann. tit. 21, § 1720; Utah Code Ann. § 76-6-412(1)(a)(ii); Wash. Rev. Code Ann. § 9A.56.050.

[30] Conn. Gen. Stat. Ann. §§ 53a-122, 123, -124, 125, -125a, -125b; Iowa Code Ann. § 714.2; La. Stat. Ann. §§ 14:67:67.26; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. §§205.220, .222, .228, .240; N.Y. Penal Law §§ 155.25, .30, .35, .40, .42.

[31] D.C. Code § 22-3212(c).

[32] Alaska Stat. Ann. § 11.46.130; 11.46.140; Cal. Penal Code § 490.2; Fla. Stat. Ann. § 812.014; Ga. Code Ann. § 16-8-12; Haw. Rev. Stat. Ann. § 708-803; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-

highest maximum penalty is ten years, but it only applies when the property has a value of $1,000 or more but less than $20,000.[33] The next highest maximum possible penalty is seven years,[34] regardless of the value of the property, which is far lower than the maximum possible sentence of 15 years under current D.C. law. In addition, none of the 23 states appear to require a mandatory minimum sentence like D.C.'s current theft-specific recidivist penalty.

RCC § 22E-2102. Unauthorized Use of Property.

Relation to National Legal Trends. *The UUP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends. Only a few of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[35] (hereafter "reformed code jurisdictions") have statutes that generally criminalize the temporary unauthorized use or taking of property.[36]*

First, all of the six reformed code jurisdictions with comparable statutes proscribe a wide range of conduct beyond "takes and carries away" in the current TPWR statute.[37] None of the comparable statutes in the six reformed code jurisdictions has an asportation element like the current TPWR statute does.[38]

Second, codifying a "knowingly" mental state to the element "without the effective consent of the owner" also reflects national trends. As of 2015, it appears just one of the 50 states has a statute that criminalizes the temporary taking of particular property with no culpable mental state requirement.[39] Among the six reformed code jurisdictions with

4-2; Iowa Code Ann. § 714.2; Kan. Stat. Ann. § 21-5801; La. Stat. Ann. § 14:67; Me. Rev. Stat. tit. 17-A, § 360; Md. Code Ann., Crim. Law § 7-104; Mich. Comp. Laws Ann. § 750.356; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.040; Mont. Code Ann. § 45-6-301; Neb. Rev. Stat. Ann. § 28-518; N.H. Rev. Stat. Ann. § 637:11; N.C. Gen. Stat. Ann. § 14-72; 11 R.I. Gen. Laws Ann. § 11-41-24; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-412; Va. Code Ann. § 18.2-104.

[33] Mich. Comp. Laws Ann. § 750.736(2)(b)).

[34] N.H. Rev. Stat. Ann. § 637:11(II)(b.

[35] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[36] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803. The MPC declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles, but recognized that a few states had such statutes. MPC § 223.9 cmt. at 271-72. The Proposed Federal Criminal Code also declined to extend criminal liability to the temporary deprivation of movable property other than motor vehicles.

[37] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04; Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3; Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[38] D.C. Code § 22-3216.

[39] N.C. Gen. Stat. Ann. § 14-72.4 (concerning the unauthorized taking or sale of a dairy milk case or milk crate).

comparable statutes to UUP,[40] all of them specify a "knowingly" culpable mental state[41] or require the defendant to act "with intent to" temporarily deprive the owner of the property.[42] It is difficult to generalize about the elements to which the culpable mental states apply in these jurisdictions due to the varying rules of construction.

Third, regarding the bar on multiple convictions for the revised unauthorized use of property offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised unauthorized use of property offense and other overlapping property offenses. For example, where the offense most like the revised unauthorized use of property offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[43] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[44] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[45]

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[46] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[47] Among those reform jurisdictions that expressly codify a

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[40] *See, e.g.*, Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305; Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[41] Ohio Rev. Code Ann. § 2913.04(A), (D), (E), (F); Ind. Code Ann. § 35-43-4-3; 720 Ill. Comp. Stat. Ann. 5/16-3(a), (d); Mont. Code Ann. § 45-6-305.

[41] N.C. Gen. Stat. Ann. § 14-72.4

[42] Utah Code Ann. §76-6-404.5; Kan. Stat. Ann. § 21-5803.

[43] D.C. Code § 22-3203.

[44] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[45] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[46] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[47] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[48]

RCC § 22E-2103. Unauthorized use of a Motor Vehicle.

Relation to National Legal Trends. *The revised UUV offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, expanding the definition of "motor vehicle," and, in turn, the scope of the revised UUV offense to include vehicles such as aircraft and watercraft follows a strong majority of jurisdictions nationwide. Of the 40 states with UUV offenses,[49] a majority includes aircraft and watercraft,[50] as do the Model Penal Code (MPC)[51] and the Proposed Federal Criminal Law Code.[52]

Second, the RCC's elimination of overlap between theft of a motor vehicle, receiving stolen property (RSP), and UUV brings these offenses in line with national trends. Of the 40 states with UUV offenses,[53] the majority bar liability for both UUV and

[48] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[49] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[50] Ala. Code §§ 13A-8-11 and 13A-8-1; Ariz. Rev. Stat. Ann. §§ 13-1803, 13-1803, and 13-105; Ark. Code Ann. §§ 5-36-108 and 5-36-101; Alaska Stat. Ann. § 11.46.360(a)(1); Colo. Rev. Stat. Ann. § 18-4-409; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 708-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. §§ 514.100 and 514.010; Me. Rev. Stat. tit. 17-A, §360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03(A); Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-406; Tex. Penal Code Ann. §31.07; Minn. Stat Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; N.C. Gen. Stat. Ann. § 14-72.2; Iowa Code Ann. § 714.7; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. §§ 943.23 and 939.22.

[51] MPC § 223.9

[52] Proposed Federal Criminal Code § 1736.

[53] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, §

theft in regards to the same car involved in a single act or course of conduct.[54] The MPC and the Proposed Federal Criminal Code do not explicitly prohibit convictions for both theft and UUV for the same act or course of conduct, but the commentary for each[55] recognizes that UUV is necessary to punish conduct that falls short of theft.

Other jurisdictions' treatment of liability for both UUV and RSP involving the same act or course of conduct is more variable. A few states bar liability for both offenses in regards to the same car involved in a single act or course of conduct,[56] although at least one state appears to explicitly allow dual liability.[57] Overall, however, there is a lack of statutory authority that squarely addresses the issue of RSP and UUV convictions for the same act or course of conduct. In addition, a few states appear to not have a specific RSP offense.[58] In the MPC, liability for both UUV and RSP based on the same act or course of conduct is barred because RSP is a form of theft, and the commentary recognizes that UUV

360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[54] A variety of mechanisms prevent the overlap, the most common of which is that the UUV offense requires an intent to temporarily deprive the owner of the motor vehicle, whereas the theft offense requires intent to deprive. Ariz. Rev. Stat. Ann. § 13-1803; Kan. Stat. Ann. § 21-5803; Iowa Code Ann. § 714.7; La. Stat. Ann. § 14:68.4; Mich. Comp. Laws Ann. § 750.414; Nev. Rev. Stat. Ann. § 205.2715; N.J. Stat. Ann. § 2C:30-10; S.C. Code Ann. § 16-21-60(B); S.D. Codified Laws § 22-30A-12; Utah Code Ann. § 41-1a-1314; Va. Code Ann. § 18.2-102; Idaho Code Ann. § 49-227; W. Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102; Tenn. Code. Ann. § 39-14-106; Haw. Rev. Stat. Ann. § 708-836 (specified in commentary). Overlap in other states is prevented by including UUV as a type of theft, Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360, or merger at sentencing, Md. Code Ann., Crim. Law § 7-105(2).
Finally case law in five states views UUV as a lesser included offense, thus preventing convictions for both. *See State v. Willis*, 673 A.2d 1233, 1240 (Del. Super. Ct. 1995); *Jackson v. State*, 270 S.W.3d 649, 652 (Tex. App. 2008); *State v. Shults*, 169 Mont. 33, 35-36 (1976); *Reyna-Abarca v. People*, 2017 WL 745876, 10 (Colo. 2017); *Greer v. State*, 77 Ark. App. 180, 184 (2002).

[55] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another."); Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[56] Two states prevent overlap by including UUV as a type of theft, Minn. Stat. Ann. § 609.52(2)(17); Me. Rev. Stat. tit. 17-A, § 360. Maryland has a merger at sentencing provision for theft and UUV and includes RSP in the definition of "theft." Md. Code Ann., Crim. Law §§ 7-105(2), 7-104.
Several states prohibit overlap between UUV and RSP by requiring an intent to temporarily deprive the owner of the motor vehicle for UUV, and requiring for RSP an intent to deprive. Kan. Stat. Ann. § 21-5801; Utah Code Ann. § 76-6-408; Nev. Rev. Stat. Ann. § 205.275; Idaho Code Ann. § 18-2403.

[57] *Commonwealth v. Thompson*, 2015 WL 7722270 (Pa. Super. Ct. Nov. 30, 2015) (affirming convictions for RSP and UUV for the same motor vehicle) (non-precedential).

[58] Tenn. Code Ann. § 39-14-101; Wyo. Stat. Ann. § 6-3-402.

is necessary to punish conduct that falls short of theft.[59] Similarly, the Proposed Federal Criminal Code includes RSP as a type of theft and the commentary recognizes that UUV is necessary to punish conduct that falls short of theft.[60]

Third, the RCC's deletion of the UUV-specific recidivist enhancement and the enhancement for committing UUV during a crime of violence or to facilitate a crime of violence reflect national trends. Only 9 of the 40 states with UUV offenses[61] have UUV-specific recidivist penalties.[62] The MPC and Proposed Federal Criminal Code do not have UUV-specific penalties. Of the few states with UUV-specific recidivist penalties, the highest maximum penalty is 9 years,[63] which is significantly less than the 30 year maximum possible penalty in the District's current UUV recidivist penalty. Five years is the most common maximum possible penalty in these 9 states with UUV-specific recidivist penalties,[64] with the remaining states having lower maximum penalties.[65] None of the 40

[59] MPC § 223.9 cmt. at 271 (discussing the requirements for theft under the MPC and noting that "Nevertheless, there is still need for a non-felony sanction against the disturbing and dangerous practice of driving off a motor vehicle belonging to another.").

[60] Proposed Federal Criminal Code § 1736 cmt. at 212 (discussing the requirements for theft under the proposed revised federal criminal code and noting that "In defining an offense of borrowing the vehicle, this section has the effect of providing in federal criminal laws a felony-misdemeanor distinction so that a felony charge and conviction in most 'joyriding' cases may be avoided.").

[61] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[62] Kan. Stat. Ann. § 21-5803; Neb. Rev. Stat. Ann. § 28-516; Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; W. Va. Code Ann. § 17A-8-4; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1.

[63] N.M. Stat. Ann. § 30-16D-1.

[64] Conn. Gen. Stat. Ann. § 53a-119b; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mass. Gen. Laws Ann. ch. 90, § 24.

[65] Kan. Stat. Ann. § 21-5803 (5 to 7 months if the defendant has one prior misdemeanor conviction or no prior convictions); Neb. Rev. Stat. Ann. § 28-516 (2 years); N.Y. Penal Law §§ 165.06 (4 years); W. Va. Code Ann. § 17A-8-4 (3 years).

states with UUV offenses[66] or the MPC[67] or the Proposed Federal Criminal Code[68] enhance UUV if the defendant used the motor vehicle during the course of or to facilitate a crime of violence or a similar type of crime. However, four states generally penalize using the vehicle in the commission of a felony or a crime or with the intent to do so.[69]

Fourth, establishing multiple gradations for UUV follows national trends. More than half the 40 jurisdictions with a UUV offense[70] have multiple gradations of UUV.[71]

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[66] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[67] MPC § 223.9.

[68] Proposed Federal Criminal Code § 1736.

[69] N.Y. Penal Law § 165.08; Utah Code Ann. § 41-1a-1314; Colo. Rev. Stat. Ann. § 18-4-409; Vt. Stat. Ann. tit. 23, § 1094.

[70] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[71] Ala. Code § 13A-8-11 (grading based on whether the defendant used force or threat of force); Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle); Ariz. Rev. Stat. § 13-1803 (grading based on whether the defendant "took unauthorized control" over a vehicle or was "transported or physically located" in the vehicle); Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle); Conn. Gen. Stat. Ann. § 53a-119b (grading based on whether defendant has prior conviction); Kan. Stat. Ann. § 21-5803 (grading based on whether defendant has prior conviction); Ky. Rev. Stat. Ann. § 514.100 (grading based on whether defendant has prior conviction); Me. Rev. Stat. tit. 17-A, § 360 (grading based on whether defendant has prior conviction); N.J. Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.Y. Penal Law §§ 165.05, .06, .08 (grading based on whether defendant has prior conviction and whether defendant had the intent to use the vehicle in the course of or the commission of specified offenses, or in the immediate flight therefrom); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval

The MPC only has one grade of UUV,[72] but the Federal Proposed Criminal Code has two.[73] There is less precedent for grading operating a motor vehicle more seriously than riding as a passenger, in part because only eight states explicitly codify liability for UUV for a passenger.[74] However, three of these eight states do grade UUV for a passenger less seriously than the general UUV offense,[75] like the UUV offense in the RCC. The MPC declined to criminalize a passenger's non-operational use of a vehicle without the owner's consent,[76] as did the Proposed Federal Criminal Code.[77] The most common method of grading UUV amongst the 40 states with UUV offenses[78] is based upon whether the defendant has prior convictions.[79] However, many of the remaining states grade UUV on

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and restoration); Ohio Rev. Code Ann. § 2913.03 (grading based on whether the victim was an elderly person or disabled adult); Utah Code Ann. §§ 41-1a-1314 (grading based on several factors, including if the motor vehicle was used to commit a felony); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle); Wash. Rev. Code Ann. §§ 9A.56.070, .075 (grading based on whether defendant was a passenger); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle); Wis. Stat. Ann. § 943.23 (grading based on whether defendant was a passenger); Neb. Rev. Stat. Ann. § 28-516 (grading based on whether defendant had a prior conviction); Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle); Mass. Gen. Laws Ann. ch. 90, § 24 (grading based on whether defendant has prior conviction); N.M. Stat. Ann. § 30-16D-1 (grading based on whether the defendant has prior conviction); Vt. Stat. Ann. tit. 23, § 1094 (grading based on several factors, including whether used the vehicle in the commission of a felony); W.Va. Code Ann. § 17A-8-4 (grading based on whether defendant has a prior conviction).

[72] MPC § 223.9.

[73] Proposed Federal Criminal Code §1736(3).

[74] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Del. Code Ann. tit. 11, § 853(1); Me. Rev. Stat. tit. 17-A, § 360(1)(A); N.J. Stat. Ann. § 2C:20-10(d); N.Y. Penal Law § 165.03(1); Or. Rev. Stat. Ann. § 164.135(1)(a); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[75] Ariz. Rev. Stat. Ann. § 13-1803(A)(2); Wash. Rev. Code Ann. § 9A.56.075(1); Wis. Stat. Ann. § 943.23(4m).

[76] MPC § 223.9 cmt. at 273.

[77] Proposed Federal Criminal Code § 1736.

[78] For the purposes of this survey, statutes that did not specify an intent to interfere with the vehicle, as well as statutes that specified an intent to temporarily interfere with the vehicle, were included. Statutes that included an intent to permanently interfere with or deprive the vehicle were excluded. Ala. Code § 13A-8-11; Alaska Stat. Ann. §§ 11.46.360, .365; Ariz. Rev. Stat. Ann. § 13-1803; Ark. Code Ann. § 5-36-108; Colo. Rev. Stat. Ann. § 18-4-409; Conn. Gen. Stat. Ann. § 53a-119b; Del. Code Ann. tit. 11, § 853; Haw. Rev. Stat. Ann. § 703-836; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; Mont. Code Ann. § 45-6-308; N.J. Stat. Ann. § 2C:20-10; N.Y. Penal Law §§ 165.05, .06, .08; N.D. Cent. Code Ann. § 12.1-23-06; Ohio Rev. Code Ann. § 2913.03; Or. Rev. Stat. Ann. § 164.135; 18 Pa. Stat. Ann. § 3928; Tenn. Code Ann. § 39-14-106; Tex. Penal Code Ann. § 31.07; Utah Code Ann. § 41-1a-1314, 76-6-410.5, 76-6-410; La. Stat. Ann. § 14:68.4; N.C. Gen. Stat. Ann. § 14-72.2; S.C. Code Ann. § 16-21-60(B); Md. Code Ann., Crim. Law § 7-105; Wash. Rev. Code Ann. §§ 9A.56.070, .075; Minn. Stat. Ann. § 609.52; Nev. Rev. Stat. Ann. § 205.2715; Mich. Comp. Laws Ann. § 750.414; Iowa Code Ann. § 714.7; S.D. Codified Laws § 22-30A-12; Va. Code Ann. § 18.2-102; Wis. Stat. Ann. § 943.23; Neb. Rev. Stat. Ann. § 28-516; Idaho Code Ann. § 49-227; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; Vt. Stat. Ann. tit. 23, § 1094; W.Va. Code Ann. § 17A-8-4; Wyo. Stat. Ann. § 31-11-102.

[79] Conn. Gen. Stat. Ann. § 53a-119b; Kan. Stat. Ann. § 21-5803; Ky. Rev. Stat. Ann. § 514.100; Me. Rev. Stat. tit. 17-A, § 360; N.Y. Penal Law §§ 165.05, .06, .08; Neb. Rev. Stat. Ann. § 28-516; Mass. Gen. Laws Ann. ch. 90, § 24; N.M. Stat. Ann. § 30-16D-1; W.Va. Code Ann. § 17A-8-4.

other factors such as the type of vehicle involved[80] or the value of the vehicle or amount of damage done to the vehicle.[81]

Fifth, the revised UUV statute prohibits convictions for both UUV and carjacking, RCC § 22E-1XXX, and UUV and the District's unauthorized use of a rented or leased motor vehicle, D.C. Code 22-3215 based on the same act or course of conduct. Neither the MPC nor the Proposed Federal Criminal Code has a carjacking offense. Case law addressing this issue in the 50 states is scant. However, in at least three states, UUV or an equivalent offense to the revised UUV offense in the RCC is a lesser included offense of carjacking.[82] A few of the states with failing to return rented or leased vehicle statutes appear to avoid multiple convictions with UUV for the same act or course of conduct by making failing to return rented or leased vehicles an alternative means of committing the general UUV offense.[83] At least one state appears to avoid multiple convictions by making failure to return a rented or leased vehicle a grade of the general UUV offense.[84] Neither the MPC nor the Proposed Federal Criminal Code have offenses that specifically prohibit failing to return rented or leased motor vehicles.

Sixth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[85] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the

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[80] Alaska Stat. Ann. §§ 11.46.360, .365 (grading based on several factors, including the type of vehicle) N.J. Stat. Ann. § (grading based on type of vehicle and whether defendant was passenger); N.C. Gen. Stat. Ann. § 14-72.2 (grading based on type of vehicle).

[81] Colo. Rev. Stat. Ann. § 18-4-409 (grading based on several factors, including the value of the vehicle);); N.D. Cent. Code Ann. § 12.1-23-06 (grading based on the value of the use of the vehicle and the cost of retrieval and restoration); Minn. Stat. Ann. § 609.52 (grading based on value of the vehicle); Va. Code Ann. § 18.2-102 (grading based on the value of the vehicle; Idaho Code Ann. § 49-227 (grading based on the amount of damage caused to the vehicle and the value of the property taken from the vehicle).

[82] *Fryer v. State*, 732 So. 2d 30, 33 (Fla. Dist. Ct. App. 1999) (stating that grand theft auto, which includes as an alternative element that the defendant acted with the intent temporarily deprive, "appears to be a necessarily lesser included offense of carjacking."); *State v. Ector*, 2012 WL 3201985 at 8 (Tenn. Crim. App. 2012) (unpublished) ("Unauthorized use of a motor vehicle is a lesser-included offense of carjacking."); *State v. Talbert*, 2007 WL 466762 at 1 (La. App. 1 Cir. 2007) ("Defendant . . . was charged by bill of information with carjacking, a violation of LSA-R.S. 14:64.2. . . . Defendant was tried by a jury and convicted of the lesser and included offense of unauthorized use of a motor vehicle, a violation of LSA-R.S. 14:68.4.).

[83] Ala. Code § 13A-8-11; Del. Code Ann. tit. 11, § 853; N.Y. Penal Law §§ 165.05, .06, .08; Or. Rev. Stat. Ann. § 164.135.

[84] Alaska Stat. Ann. §§ 11.46.360, .365.

[85] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

requisite [] knowledge."[86] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[87]

RCC § 22E-2104. Shoplifting.

Relation to National Legal Trends*. The revised shoplifting offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

Approximately 28 states have separate shoplifting statutes.[88] Several other states do not have separate shoplifting statutes, but codify special evidentiary presumptions for their theft statutes that are specific to shoplifting.[89] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has a shoplifting offense.

First, regarding the transfer of merchandise between containers, of the 28 states that have separate shoplifting statutes,[90] at least 17 codify as a means of committing shoplifting conduct substantially similar or identical to subsection (a)(1)(C) in the revised shoplifting statute.[91] Nine of these 17 states prohibit transferring the property at issue from one container or package to another, without additional requirements for the container or package.[92] These states may, however, have requirements for the property at issue, such

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[86] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[87] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[88] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[89] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

[90] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.

[91] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Del. Code Ann. tit. 11, § 840(a)(5); Haw. Rev. Stat. Ann. § 708-833.5(c); Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Tenn. Code Ann. § 39-14-146(a)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); N.M. Stat. Ann. § 30-16-19(A)(4); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

[92] Ariz. Rev. Stat. Ann. § 13-1805(A)(4); Haw. Rev. Stat. Ann. § 708-833.5(c); Tenn. Code Ann. § 39-14-146(a)(4); Neb. Rev. Stat. Ann. § 28-511.01(1)(c); Vt. Stat. Ann. tit. 13, § 2577(3); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3); W. Va. Code Ann. § 61-3A-1(a)(4); Ga. Code Ann. § 16-8-14(a)(3); Miss. Code Ann. § 97-23-93(2)(d).

that it be displayed for sale, like the RCC does.[93] In seven of the remaining states, the statute prohibits transferring property that is displayed for sale or intended for sale in a container to any other container.[94]

Second, regarding the bar on multiple convictions for the revised shoplifting offense and overlapping property offenses, a generalization to other jurisdictions for all the offenses would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offense similar to the revised shoplifting offense and other overlapping property offenses. For example, where the offense most like the revised theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences statute[95] or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[96] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[97]

Specifically for shoplifting, in at least six[98] of the twenty-eight states with shoplifting statutes, [99] multiple convictions for these offenses are barred because they are alternative means of committing the same consolidated "theft" offense. All states[100] that treat shoplifting as an evidentiary presumption for theft also effectively bar multiple punishments for shoplifting and theft because shoplifting is not a separate offense. Research was not conducted to determine whether shoplifting statutes in other jurisdictions are lesser included offenses of theft.

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

Relation to National Legal Trends*. The revised UCPR's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

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[93] Ariz. Rev. Stat. Ann. § 13-1805(A) ("merchandise displayed for sale."); 11 R.I. Gen. Laws Ann. § 11-41-20(b)(3) ("any merchandise displayed, held, stored of offered for sale in a retail mercantile establishment.").
[94] Ill. Comp. Stat. Ann. 5/16-25(a)(3); N.H. Rev. Stat. Ann. § 637:3-a(II)(d); N.J. Stat. Ann. § 2C:20-11(b)(4); Utah Code Ann. § 76-6-602(3); S.C. Code Ann. § 16-13-110(A)(3); Mass. Gen. Laws Ann. ch. 266, § 30A; N.M. Stat. Ann. § 30-16-19(A)(4);
[95] D.C. Code § 22-3203.
[96] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[97] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[98] Conn. Gen. Stat. Ann. §53a-119; Haw. Rev. Stat. ann. § 708-833.5; N.H. Rev. Stat. Ann. § 637:3-a(II); Tenn. Code Ann. § 39-14-146; Neb. Rev. Stat. Ann. § 28-511.01; Idaho Code Ann. § 18-4624.
[99] Alaska Stat. Ann. § 11.46.220; Ariz. Rev. Stat. Ann. § 13-1805; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 840; Haw. Rev. Stat. Ann. § 708-833.5; Ill. Comp. Stat. Ann. 5/16-25; N.H. Rev. Stat. Ann. § 637:3-a; N.J. Stat. Ann. § 2C:20-11; 18 Pa. Stat. Ann. § 3929; Tenn. Code Ann. § 39-14-146; Utah Code Ann. § 76-6-602; Wis. Stat. Ann. § 943.50; Wyo. Stat. Ann. § 6-3-404; S.C. Code Ann. § 16-13-110; Neb. Rev. Stat. Ann. § 28-511.01; Mich. Comp. Laws Ann. § 703.356d; Cal. Penal Code § 459.5; Mass. Gen. Laws Ann. ch. 266, § 30A; Vt. Stat. Ann. tit. 13, § 2577; 11 R.I. Gen. Laws Ann. § 11-41-20; N.M. Stat. Ann. § 30-16-19; Idaho Code Ann. § 18-4624; W. Va. Code Ann. § 61-3A-1; Va. Code Ann. § 18.2-103; Ga. Code Ann. § 16-8-14; Miss. Code Ann. § 97-23-93; Okla. Stat. Ann. tit. 21, § 1731.
[100] *See, e.g.*, Ark. Code Ann. §5-36-116; Colo. Rev. Stat. Ann § 18-4-406; Mo. Ann. § 570.030.

First, removing liability for proprietary information from the revised UCPR offense follows a clear national trend amongst the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[101](hereafter "reformed code jurisdictions. Nearly all of the 29 reformed code jurisdictions have offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings.[102] None of them include proprietary information or intellectual property in their offenses concerning sound and audiovisual recordings. Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has commercial piracy offenses.

Second, applying a "knowingly" culpable mental state to the element in subsection (a)(3) that the defendant acted "without the effective consent of the owner" is consistent with many of the reformed code jurisdictions' commercial piracy statutes. It is difficult to generalize about the required mental state in other jurisdictions for this element due to the varying rules of construction between states. However, a majority of the reformed code jurisdictions with unlawful creation or possession of a recording statutes appear to apply a "knowingly" mental state to the element of without consent or its substantive equivalent.[103]

Third, the UCPR statute increases the number and type of gradations for the offense. The current commercial piracy statute is a misdemeanor, regardless of the number of the unlawful recordings at issue.[104] A majority of the reformed code jurisdictions with commercial piracy statutes have more than one grade of the offense,[105] like the revised UCPR offense. Due to the variety of methods by which the reformed code jurisdictions

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[101] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[102] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Conn. Gen. Stat. Ann. § 53-142b; Del. Code Ann. tit. 11, §§ 921, 921; Haw. Rev. Stat. Ann. § 482C-1, C-2, C-5; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[103] Ala. Code § 13A-8-81; Alaska Stat. Ann. § 45.50.900; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Conn. Gen. Stat. Ann. § 53-142b; Haw. Rev. Stat. Ann. §§ 482C-1; -2; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.17; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. §§ 164.085; .869; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-2; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Utah Code Ann. § 13-10-4; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

[104] D.C. Code § 22-3214(d).

[105] Ala. Code § 13A-8-86; Ariz. Rev. Stat. Ann. § 13-3705; Ark. Code Ann. § 5-37-510; Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Del. Code Ann. tit. 11, §§ 921, 921; 720 Ill. Comp. Stat. Ann. 5/16-7; Kan. Stat. Ann. § 21-5806; Ky. Rev. Stat. Ann. § 434.445; Me. Rev. Stat. tit. 10, § 1261; Minn. Stat. Ann. § 325E.201; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2, -A:5; N.J. Stat. Ann. § 2C:21-21; N.Y. Penal Law §§ 275.05, .15, .20, .25, .30; N.D. Cent. Code Ann. § 47-21.1-02; Or. Rev. Stat. Ann. §§ 164.865, .869; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030; Wis. Stat. Ann. §§ 943.207, .208.

grade the commercial piracy offense, it is difficult to generalize about the most common number of gradations or the substance of the gradations.[106] The threshold for the number of unlawful recordings at issue also varies amongst the states with reformed code jurisdictions, and in some states depends on the prohibited conduct.[107] One hundred unlawful recordings, however, is a threshold in several of the reformed code jurisdictions that do not differentiate between sound recordings and audiovisual recordings, particularly in lower gradations in those jurisdictions.[108]

Fourth, the addition of the forfeiture provision in subsection (f) of the revised UCPR also reflects national trends. A majority of the reformed jurisdictions with unlawful creation or possession of a recording statutes have similar provisions.[109]

Fifth, regarding the aggregation of quantities of property in a single scheme or systematic course of conduct, the revised UCPR offense follows many jurisdictions[110] which have statutes that closely follow the Model Penal Code (MPC)[111] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[112] However,

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[106] For example, several states grade, either in whole or in part, upon the type of prohibited conduct, such as whether the defendant transferred the sounds onto the unlawful recording or merely possessed the unlawful recording. *See, e.g.*, Ala. Code § 13A-8-86; Colo. Rev. Stat. Ann. § 18-4-602, -603, -604; Del. Code Ann. tit. 11, §§ 920, 921; Me. Rev. Stat. tit. 10, § 1261; Mont. Code Ann. §§ 30-13-142, -143; N.H. Rev. Stat. Ann. § 352-A:2. Several states differentiate in the gradations between sound recordings and audiovisual recordings, *e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; 720 Ill. Comp. Stat. Ann. 5/16-7; N.J. Stat. Ann. § 2C:21-21; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[107] *See, e.g.*, Ala. Code § 13A-8-86 Colo. Rev. Stat. Ann. §§ 18-4-602,4-603, 4-604.3, 604.7; Ark. Code Ann. § 5-37-510; N.H. Rev. Stat. Ann. § 352-A:2, -A:5.

[108] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-3705; Conn. Gen. Stat. Ann. §§ 53-142b, -142f; Mo. Ann. Stat. § 570.225; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. §§ 641.051, .052; Wash. Rev. Code Ann. §§ 19.25.020, .030.

[109] Ala. Code § 13A-8-4; Ariz. Rev. Stat. Ann. § 13-3705(F); Ark. Code Ann. § 5-37-510(g); Colo. Rev. Stat. Ann. §§ 18-4-606; 720 Ill. Comp. Stat. Ann. 5/16-7(i); Kan. Stat. Ann. § 21-5806(f); Ky. Rev. Stat. Ann. § 434.445(6); Mont. Code Ann. § 30-13-145; N.H. Rev. Stat. Ann. § 352-A:5(III); N.J. Stat. Ann. § 2C:21-21(e); N.D. Cent. Code Ann. § 47-21.1-04; 18 Pa. Stat. Ann. § 4116(f); Tenn. Code Ann. § 39-14-139(g); Tex. Bus. & Com. Code Ann. §§ 641.055; Wash. Rev. Code Ann. §§ 19.25.050.

[110] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann., Crim. Law § 7-103; Me. Rev. Stat. Ann. tit. 17-A, § 352; Neb. Rev. St. § 28-518; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N. D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; 18 Pa. Stat. Ann., § 3903; S. D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[111] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[112] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

there is some variation among states' aggregation provisions in situations where there are multiple victims.[113]

Sixth, regarding the bar on multiple convictions for the revised UCPR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised UCPR offense and other overlapping property offenses. For example, where the offense most like the revised UCPR is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[114] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[115] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[116]

National legal trends also support other changes to the revised UCPR offense. There is significant support for including audiovisual recordings for live performances in the scope of the revised UCPR offense. At least 18 of the reformed jurisdictions with offenses that prohibit the unlawful creation or possession of specific sound and audiovisual recordings include live performances in their statutes[117] and a majority of these statutes include audiovisual recordings.[118]

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

[No national legal trends section.]

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[113] *See, e.g. Commonwealth v. Young,* 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); *People v. Brown,* 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[114] D.C. Code § 22-3203.

[115] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[116] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[117] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5); Ark. Code Ann. § 5-37-510(b)(1); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Kan. Stat. Ann. § 21-5806(a)(1); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); Mont. Code Ann. § 30-13-142(2); N.H. Rev. Stat. Ann. § 352-A:2(1)(b); N.J. Stat. Ann. § 2C:21-21(c)(3); N.Y. Penal Law §§ 275.15, .20, .25; N.D. Cent. Code Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. § 164.869; 18 Pa. Stat. Ann. § 4116(d.1); Tenn. Code Ann. § 39-14-139(c)(1); Tex. Bus. & Com. Code Ann. § 641.052; Wash. Rev. Code Ann. §§ 19.25.030; Wis. Stat. Ann. § 943.208.

[118] Ala. Code § 13A-8-81(2); Ariz. Rev. Stat. Ann. § 13-3705(A)(5), (G)(2); Ark. Code Ann. § 5-37-510(b)(1), (a)(3); Colo. Rev. Stat. Ann. § 18-4-604.3; 720 Ill. Comp. Stat. Ann. 5/16-7(a)(4); Ky. Rev. Stat. Ann. § 434.445(2); Mo. Ann. Stat. § 570.225(1)(2); N.J. Stat. Ann. § 2C:21-21(c)(3); N.D. Cent. Code Ann. § 47-21.1-02(2); Or. Rev. Stat. Ann. §§ 164.865(10), .869; Tenn. Code Ann. § 39-14-139(c)(1), (a)(6); Tex. Bus. & Com. Code Ann. §§ 641.001(4), .052; Wash. Rev. Code Ann. §§ 19.25.010(4), .25.030; Wis. Stat. Ann. § 943.208.

Chapter 22. Fraud Offenses

RCC § 22E-2201. Fraud.

Relation to National Legal Trends. *The revised fraud offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

A majority of states' criminal codes do not include a general fraud offense similar to the District's current fraud statute. While many states have narrow fraud offenses that cover specific types of frauds[1], only six states have a separate, general fraud offense that broadly covers obtaining property by deception.[2] Instead, most states, and the American Law Institute's Model Penal Code (MPC) criminalize general frauds as theft by deception.[3] The RCC retains a separate fraud offense, but the revised fraud offense is similar to theft by deception offenses in other jurisdictions and the MPC.

Three of the substantive changes discussed above are consistent with the majority national trend of treating deceptive takings as a form of theft. First, limiting fraud to exclude causing a loss is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property; merely causing loss does not suffice.[4] Second, eliminating the inchoate version of fraud that is currently codified as second degree fraud is consistent with national trends, as theft requires that the accused actually take, obtain, transfer, or exercise control over property. Unsuccessful attempts to obtain property are not criminalized as completed offenses. Third, eliminating the "scheme or systematic course of conduct" element is also consistent with national trends, as theft does not require a "scheme or systematic course of conduct."[5]

Regarding the bar on multiple convictions for the revised fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised fraud offense and other overlapping property offenses. For example, where the offense most like the revised fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those

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[1] Many states have fraud offenses that only apply to specific situations. For example, Iowa's fraud statute specifies very specific types of frauds, such as "for the purpose of soliciting assistance, contributions, or other thing of value, falsely represents oneself to be a veteran of the armed forces of the United States, or a member of any fraternal, religious, charitable, or veterans organization, or any pretended organization of a similar nature, or to be acting on behalf of such person or organization." Iowa Code Ann. § 714.8.

[2] Alaska Stat. Ann. § 11.46.600 ; Ariz. Rev. Stat. Ann. § 13-2310; Fla. Stat. Ann. § 817.034; Mich. Comp. Laws Ann. § 750.218; N.M. Stat. Ann. § 30-16-6 ; N.Y. Penal Law § 190.65. Colorado also has an offense called "Charitable Fraud", though it is defined broadly enough that it could arguably be counted as a general fraud offense. Colo. Rev. Stat. Ann. § 6-16-111.

[3] MPC § 223.3.

[4] *E.g.,* Haw. Rev. Stat. Ann. § 708-830 (person commits theft if that person "obtained or exerts control over property;" or "obtains services[.]"; N.Y. Penal Law § 155.05 (person commits theft when that person "wrongfully takes, obtains, or withholds such property from an owner"; Tex. Penal Code Ann. § 31.03 (person commits theft if he "unlawfully appropriates property with intent to deprive the owner of property); MPC § 223.3. Theft by Unlawful Taking or Disposition (requiring that person "takes, or exercise unlawful control over, moveable property of another[.]" *See also*, Lafave, Wayne. 3 SUBST. CRIM. L. § 19.3 (2d ed.) ("Commission of the crime of larceny requires a taking (caption) and carrying away (asportation) of another's property.")

[5] *E.g.*, Haw. Rev. Stat. Ann. § 708-830; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 31.03; MPC § 223.3.

overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[6] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[7] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[8]

Increasing the number of penalty grades for fraud reflects national trends. Nearly all of the 29 states[9] that have comprehensively reformed criminal codes influenced by the MPC and have a general part[10] (hereafter "reformed code jurisdictions"), as well as the MPC[11] and Proposed Federal Criminal Code[12] have more than two penalty grades for fraud or theft by deception.

The revised fraud statute's use of a new definition of deception, under RCC § 22A-2001 (8), is broadly supported by national legal trends. Of the 29 reformed criminal code jurisdictions, fifteen states,[13] and the MPC[14] include a definition of deception. The deception definition in the revised fraud offense is modeled on, and largely consistent with, the definitions adopted in these fifteen states and the MPC. Relying on a statutory deception definition, instead of a vague "intent to defraud" element is also consistent with national legal trends. Of the fifteen states that statutorily define deception, only two also require an intent to defraud.[15]

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[6] D.C. Code § 22-3203.

[7] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[8] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[9] Only two of the 29 reformed code jurisdictions use two or fewer penalty grades for either fraud or theft. Alaska Stat. Ann. § 11.46.600; Ariz. Rev. Stat. Ann. § 13-2310; N.Y. Penal Law § 190.65.

[10] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[11] MPC § 223.1(2) (establishing 3 grades of theft).

[12] Proposed Federal Criminal Code § 1735 (establishing 5 grades of theft).

[13] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Del. Code Ann. tit. 11, § 843; Del. Code Ann. tit. 11, § 844; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401; Wash. Rev. Code Ann. § 9A.56.010.

[14] MPC § 223.3.

[15] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3. See also, N.Y. Penal Law § 190.65 ("A person is guilty of a scheme to defraud in the first degree when he or she: (a) engages in a scheme or systematic ongoing course of conduct with intent to defraud ten or more persons or to obtain property from ten or more persons by false or fraudulent pretenses, representations or promises, and so obtains property from one or more such persons[.]"); *See also*, 18 U.S.C. 1341("Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or

Requiring that the defendant knowingly deceive the other is consistent with law in the fifteen reformed code jurisdictions states that have statutorily defined "deception." Eleven of these states require that the defendant acted "knowingly,"[16] "intentionally,"[17] or "purposely"[18]; two states require "intent to defraud"[19]; and one state requires that the defendant made a representation which he or she "does not believe to be true"[20] Only one of these states does not specify a mental state as to deception.[21] However, requiring a knowing mental state for fraud departs from federal courts' interpretation of analogous federal fraud statutes.[22] Federal courts have held that under the federal mail and wire fraud statutes, a person commits fraud by either "knowingly making false representations" or by making statements "with reckless indifference to their truth or falsity."[23]

In some respects the RCC's deception definition diverges from the majority approach amongst the fifteen states and the MPC. For instance, unlike the MPC definition, the deception definition requires that the false impression be as to a material fact. Only three of the fifteen states with statutory deception definitions also require materiality, [24] though traditionally, fraud and false pretenses required a misrepresentation as to a material fact.[25] Although the MPC and most states do not explicitly require materiality, the MPC and six states[26] require that the false impression must be of "pecuniary significance."[27] The materiality requirement may be both broader and narrower than the "pecuniary significance" requirement. Materiality may be broader in that it could include false impressions that would affect a reasonable person's decision, even without relating to pecuniary matters. The materiality requirement may be narrower however, by excluding false impressions of pecuniary significance, that are nonetheless so minor they would not affect a reasonable person's decision.

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deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.").

[16] Alaska Stat. Ann. § 11.81.900; Ala. Code § 13A-8-1; Ohio Rev. Code Ann. § 2913.01; Wash. Rev. Code Ann. § 9A.56.010

[17] Del. Code Ann. tit. 11, § 843; Me. Rev. Stat. tit. 17-A, § 354; 18 Pa. Stat. Ann. § 3922; Utah Code Ann. § 76-6-401

[18] N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4

[19] Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[20] Mo. Ann. Stat. § 570.010.

[21] Tex. Penal Code Ann. § 31.01

[22] *Williams v. United States*, 979 F.2d 844 (1st Cir. 1992); *United States v. Hannigan*, 27 F.3d 890, 892 n.1 (3d Cir. 1994); *United States v. Wells*, 163 F.3d 889, 898 (4th Cir. 1998); *United States v. Hathaway*, 798 F.2d 902, 909 (6th Cir. 1986); *United States v. Cohen*, 516 F.2d 1358, 1367 (8th Cir. 1975); *United States v. Munoz*, 233 F.3d 1117, 1136 (9th Cir. 2000); *United States v. Welch*, 327 F.3d 1081, 1105 (10th Cir. 2003); *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

[23] *United States v. Sawyer*, 799 F.2d 1494, 1502 (11th Cir. 1986).

[24] Mo. Ann. Stat. § 570.010 ; Tex. Penal Code Ann. § 31.01; Utah Code Ann. § 76-6-401.

[25] *Neder v. United States*, 527 U.S. 1, 22, (1999) (holing that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"); *See generally,* Geraldine Szott Moohr, *Mail Fraud Meets Criminal Theory*, 67 U. Cin. L. Rev. 1 (1998); LaFave, Wayne. 3 Subst. Crim. L. § 19.7.

[26] Ala. Code § 13A-8-1; Ark. Code Ann. § 5-36-101; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; Or. Rev. Stat. Ann. § 164.085; S.D. Codified Laws § 22-30A-3.

[27] MPC § 223.3.

The RCC deception definition also does not include false impressions as to the actor's state of mind (except as it relates to intent to perform a promise). The MPC[28] and nine[29] of the fifteen states with deception definitions, by contrast, include false impressions as to the actor's state of mind. A false impression as to the defendant's state of mind can constitute deception under the RCC definition to the extent that the false impression as to the defendant's state of mind is used to create a false impression about some other material fact.[30]

The RCC deception definition is consistent with the MPC in including a failure to correct a false impression when the defendant has a fiduciary duty or is in any other confidential relationship with the other person from whom the defendant obtains property. However, most states with statutory deception definitions have not followed this approach. Only three states[31] with statutory deception definitions have criminalize failure to correct a false impression when the actor has a legal duty to do so.

RCC § 22E-2202. Payment Card Fraud.

Relation to National Legal Trends. The changes to the payment card fraud statute discussed above are broadly supported by national legal trends.

First, although increasing the number of penalty gradations follows a majority of jurisdictions nationwide, only five jurisdictions use as many as five penalty grades for payment card fraud.[32] Of those jurisdictions with fewer than five grades, a majority of jurisdictions use three[33] or four[34] penalty grades.

Second, regarding the bar on multiple convictions for the revised payment card fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised payment card fraud offense and other overlapping property offenses. For example, where the offense most like the revised payment card fraud is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[35]

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[28] MPC § 223.3.

[29] Alaska Stat. Ann. § 11.81.900; Me. Rev. Stat. tit. 17-A, § 354; Mo. Ann. Stat. § 570.010; N.H. Rev. Stat. Ann. § 637:4; N.J. Stat. Ann. § 2C:20-4 ; Ohio Rev. Code Ann. § 2913.01; Or. Rev. Stat. Ann. § 164.085 ; 18 Pa. Stat. Ann. § 3922; S.D. Codified Laws § 22-30A-3.

[30] For example, if a salesman says "in my opinion, this cold coin is worth at least $1,000", when in fact the salesman does not hold that opinion, but lies about his opinion to deceive a buyer into believing the coin is worth that much, he could still be found guilty of fraud.

[31] Ala. Code § 13A-8-1; N.H. Rev. Stat. Ann. § 637:4; S.D. Codified Laws § 22-30A-3.

[32] Colo. Rev. Stat. Ann. § 18-5-702; Minn. Stat. Ann. § 609.821; Minn. Stat. Ann. § 609.821; N.M. Stat. Ann. § 30-16-33; Tenn. Code Ann. § 39-14-118, Tenn. Code Ann. § 39-14-105.

[33] Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2105; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Kan. Stat. Ann. § 21-5828; Ky. Rev. Stat. Ann. § 434.650; N.H. Rev. Stat. Ann. § 638:5; N.D. Cent. Code Ann. § 12.1-23-11.

[34] Ark. Code Ann. § 5-37-207; Utah Code Ann. § 76-6-506.5; Wis. Stat. Ann. § 943.41.

[35] *Compare, State v. Bozelko*, 987 A.2d 1102, 1116 (Conn. App. Ct. 2010) (holding that convictions for identity theft and illegal use of a credit card based on a single course of conduct are permissible), with *State v. Thompson*, 2014 WL 265491 at 4 (holding that convictions for identity theft and credit card fraud merge when arising from the same act).

Research has not identified any equivalent statutory provision to either the current Consecutive sentences[36] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[37] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[38]

In addition, it should be noted that most jurisdictions retain an intent to defraud clause in their comparable statutes, although several other jurisdictions have eliminated it.[39]

Requiring knowledge that the card was stolen, forged, revoked, canceled, issued to another and was used without that person's authorization, or that the card was not actually issued, is consistent with payment card fraud statutes in other jurisdictions[40], as well as the Model Penal Code.[41]

Also, not explicitly criminalizing the use of a mutilated or altered payment card is broadly supported by law in other jurisdictions. A majority of jurisdictions with reformed criminal codes,[42] as well as American Law Institute's Model Penal Code[43], do not explicitly criminalize use of a mutilated or altered payment card.

Criminalizing use of a payment card issued or provided by an employer or contractor for the person's own purposes is consistent with payment card fraud statutes in other jurisdictions. Many jurisdictions include language that criminalizes any use of a payment card that is unauthorized by the issuer.[44]

RCC § 22E-2203. Check Fraud.

Relation to National Legal Trends. *Two of the revised check fraud offense's above-mentioned substantive changes to current District law have mixed support in national legal trends*.

First, requiring for check fraud that the accused actually pays for or obtains property of another, appears to be a minority practice in other jurisdictions. Of the 34 states that

[36] D.C. Code § 22-3203.
[37] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[38] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[39] Ala. Code § 13A-9-14; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.
[40] E.g., Ala. Code § 13A-9-14; Ariz. Rev. Stat. Ann. § 13-2105; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Del. Code Ann. tit. 11, § 903; Ind. Code Ann. § 35-43-5-4; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; Mont. Code Ann. § 45-6-317; N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.
[41] Model Penal Code § 224.6.
[42] Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ariz. Rev. Stat. Ann. § 13-2102; Ark. Code Ann. § 5-37-207; Colo. Rev. Stat. Ann. § 18-5-702; Conn. Gen. Stat. Ann. § 53a-128d; Del. Code Ann. tit. 11, § 903; Fla. Stat. Ann. § 817.61; Ga. Code Ann. § 16-9-33; Haw. Rev. Stat. Ann. § 708-8100; Ind. Code Ann. § 35-43-5-4; Iowa Code Ann. § 715A.6; Ky. Rev. Stat. Ann. § 434.650; Minn. Stat. Ann. § 609.821; Mo. Ann. Stat. § 570.130 (explicitly criminalizes use of a forged payment card, but not of a mutilated or altered card); N.H. Rev. Stat. Ann. § 638:5; N.M. Stat. Ann. § 30-16-33.
[43] MPC § 224.6.
[44] *E.g.*, Ala. Code § 13A-9-14; Alaska Stat. Ann. § 11.46.285; Ark. Code Ann. § 5-37-207; Del. Code Ann. tit. 11, § 903; Iowa Code Ann. § 715A.6; Mo. Ann. Stat. § 570.130; N.H. Rev. Stat. Ann. § 638:5.

have adopted a new criminal code influenced by the Model Penal Code (MPC)[45], only four jurisdictions require that the defendant obtained property of another.[46] The remaining states, and the MPC[47] do not require by statute that the defendant actually obtain property. Under the MPC check fraud statute[48], and many other jurisdictions' statutes[49], a person need only "issue" or "pass" a check. Issuing or passing a check can involve merely making or delivering a check.[50] However, case law in many jurisdictions have interpreted analogous check fraud statutes to require that the accused actually obtained property in exchange for the fraudulent check,[51] complicating an exact analysis of how many jurisdictions require obtaining property by use of the bad check.

Second, including a permissive inference is consistent with a slight majority of jurisdictions with reformed theft offenses, as well as the MPC.[52] Almost all states with reformed criminal codes have check fraud statutes allow some form of inference of wrongful knowledge or intent if a defendant fails to make payment after being notified that the check was not honored. Of these states, a slight majority use permissive inference language similar to that in the revised statutes[53], while a minority refer to "prima facie evidence" [54], similar to language in the current statute.

Third, the revised statute uses two penalty grades, but changes the value threshold for first degree check fraud from $1,000 to $2,500. Of the 34 states with codes influenced by the MPC, a slight majority use three or more penalty grades.[55] In most jurisdictions

[45] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).
[46] ALA. CODE § 13A-9-13.1. KY. REV. STAT. ANN. § 514.040 (check fraud is a form of theft); N.M. STAT. ANN. § 30-36-4, W. VA. CODE ANN. § 61-3-39.
[47] MPC § 224.5 (requiring that a person "issues or passes a check", but obtaining property not required).
[48] *Id.*
[49] *E.g.*, Alaska Stat. Ann. § 11.46.280; Ariz. Rev. Stat. Ann. § 13-1807; Me. Rev. Stat. tit. 17-A, § 708.
[50] *E.g.*, Colo. Rev. Stat. Ann. § 18-5-205 (1)(e) ("A person issues a check when he makes, draws, delivers, or passes it or causes it to be made, drawn, delivered, or passed.").
[51] *Com. v. Goren*, 72 Mass. App. Ct. 678, 682–83, 893 N.E.2d 786, 789–90 (2008) (noting that most states' statutes require that property or something of value be obtained in exchange for a fraudulent check, and cases decided under substantially all such statutes have concluded that the statute does not apply to a check tendered in payment of an antecedent debt) (internal citations omitted).
[52] MPC § 224.5.
[53] Ark. Code Ann. § 5-37-307; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; 720 Ill. Comp. Stat. Ann. 5/17-1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; Tenn. Code Ann. § 39-14-121; Tex. Penal Code Ann. § 32.41.
[54] Del. Code Ann. tit. 11, § 901; Fla. Stat. Ann. § 832.07; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; Ind. Code Ann. § 35-43-5-5; Iowa Code Ann. § 714.1; Kan. Stat. Ann. § 21-5821; Mont. Code Ann. § 45-6-316; N.M. Stat. Ann. § 30-36-7; N.Y. Penal Law § 190.10; Or. Rev. Stat. Ann. § 165.065; S.D. Codified Laws § 22-30A-27.
[55] Alaska Stat. Ann. § 11.46.280; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Ga. Code Ann. § 16-9-20; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; N.D. Cent. Code Ann. § 6-08-16; Neb. Rev. Stat. Ann. § 28-611; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-25; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

that determine penalty grades based on value[56], the minimum value threshold for felony check fraud is $1,000 or less,[57] and the minimum value threshold for the highest penalty grade is $2,000 or more.[58] However, there is considerable variation in the minimum value threshold required for the highest penalty grade, ranging from $25[59], to $500,000.[60]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised check fraud offense follows many jurisdictions[61] which have statutes that closely follow the Model Penal Code (MPC)[62] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[63] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[64]

Fifth, regarding the bar on multiple convictions for the revised check fraud offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised check fraud offense and other overlapping

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[56] Two states do not grade their analogous check fraud offenses based on the value of the check. Oregon applies felony liability if the accused has one prior check fraud conviction in the prior 12 months. OR. REV. STAT. ANN. § 165.065. Texas applies felony liability if the fraudulent check was used for child support. TEX. PENAL CODE ANN. § 32.41

[57] Alaska Stat. Ann. § 11.46.280; Fla. Stat. Ann. § 832.05, Iowa Code Ann. §§ 714.1-714.2, 720 Ill. Comp. Stat. Ann. 5/17-1, Ind. Code Ann. § 35-43-5-12, Kan. Stat. Ann. § 21-5821, Ky. Rev. Stat. Ann. § 514.040, Me. Rev. Stat. tit. 17-A, § 708, Minn. Stat. Ann. § 609.535, Mo. Ann. Stat. § 570.120, N.D. Cent. Code Ann. § 6-08-16, N.H. Rev. Stat. Ann. § 638:4, N.J. Stat. Ann. § 2C:21-5, N.M. Stat. Ann. § 30-36-5, Ohio Rev. Code Ann. § 2913.11, S.D. Codified Laws §§ 22-30A-25, 22-30A-17, Tenn. Code Ann. § 39-14-121, Wash. Rev. Code Ann. § 9A.56.060, W. Va. Code Ann. § 61-3-39, Wyo. Stat. Ann. § 6-3-702.

[58] Alaska Stat. Ann. § 11.46.280; Ala. Code § 13A-9-13.1; Ark. Code Ann. § 5-37-302; Ariz. Rev. Stat. Ann. § 13-1807; Colo. Rev. Stat. Ann. § 18-5-205; Conn. Gen. Stat. Ann. § 53a-128; Iowa Code Ann. § 714.1; Ind. Code Ann. § 35-43-5-12; Kan. Stat. Ann. § 21-5821; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.01; 18 Pa. Stat. Ann. § 4105; S.D. Codified Laws § 22-30A-24; Tenn. Code Ann. § 39-14-121; Utah Code Ann. § 76-6-505.

[59] N.M. Stat. Ann. § 30-36-5.

[60] S.D. Codified Laws § 22-30A-24, S.D. Codified Laws § 22-30A-17.

[61] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[62] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[63] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[64] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

property offenses. For example, where the offense most like the revised check fraud offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[65] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[66] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[67]

In addition, eliminating the intent to defraud element in check fraud follows a strong majority of jurisdictions with reformed criminal codes. Most jurisdictions with reformed criminal codes[68] and the American Law Institute's Model Penal Code[69] (MPC) omit any reference to an "intent to defraud", and instead simply require that the defendant knew that the check would not be honored by the drawee. [70]

RCC § 22E-2204. Forgery.

Relation to National Legal Trends. *The revised forgery offense's above-mentioned substantive changes to current District law has mixed support in national legal trends, with the exception of deleting the "intent to defraud" element of forgery.*

First, combining forgery and uttering in a single statute follows a strong majority of jurisdictions nationwide. A majority of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[71] and the MPC[72] include both forgery and uttering in a single forgery statute. [73]

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[65] D.C. Code § 22-3203.

[66] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[67] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[68] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Ark. Code Ann. § 5-37-307; Conn. Gen. Stat. Ann. § 53a-128; Del. Code Ann. tit. 11, § 900; Fla. Stat. Ann. § 832.05; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mont. Code Ann. § 45-6-316; Neb. Rev. Stat. Ann. § 28-611; N.J. Stat. Ann. § 2C:21-5; N.Y. Penal Law § 190.05; N.D. Cent. Code Ann. § 6-08-16; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Tex. Penal Code Ann. § 32.41; Utah Code Ann. § 76-6-505.

[69] MPC § 224.5.

[70] Ala. Code § 13A-9-13.1; Alaska Stat. Ann. § 11.46.280; Del. Code Ann. tit. 11, § 900; Ga. Code Ann. § 16-9-20; Haw. Rev. Stat. Ann. § 708-857; 720 Ill. Comp. Stat. Ann. 5/17-1; Ind. Code Ann. § 35-43-5-12; Iowa Code Ann. § 714.1; Ky. Rev. Stat. Ann. § 514.040; Me. Rev. Stat. tit. 17-A, § 708; Minn. Stat. Ann. § 609.535; Mo. Ann. Stat. § 570.120; Mont. Code Ann. § 45-6-316; N.H. Rev. Stat. Ann. § 638:4; N.J. Stat. Ann. § 2C:21-5; Ohio Rev. Code Ann. § 2913.11; Or. Rev. Stat. Ann. § 165.065; 18 Pa. Stat. Ann. § 4105; Utah Code Ann. § 76-6-505.

[71] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[72] MPC § 224.1.

[73] Alaska Stat. Ann. § 11.46.510; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2002; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-139; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-851; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan.

Second, replacing the intent to defraud element with an intent to obtain property of another by deception the revised offense does not follow the majority trend,[74] or the MPC.[75] However, there are some other jurisdictions with forgery statutes that omit an intent to defraud element.[76] In addition, the Proposed Federal Criminal Code's forgery statute also omits an intent to defraud element.[77]

Third, omitting payroll checks, regardless of value, from first degree forgery follows a strong majority of jurisdictions nationwide. Every one of the 34 states that have adopted a new criminal code influenced by the MPC[78], as well as the MPC's forgery offense[79] does not treat forgery of payroll checks differently from ordinary checks for penalty purposes. The Proposed Federal Criminal Code also does not treat forgeries of payroll checks differently than forgeries of ordinary checks.[80]

Fourth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised forgery offense follows many jurisdictions[81] which have statutes that closely follow the Model Penal Code (MPC)[82] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations.

Stat. Ann. § 21-5823; Me. Rev. Stat. tit. 17-A, § 703; Mo. Ann. Stat. § 570.090 ; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-602; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.007; 18 Pa. Stat. Ann. § 4101; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[74] *E.g.* Alaska Stat. Ann. § 11.46.500, Fla. Stat. Ann. § 831.01, Haw. Rev. Stat. Ann. § 708-851.

[75] MPC § 224.1 (requiring a "purpose to defraud or injure anyone").

[76] Neb. Rev. Stat. Ann. § 28-602, N.D. Cent. Code Ann. § 12.1-24-01, Va. Code Ann. § 18.2-168.

[77] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF THE FEDERAL CRIMINAL LAWS § 1751 (omitting intent to defraud, but requiring "intent to deceive or harm the government or another person").

[78]Ala. Code § 13A-9-2; Alaska Stat. Ann. § 11.46.500; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-102; Conn. Gen. Stat. Ann. § 53a-138; Del. Code Ann. tit. 11, § 861; Fla. Stat. Ann. § 831.01; Ga. Code Ann. § 16-9-1; Haw. Rev. Stat. Ann. § 708-853; 720 Ill. Comp. Stat. Ann. 5/17-3; Ind. Code Ann. § 35-43-5-2; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.020; Me. Rev. Stat. tit. 17-A, § 703; Minn. Stat. Ann. § 609.625; Mo. Ann. Stat. § 570.090; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-603; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.M. Stat. Ann. § 30-16-10; N.Y. Penal Law § 170.10; N.D. Cent. Code Ann. § 12.1-24-01; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.013; 18 Pa. Stat. Ann. § 4101; S.D. Codified Laws § 22-39-36; Tex. Penal Code Ann. § 32.21; Utah Code Ann. § 76-6-501; Va. Code Ann. § 18.2-172; Wash. Rev. Code Ann. § 9A.60.020; Wyo. Stat. Ann. § 6-3-602.

[79] MPC § 224.1. It is worth noting however that the MPC, and many reformed jurisdictions, do grade forgery in part based on whether the instrument was "part of an issue of stock, bonds, or other instruments representing interests in or claims against any property or enterprise." *E.g.*, ALASKA STAT. ANN. § 11.46.500. Arguably, this language could include payroll checks, but not ordinary checks, in that a payroll check is an instrument representing a claim against property. However, the MPC commentary does not indicate that this language would necessarily include payroll checks.

[80] Proposed Federal Criminal Code § 1751.

[81] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[82] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[83] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[84]

Fifth, regarding the bar on multiple convictions for the revised forgery offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised forgery offense and other overlapping property offenses. For example, where the offense most like the revised forgery is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[85] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[86] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[87] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[88]

In addition, the clarificatory change defining forgery to include altering an instrument without authorization, or making or completing an instrument so that it appears to be the act of another who did not authorize that act follows a strong majority of jurisdictions nationwide. The MPC[89], and a large majority of jurisdictions' forgery statutes specify that altering, making, or completing instruments must be done without authorization.[90]

RCC § 22E-2205. Identity Theft.

Relations to National Legal Trends. *The revised identity theft offenses' above-mentioned substantive changes to current District law are broadly supported by national*

[83] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[84] *See, e.g.* Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[85] *E.g., State v. Baldwin*, 78 P.3d 1005, 1010 (Wash. 2003) (en banc) (holding that convictions for forgery and identity theft do not merge, even when arising from the same act).

[86] D.C. Code § 22-3203.

[87] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[88] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[89] MPC § 224.1.

[90] Ala. Code § 13A-9-1; Alaska Stat. Ann. § 11.46.580; Ark. Code Ann. § 5-37-201; Ariz. Rev. Stat. Ann. § 13-2001; Colo. Rev. Stat. Ann. § 18-5-101; Conn. Gen. Stat. Ann. § 53a-137; Del. Code Ann. tit. 11, § 861; Haw. Rev. Stat. Ann. § 708-850; Iowa Code Ann. § 715A.2; Kan. Stat. Ann. § 21-5823; Ky. Rev. Stat. Ann. § 516.010; Me. Rev. Stat. tit. 17-A, § 701; Mont. Code Ann. § 45-6-325; Neb. Rev. Stat. Ann. § 28-601; N.H. Rev. Stat. Ann. § 638:1; N.J. Stat. Ann. § 2C:21-1; N.D. Cent. Code Ann. § 12.1-24-04; Ohio Rev. Code Ann. § 2913.31; Or. Rev. Stat. Ann. § 165.002; Utah Code Ann. § 76-6-501; Wash. Rev. Code Ann. § 9A.60.010; Wyo. Stat. Ann. § 6-3-602.

legal trends, with the exception of criminalizing intent to use another person's identifying information to avoid payment due for any property, fines, or fees by deception, and increasing the number of penalty grades.

First, revising the identity theft offense to no longer cover possession of identifying information with intent to use identifying information to falsely identify himself or herself at an arrest, to facilitate or conceal his or her commission of a crime, or to avoid detection, apprehension or prosecution for a crime is consistent with national legal norms. Of the 34 states that have adopted a new criminal code influenced by the Model Penal Code (MPC)[91], only two explicitly criminalize possession of identifying information for these purposes,[92] while fourteen others more broadly criminalize possession of identifying information with intent to commit a crime, or for any unlawful purpose.[93]

Second, broadening identity theft to include use of another person's identifying information to avoid payment, does not follow clear national norms, though it is unclear whether the District would be an outlier in criminalizing this use of identifying information. Of the 34 states that have adopted a new criminal code influenced by the MPC, only two have identity theft statutes that explicitly include intent to avoid payment.[94] However, many other jurisdictions' identity theft statutes are likely broad enough to criminalize using identifying information to avoid payments. Many jurisdictions criminalize using identifying information either for an "unlawful purpose,"[95] with intent "to cause loss,"[96] to "subject [a] person to economic . . . harm";[97] or to generally "assume another person's identity."[98]

Third, increasing the number of penalty grades to five also does not follow the majority practice in other jurisdictions. Of the 34 states that have adopted a new criminal code influenced by the MPC, five states' identity theft offenses use five grades[99], and a slight majority use two or one grade.[100]

Fourth, regarding the bar on multiple convictions for the revised identity theft offense and overlapping property offenses, a generalization to other jurisdictions would be

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[91] Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).
[92] Ky. Rev. Stat. Ann. § 514.160, N.J. Stat. Ann. § 2C:21-17.
[93] Alaska Stat. Ann. § 11.46.570, Ariz. Rev. Stat. Ann. § 13-2008, Del. Code Ann. tit. 11, § 854, Haw. Rev. Stat. Ann. §§ 708-839.6-839.8, 720 Ill. Comp. Stat. Ann. 5/16-30, Minn. Stat. Ann. § 609.527, Mont. Code Ann. § 45-6-332, Neb. Rev. Stat. Ann. § 28-639, N.M. Stat. Ann. § 30-16-24.1, N.D. Cent. Code Ann. § 12.1-23-11, 18 Pa. Stat. Ann. § 4120, Tenn. Code Ann. § 39-14-150, Wash. Rev. Code Ann. § 9.35.020, Wyo. Stat. Ann. § 6-3-901.
[94] Fla. Stat. Ann. § 817.568; N.J. Stat. Ann. § 2C:21-17.
[95] Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wyo. Stat. Ann. § 6-3-901.
[96] Neb. Rev. Stat. Ann. § 28-639.
[97] Kan. Stat. Ann. § 21-6107.
[98] Ind. Code Ann. § 35-43-5-3.5; N.H. Rev. Stat. Ann. § 638:26; Ohio Rev. Code Ann. § 2913.49.
[99] 720 Ill. Comp. Stat. Ann. 5/16-30; Minn. Stat. Ann. § 609.527; Mo. Ann. Stat. § 570.223.
[100] Alaska Stat. Ann. § 11.46.565 ; Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Ariz. Rev. Stat. Ann. § 13-2008; Colo. Rev. Stat. Ann. § 18-5-902; Del. Code Ann. tit. 11, § 854; Ga. Code Ann. § 16-9-121, Ga. Code Ann. § 16-9-121.1; Idaho Code Ann. § 18-3126; Ind. Code Ann. § 35-43-5-3.5; Kan. Stat. Ann. § 21-6107; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; N.D. Cent. Code Ann. § 12.1-23-11; N.H. Rev. Stat. Ann. § 638:26; N.M. Stat. Ann. § 30-16-24.1; Or. Rev. Stat. Ann. § 165.800, Or. Rev. Stat. Ann. § 165.803; S.D. Codified Laws § 22-40-8; Tenn. Code Ann. § 39-14-150; Utah Code Ann. § 76-6-1102; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised identity theft offense and other overlapping property offenses. For example, where the offense most like the revised identity theft offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[101] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[102] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[103]

In addition, deleting the requirement that property be obtained "fraudulently" is also consistent with the majority approach across reform jurisdictions. A majority of reform jurisdictions' identity theft offenses, when predicated on using identifying information to obtain property, do not require that the defendant acted "fraudulently."[104]

RCC § 22E-2206. Identity Theft Civil Provisions.

[No national legal trends section.]

RCC § 22E-2207. Unlawful Labeling of a Recording.

Relation to National Legal Trends. *The revised unlawful labeling statute's above-mentioned substantive changes to current District law are broadly supported by national legal trends, with the exception of the addition of the permissive inference.*

First, of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[105](hereafter "reformed code jurisdictions"), a majority have statutes that only criminalize possession of recordings with intent to sell or rent, and do not more broadly criminalize possessing recordings for "commercial advantage or private financial gain."[106]

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[101] D.C. Code § 22-3203.

[102] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[103] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[104] Ariz. Rev. Stat. Ann. § 13-2008; Ark. Code Ann. § 5-37-227; Colo. Rev. Stat. Ann. § 18-5-902; Conn. Gen. Stat. Ann. § 53a-129a; Del. Code Ann. tit. 11, § 854; Haw. Rev. Stat. Ann. § 708-839.8; Idaho Code Ann. § 18-3126; Ky. Rev. Stat. Ann. § 514.160; Me. Rev. Stat. tit. 17-A, § 905-A; Minn. Stat. Ann. § 609.527; Mont. Code Ann. § 45-6-332; Neb. Rev. Stat. Ann. § 28-639; N.J. Stat. Ann. § 2C:21-17; N.D. Cent. Code Ann. § 12.1-23-11; Ohio Rev. Code Ann. § 2913.49; 18 Pa. Stat. Ann. § 4120; Tenn. Code Ann. § 39-14-150; Wash. Rev. Code Ann. § 9.35.020; Wyo. Stat. Ann. § 6-3-901.

[105] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[106] Ariz. Rev. Stat. Ann. § 13-3705; Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; 720 Ill. Comp. Stat. Ann. 5/16-7; Ky. Rev. Stat. Ann. § 434.445; Minn. Stat. Ann. § 325E.18; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03;

Second, the District would be an outlier in including a permissive inference that allows fact finders to infer intent to rent or sell when the defendant possessed five or more copies of the same recording. Amongst reformed code jurisdictions, only one state includes a similar presumption of intent to sell or rent in their analogous offenses.[107]

Third, changing the penalty gradations to treat sound and audiovisual recordings the same is consistent with national trends. A large majority of reformed code jurisdictions' analogous unlawful labeling statutes do not differentiate between sound and audiovisual recordings for penalty purposes.[108]

Fourth, removing the 180 day aggregation time period is also supported by national legal trends. Amongst reformed code jurisdictions only six states allow aggregating the number of recordings across a 180 day period for sentencing purposes.[109]

Fifth, regarding the aggregation of the number of recordings possessed in a single scheme or systematic course of conduct, the revised ULR offense follows many jurisdictions[110] which have statutes that closely follow the Model Penal Code (MPC)[111] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[112]

Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; 18 Pa. Stat. Ann. § 4116; S.D. Codified Laws § 43-43A-3; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040.

[107] Or. Rev. Stat. Ann. § 164.868. *Cf.*, N.H. Rev. Stat. Ann. § 352-A:2 (A related offense criminalizing possession of copyrighted materials with intent to sell provides that "Possession of 5 or more duplicate copies or 20 or more individual copies of such recorded articles, produced without the consent of the owner or performer, shall create a rebuttable presumption that such articles are intended for sale or distribution in violation of this section.").

[108] Alaska Stat. Ann. § 45.50.900; Conn. Gen. Stat. Ann. § 53-142c; Ind. Code Ann. § 24-4-10-4; Ky. Rev. Stat. Ann. § 434.445; Md. Code Ann., Crim. Law § 7-309; Mo. Ann. Stat. § 570.225; Mont. Code Ann. § 30-13-144; N.H. Rev. Stat. Ann. § 352-A:3; N.D. Cent. Code Ann. § 47-21.1-03;N.Y. Penal Law § 275.35; Ohio Rev. Code Ann. § 1333.52; Or. Rev. Stat. Ann. § 164.868; S.D. Codified Laws § 43-43A-3; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

[109] 720 Ill. Comp. Stat. Ann. 5/16-7; 18 Pa. Stat. Ann. § 4116; Tenn. Code Ann. § 39-14-139; Tex. Bus. & Com. Code Ann. § 641.054; Utah Code Ann. § 13-10-8; Wash. Rev. Code Ann. § 19.25.040; Wis. Stat. Ann. § 943.209.

[110] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[111] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[112] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[113]

Sixth, regarding the bar on multiple convictions for the revised ULR offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ULR offense and other overlapping property offenses. For example, where the offense most like the revised ULR offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[114] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[115] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[116]

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult.

Relation to National Legal Trends. *Two of the main changes to the FEVA statute discussed above are broadly supported by national legal trends, but remaining four changes are not consistent with national legal trends.*

First, a majority of states do not specify the mental state as to whether the victim is a vulnerable adult or elderly person. At least four states require a culpable mental state less demanding than "knowingly." Two states require that the accused either "knows or reasonably should know" that the victim is an "elder or dependent adult,"[117] or that the victim is "at least 68 years old."[118] In addition, two states expressly state that it is not a defense if the "accused reasonably believed that the endangered adult or dependent was less than sixty (60) years of age at the time of the offense,"[119] or did not know the age of the victim.[120]

Second, a majority jurisdictions with analogous FEVA offenses do not criminalize causing a vulnerable adult or elderly person to assume a legal obligation. Analogous FEVA offenses in other jurisdictions require that the defendant expend, diminish, or use the property;[121] commit another property offense[122], or more generally requires that the

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[113] *See, e.g. Commonwealth v. Young*, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); *People v. Brown*, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).
[114] D.C. Code § 22-3203.
[115] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[116] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[117] Cal. Penal Code § 368.
[118] Md. Code Ann., Crim. Law § 8-801.
[119] Ind. Code Ann. § 35-46-1-12.
[120] N.D. Cent. Code Ann. § 12.1-31-07.1.
[121] Ala. Code § 38-9-2; Ark. Code Ann. § 5-28-101; Del. Code Ann. tit. 31, § 3902; Fla. Stat. Ann. § 825.103; 720 Ill. Comp. Stat. Ann. 5/17-56; Ind. Code Ann. § 35-46-1-12; Kan. Crim. Code Ann. § 21-5417; La. Stat. Ann. § 14:67.21; Md. Code Ann., Crim. Law § 8-801; Mich. Comp. Laws Ann. § 750.174a.
[122] Cal. Penal Code § 368

defendant "exploits" the elderly person.[123] One exception, Minnesota, also criminalizes causing a vulnerable adult to establish a fiduciary relationship by use of undue influence, harassment, duress, force, compulsion, coercion, or other enticement.[124]

Third, increasing the number of penalty gradations is not supported by national legal trends. Of the jurisdictions with analogous FEVA offenses, a majority use either two, or one penalty grades.[125] Only four jurisdictions' analogous FEVA offenses include five or more penalty grades.[126]

Fourth, deleting the recidivist penalty provision is consistent with national trends. A majority of jurisdictions with analogous FEVA offenses do not include a recidivist penalty provision. Only seven states include such a provision.[127]

Fifth, regarding the aggregation of values in a single scheme or systematic course of conduct, the revised FEVA offense follows many jurisdictions[128] which have statutes that closely follow the Model Penal Code (MPC)[129] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[130] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[131]

Sixth, regarding the bar on multiple convictions for the revised FEVA offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised FEVA offense and other overlapping property

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[123] Idaho Code Ann. § 18-1505; Miss. Code. Ann. § 43-47-19;

[124] Minn. Stat. Ann. § 609.2335.

[125] Ala. Code § 38-9-7; Ala. Code § 38-9-2; Cal. Penal Code § 368; Colo. Rev. Stat. Ann. § 18-6.5-103; Idaho Code Ann. § 18-1505; Ind. Code Ann. § 35-46-1-12; Minn. Stat. Ann. § 609.2335; Miss. Code. Ann. § 43-47-19; Neb. Rev. Stat. Ann. § 28-358; Okla. Stat. Ann. tit. 21, § 843.4; Or. Rev. Stat. Ann. § 163.205; S.C. Code Ann. § 43-35-10; S.D. Codified Laws § 22-46-3; Tex. Penal Code Ann. § 32.53; Vt. Stat. Ann. tit. 13, § 1380; Wyo. Stat. Ann. § 35-20-102.

[126] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913 ; Kan. Crim. Code Ann. § 21-5417; Mich. Comp. Laws Ann. § 750.174a; Mo. Ann. Stat. § 570.145.

[127] Del. Code Ann. tit. 31, § 3902, Del. Code Ann. tit. 31, § 3913; Fla. Stat. Ann. § 825.103; Kan. Crim. Code Ann. § 21-5417; Ky. Rev. Stat. Ann. § 209.990; La. Stat. Ann. § 14:67.21, La. Stat. Ann. § 14:93.4; Mich. Comp. Laws Ann. § 750.174a. Miss. Code. Ann. § 43-47-19.

[128] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[129] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[130] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[131] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

offenses. For example, where the offense most like the revised FEVA is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[132] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[133] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[134]

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult Civil Provisions.

[No national legal trends section.]

RCC § 22E-2210. Trademark Counterfeiting.

Relation to National Legal Trends.

Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

[132] D.C. Code § 22-3203.
[133] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[134] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Chapter 23. Extortion

RCC § 22E-2301. Extortion.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

As a general matter, states take two approaches to extortion. Either states incorporate coercion and extortion into the structure of their theft offenses, or they codify extortion as a standalone offense that shares few, if any, elements with their theft offenses. Those states that adopt a theft-like approach to extortion tend to have similar elements to the elements of RCC extortion, while those that adopt a *sui generis* version of extortion are less likely to have similar elements.[1]

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"), only one state punishes attempted extortion and completed extortion the same.[2]

Second, the types of coercion that are predicates for extortion vary widely. The relationship between the factors the Revised Criminal Code uses in the definition of "coercion" and the practice of reformed jurisdictions is discussed in more detail in the RCC Commentary to "coercion." However, the three new types of threats that may provide the basis for an extortion conviction (threats to report a person's immigration status, threats to commit any offense, and threats to cause material harm to a person's interests) are supported by national legal trends.[3]

Third, the inclusion of the "intent to deprive" element in extortion is also common to reform code jurisdictions. Twelve states require it,[4] while thirteen do not.[5]

Fourth, grading on the basis of value is also common to jurisdictions. Eleven states include value as a basis for grading extortion.[6] Of the states that do not, three states grade

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[1] The states that include extortion as a means or a type of theft include Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.J. Stat. Ann. § 2C:20-5; N.Y. Penal Law § 155.05; S.D. Codified Laws § 22-30A-4. Additionally, as with the current blackmail offense, many states codify a "coercion" offense that punishes using coercive threats to induce a person to act or refrain from acting. Such offenses seemingly overlap with extortion. The statutes of reform jurisdictions that staff examined, however, were limited to those offenses involving the taking or obtaining of property.

[2] Wash. Rev. Code Ann. § 9A.04.110. However, one other jurisdiction punishes attempted extortion the same as completed extortion if the property taken (or the property the defendant attempted to take) was anhydrous ammonia or liquid nitrogen. Mo. Ann. Stat. § 570.030.

[3] *See* RCC § 22A-2001(4), Commentary.

[4] Ala. Code § 13A-8-13; Ark. Code Ann. § 5-36-103; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent. Code Ann. § 12.1-23-02; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wis. Stat. Ann. § 943.30.

[5] Alaska Stat. Ann. § 11.41.520; Ariz. Rev. Stat. Ann. § 13-1804; Conn. Gen. Stat. Ann. § 53a-119; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Wash. Rev. Code Ann. § 9A.04.110.

[6] Ark. Code Ann. § 5-36-103; Conn. Gen. Stat. Ann. § 53a-119; Kan. Stat. Ann. § 21-5801; Mo. Ann. Stat. § 570.030; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; N.D. Cent.

on the basis of the seriousness of the coercive threat.[7] One state grades on the basis of the victim, punishing those who extort money from the elderly more seriously.[8] Last, eight states do not grade the offense at all.[9]

Fifth, regarding the aggregation of values of property in a single scheme or systematic course of conduct, the revised extortion offense follows many jurisdictions[10] which have statutes that closely follow the Model Penal Code (MPC)[11] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[12] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[13]

Sixth, the provision in RCC § 22A-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised extortion offense and other offenses in Chapters 21-25 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct. However, extortion is not among those offenses and, as described in the commentary to RCC § 22A-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised extortion offense and other closely-related offenses, RCC § 22A-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923; S.D. Codified Laws § 22-30A-4; Tex. Penal Code Ann. § 1.07. Some of these states include other, additional bases for grading extortion.

[7] Ark. Code Ann. § 5-36-103; Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Wash. Rev. Code Ann. § 9A.04.110. Note that Arkansas grades on both the value of the property taken and the type of threat issued against the victim.

[8] Del. Code Ann. tit. 11, § 846.

[9] Alaska Stat. Ann. § 11.41.520; Kan. Stat. Ann. § 21-6501; Me. Rev. Stat. tit. 17-A, § 355; N.J. Stat. Ann. § 2C:20-5; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; Tenn. Code Ann. § 39-11-106; Wis. Stat. Ann. § 943.30.

[10] Alaska Stat. Ann. § 11.46.980; Ark. Code Ann. § 5-36-102; Conn. Gen. Stat. Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md. Code Ann. Crim. Law § 7-103; Me. Rev. Stat. Ann. tit. 17-A, § 352; Neb. Rev. St. § 28-518; N.H. Rev. Stat. Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D. Cent. Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa. Cons. Stat. Ann. tit. 18, § 3903; S.D. Cod. Laws § 22-30A-18; Tex. Penal Code § 31.09.

[11] MPC § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[12] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[13] *See, e.g.* Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

In addition, it is notable that states typically apply either knowledge or a default mental state to extortion. Eight states require proof of the defendant's knowledge.[14] Sixteen use the default mental state, typically recklessness.[15] Interestingly, however, of the states that rely on default rules of construction, seven then require proof that the defendant "intend" to deprive the victim of the property.[16] This suggests that the mental state in practice is actually more like knowledge than recklessness in these jurisdictions. One state makes use of the mental state of malice.[17]

[14] Ala. Code § 13A-8-13; Ariz. Rev. Stat. Ann. § 13-1804; Kan. Stat. Ann. § 21-6501; Ky. Rev. Stat. Ann. § 514.080; Mont. Code Ann. § 45-6-301; N.J. Stat. Ann. § 2C:20-5; N.D. Cent. Code Ann. § 12.1-23-02; 18 Pa. Stat. and Cons. Stat. Ann. § 3923.

[15] Alaska Stat. Ann. § 11.41.520; Conn. Gen. Stat. Ann. § 53a-119; Del. Code Ann. tit. 11, § 846; Haw. Rev. Stat. Ann. § 707-764; Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Ohio Rev. Code Ann. § 2905.11; Or. Rev. Stat. Ann. § 164.075; S.D. Codified Laws § 22-30A-4; Tenn. Code Ann. § 39-11-106; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406; Wash. Rev. Code Ann. § 9A.04.110.

[16] Kan. Stat. Ann. § 21-5801; Me. Rev. Stat. tit. 17-A, § 355; Mo. Ann. Stat. § 570.030; N.H. Rev. Stat. Ann. § 637:5; N.Y. Penal Law § 155.05; Tex. Penal Code Ann. § 1.07; Utah Code Ann. § 76-6-406.

[17] Wis. Stat. Ann. § 943.30.

Chapter 24. Stolen Property Offenses

RCC § 22E-2401. Possession of Stolen Property.

Relation to National Legal Trends. *The revised PSP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, a majority of jurisdictions, including nearly all jurisdictions with reformed criminal codes, and the Proposed Revised Federal Criminal Code[1] have analogous PSP offenses that require intent to deprive.[2] Of the minority of jurisdictions with PSP offenses that do not require intent to deprive[3], a slight majority have explicit statutory language providing for a defense if the defendant intended to return the property to its rightful owner, or law enforcement authorities;[4] and three others require proof of a "dishonest" or "criminal" purpose or intent.[5] The Model Penal Code's PSP statute also specifically excludes cases in which the property is possessed "with purpose to restore it to the owner."[6] Only six jurisdictions' PSP statutes do not require intent to deprive, other wrongful purpose, or do not provide explicit language excluding cases in which the defendant possessed stolen property with intent to return it to its rightful owner.[7]

Second, increasing the number of penalty gradations is also consistent with the national norms. A strong majority of jurisdictions use more than two penalty gradations.[8] Only nine states use just two grades[9], and one state, Oklahoma, uses just one grade.

Third, regarding the bar on multiple convictions for the revised PSP offense and overlapping property offenses, a generalization to other jurisdictions would be

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[1] Proposed Federal Criminal Code § 1732(c). Note however that the Proposed Federal Criminal Code treats PSP as a version of theft, rather than a separate offense.

[2] Alaska Stat. Ann. § 11.46.190; Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Ariz. Rev. Stat. Ann. § 13-1802; Colo. Rev. Stat. Ann. § 18-4-401; Del. Code Ann. tit. 11, § 851; Fla. Stat. Ann. § 812.014; Haw. Rev. Stat. Ann. § 708-830; Idaho Code Ann. § 18-2403; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Mass. Gen. Laws Ann. ch. 266, § 60; Md. Code Ann., Crim. Law § 7-104; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.D. Cent. Code Ann. § 12.1-23-02; N.H. Rev. Stat. Ann. § 637:7; Nev. Rev. Stat. Ann. § 205.275; N.Y. Penal Law § 165.40; Ohio Rev. Code Ann. § 2913.51; Okla. Stat. Ann. tit. 21, § 1713; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140.

[3] Cal. Penal Code § 496 (but statute requires intent to temporarily deprive); Conn. Gen. Stat. Ann. § 53a-119; Ga. Code Ann. § 16-8-7; Ky. Rev. Stat. Ann. § 514.110; La. Stat. Ann. § 14:69; Mich. Comp. Laws Ann. § 750.535; Miss. Code. Ann. § 97-17-70; Neb. Rev. Stat. Ann. § 28-517; N.J. Stat. Ann. § 2C:20-7; N.M. Stat. Ann. § 30-16-11; N.C. Gen. Stat. Ann. § 14-71; 11 R.I. Gen. Laws Ann. § 11-41-2; S.C. Code Ann. § 16-13-180; S.D. Codified Laws § 22-30A-7; Va Code Ann. § 18.2-108; Vt. Stat. Ann. tit. 13, § 2561; Wisconsin, Wis. Stat. Ann. § 943.34; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

[4] Connecticut, Georgia, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, New Mexico, South Dakota, and Vermont.

[5] North Carolina, Virginia, and West Virginia.

[6] MPC § 223.6.

[7] California, Michigan, Rhode Island, South Carolina, Wisconsin, and Wyoming.

[8] Ten states use 3 grades; eleven states use 4 grades; nine states use 5 grades; four states use 6 grades; three states use 7 grades, and one state each uses 9 and 10 grades. On average, these forty states use 4.675 gradations.

[9] Cal. Penal Code § 496; Del. Code Ann. tit. 11, § 851 (West); Idaho Code Ann. § 18-2403; Mass. Gen. Laws Ann. ch. 266, § 60; N.C. Gen. Stat. Ann. § 14-71; Okla. Stat. Ann. tit. 21, § 1713; Vt. Stat. Ann. tit. 13, § 2561; Va. Code Ann. §18.2-108; W. Va. Code Ann. § 61-3-18; Wyo. Stat. Ann. § 6-3-403.

prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised PSP offense and other overlapping property offenses. For example, where the offense most like the revised PSP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[10] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[11] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[12]

Although it is difficult to generalize as to whether multiple convictions for PSP and other property offenses would be permitted in other jurisdictions, barring convictions for both PSP and theft based on possession of the same property follows a strong national legal trend. Only one other jurisdiction, Oklahoma, allows convictions for both theft and PSP for a single piece of property.[13] The law is somewhat unclear in three other jurisdictions: Michigan, Missouri, and Pennsylvania. In all other jurisdictions, there is either case law barring convictions for both theft and RSP of the same property,[14] statutory language barring convictions for both theft and PSP of the same property,[15] or PSP and other theft-type offenses have been consolidated into a single theft offense.[16]

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[10] D.C. Code § 22-3203.

[11] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[12] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[13] *Nowlin v. State*, 34 P.3d 654, 655-56 (Okla. Crim. App. 2012).

[14] Alabama, *George v. State*, 410 So. 2d 476, 478 (Ala. Crim. App. 1982); Colorado, *People v. Griffie*, 610 P.2d 1079, 1080-81 (Colo. App. 1980); Georgia, *Redding v. State*, 384 S.E.2d 910, 912 (Ga. Ct. App. 1989); Illinois, *People v. Miller*, 146 N.E. 501, 503 (Ill. 1925); Indiana, *Gibson v. State*, 643 N.E.2d 885, 892 (Ind. 1994); Kentucky *Phillips v. Com.*, 679 S.W.2d 235, 236-37 (Ky. 1984); Louisiana, *State v. Franklin*, 142 So. 3d 295, 305 (La. Ct. App. 2014); Massachusetts, *Com. v. Obshatkin*, 307 N.E.2d 341, 343-44 (Mass. App. Ct. 1974); Minnesota, *State v. Banks,* 358 N.W.2d 133, 135 (Minn.App.1984); Mississippi, *Young v. State*, 908 So. 2d 819, 829 (Miss. Ct. App. 2005); Montana, *State v. Hernandez* 689 P.2d 1261, 1262 (Mont. 1984); Nevada, *Stowe v. State*, 857 P.2d 15, 17 (Nev. 1993); New Hampshire, *State v. Chaisson*, 458 A.2d 95, 98 (N.H. 1983), New Mexico, *Territory v. Graves*, 125 P. 604, 604 (N.M. 1912); New York, *People v. Colon*, 267 N.E.2d 577, 582 (N.Y. 1971); Ohio, *City of Maumee v. Geiger*, 344 N.E.2d 133, 137 (Ohio 1976); Rhode Island, *State v. Grant*, 840 A.2d 541, 549 (R.I. 2004); South Carolina, *State v. Tindall*, 50 S.E.2d 188, 189 (S.C. 1948); South Dakota, *State v. Howell*, 354 N.W.2d 196, 198 (S.D. 1984); Tennessee, *State v. Kennedy*, 7 S.W.3d 58, 70 (Tenn. Crim. App. 1999); Vermont, *State v. Bleau*, 428 A.2d 1097, 1099 (Vt. 1981); Washington, *State v. Hancock*, 721 P.2d 1006, 1007-08 (Wash. Ct. App. 1986); West Virginia, *State v. Koton*, 202 S.E.2d 823, 828 (W. Va. 1974); Wisconsin, *State v. Godsey*, 75 N.W.2d 572, 573 (Wis. 1956); Wyoming, *Garcia v. State*, 777 P.2d 1091, 1094 (Wyo. 1989).

[15] California, Cal. Penal Code § 496 (West); Delaware, Del. Code Ann. tit. 11, § 856 (West).

[16] Alaska, Arizona, Arkansas, Connecticut, Florida, Hawaii, Iowa, Idaho, Kansas, Maryland, Maine, North Carolina, Nebraska, New Jersey, North Dakota, Oregon, Texas, Utah, Virginia.

RCC § 22E-2402. Trafficking of Stolen Property.

Relation to National Legal Trends*. The major changes the revised statutes makes to current District law are not consistent with national legal trends.* The District is one of just six jurisdictions that codify an offense like TSP.[17]

First, among the handful of jurisdictions with TSP offenses, none use five penalty grades. One state uses a single grade[18], with value being irrelevant, four states use two grades[19], and one state uses four grades.[20] Using five penalty grades will make the revised TSP offense consistent with other revised property offenses, but this change will not follow a majority practice in other jurisdictions. Nationally, the District is an outlier in penalizing all trafficking with a possible ten year sentence. Only five states have TSP-type offenses, and only two of those authorize sentences of 10 years or greater for trafficking in low value property.[21] In each of the states that have comprehensively reformed criminal codes influenced by the MPC and have a general part,[22] and that do not have a separate TSP offense, trafficking in low value property on two separate occasions would only constitute two counts of misdemeanor possession of stolen property.[23]

Second, regarding the bar on multiple convictions for the revised TSP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised TSP offense and other overlapping property offenses. For example, where the offense most like the revised TSP is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory

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[17] Only five other jurisdictions specifically criminalize trafficking or dealing in stolen property. Ariz. Rev. Stat. Ann. § 13-2307; N.J. Stat. Ann. § 2C:20-7.1; N.D. Cent. Code Ann. § 12.1-23-08.3; Va. Code Ann. § 18.2-108.01; Wash. Rev. Code Ann. § 9A.82.050. The Model Penal Code does not have a specific TSP statute, but its receiving stolen property statute includes a presumption of knowledge that the property was stolen if it was possessed by a dealer who is found in possession of stolen property on two or more occasions; has received stolen property in another transaction within the preceding year; or acquires the property for consideration which he knows is far below its reasonable value. In addition, the Brown Commission's Final Report of the National Commission on Reform of Federal Criminal Laws did not include a TSP offense.

[18] Va. Code Ann. § 18.2-108.01.

[19] Del. Code Ann. tit. 11, § 852A; Fla. Stat. Ann. § 812.019 ; N.D. Cent. Code Ann. § 12.1-23-08.3; Wash. Rev. Code Ann. § 9A.82.050.

[20] N.J. Stat. Ann. § 2C:20-7.1; *State v. Portuondo*, 649 A.2d 892, 896 (N.J. Super. Ct. App. Div. 1994) (holding that § 2C:20-7.1 uses same penalty structure as theft offense).

[21] Ariz. Rev. Stat. Ann. § 13-2307; Fla. Stat. Ann. § 812.019.

[22] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part).

[23] Alaska Stat. Ann. § 11.46.190 (West); Ala. Code § 13A-8-16; Ark. Code Ann. § 5-36-106; Colo. Rev. Stat. Ann. § 18-4-401; Conn. Gen. Stat. Ann. § 53a-119 ; Del. Code Ann. tit. 11, § 851; Haw. Rev. Stat. Ann. § 708-830; 720 Ill. Comp. Stat. Ann. 5/16-1; Ind. Code Ann. § 35-43-4-2; Kan. Stat. Ann. § 21-5801; Ky. Rev. Stat. Ann. § 514.110; Me. Rev. Stat. tit. 17-A, § 359; Minn. Stat. Ann. § 609.53; Mo. Ann. Stat. § 570.080; Mont. Code Ann. § 45-6-301; N.H. Rev. Stat. Ann. § 637:7; N.J. Stat. Ann. § 2C:20-7; N.Y. Penal Law § 165.40; N.D. Cent. Code Ann. § 12.1-23-02; Ohio Rev. Code Ann. § 2913.51; Or. Rev. Stat. Ann. § 164.095; 18 Pa. Stat. Ann. § 3925; S.D. Codified Laws § 22-30A-7; Tenn. Code Ann. § 39-14-103; Tex. Penal Code Ann. § 31.03; Utah Code Ann. § 76-6-408; Wash. Rev. Code Ann. § 9A.56.140; Wis. Stat. Ann. § 943.34.

provision to either the current Consecutive sentences[24] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[25] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[26]

RCC § 22E-2403. Alteration of Motor Vehicle Identification Number.

Relation to National Legal Trends. *The revised AVIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, a majority of jurisdictions only criminalize alteration of a VIN when there is an additional evidence of wrongful intent. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[27] (hereafter "reformed code jurisdictions") that have analogous AVIN statutes, a majority require some wrongful intent[28], lack of authorization from a government agency[29], or recognize a defense that the defendant was the owner of the vehicle, or had consent of the vehicle.[30] However, three of the states that require intent to conceal or misrepresent the identity of the vehicle or part only require this intent for the felony grade of the offense.[31]

Second, regarding the aggregation of value in a single scheme or systematic course of conduct, the revised AVIN offense follows many jurisdictions[32] which have statutes that closely follow the Model Penal Code (MPC)[33] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle,

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[24] D.C. Code § 22-3203.

[25] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[26] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[27] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[28] Ala. Code § 32-8-86; Alaska Stat. Ann. § 11.46.260; Ariz. Rev. Stat. Ann. § 28-4593; Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Del. Code Ann. tit. 21, § 6705; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; N.D. Cent. Code Ann. § 39-05-28; N.J. Stat. Ann. § 2C:17-6; Ohio Rev. Code Ann. § 4549.62; Tenn. Code Ann. § 55-5-112; Wash. Rev. Code Ann. § 9A.56.180.

[29] S.D. Codified Laws § 32-4-9.

[30] Tex. Penal Code Ann. § 31.11.

[31] Ala. Code § 32-8-86; Ariz. Rev. Stat. Ann. § 28-4593; Del. Code Ann. tit. 21, § 6705.

[32] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[33] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

fraud, deception, and receiving stolen property.[34] However, there is some variation among states' aggregation provisions in situations where there are multiple victims.[35] Notably, of reformed code jurisdictions with analogous AVIN offenses, a majority use only a single penalty grade, and the value of the motor vehicle or motor vehicle part is irrelevant.[36]

Third, regarding the bar on multiple convictions for the revised AVIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised AVIN offense and other overlapping property offenses. For example, where the offense most like the revised AVIN offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses.[37] Research has not identified any equivalent statutory provision to either the current Consecutive sentences[38] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[39] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[40]

RCC § 22E-2404. Alteration of Bicycle Identification Number.

Relation to National Legal Trends. *The revised ABIN offense's above mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, adding an element that the accused had intent to conceal or misrepresent the identity of the bicycle is supported by national legal trends. Of the 29 states that have comprehensively reformed criminal codes influenced by the MPC and have a general part[41]

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[34] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[35] See, e.g. Commonwealth v. Young, 487 S.W.3d 430 (Ky. 2015), as modified (May 5, 2016); People v. Brown, 179 Misc. 2d 279, 684 N.Y.S.2d 825 (Sup 1998), aff'd, 287 A.D.2d 404, 731 N.Y.S.2d 704 (1st Dep't 2001), aff'd, 99 N.Y.2d 488, 758 N.Y.S.2d 602, 788 N.E.2d 1030 (2003).

[36] Ark. Code Ann. § 27-14-2211; Colo. Rev. Stat. Ann. § 18-4-420; Conn. Gen. Stat. Ann. § 14-149; 625 Ill. Comp. Stat. Ann. 5/4-103; Kan. Stat. Ann. § 8-113; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 301.400; Mont. Code Ann. § 45-6-326; N.D. Cent. Code Ann. § 39-05-28; N.H. Rev. Stat. Ann. § 262:9; N.J. Stat. Ann. § 2C:17-6; N.Y. Penal Law § 170.65; 18 Pa. Stat. Ann. § 7703; S.D. Codified Laws § 32-4-9; Tenn. Code Ann. § 55-5-112; Tex. Penal Code Ann. § 31.11; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 342.30.

[37] *Rogers v. State*, 656 So. 2d 245, 247 (Fla. Dist. Ct. App. 1995) (holding that theft and alteration of vehicle identification numbers do not merge);

[38] D.C. Code § 22-3203.

[39] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[40] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[41] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

(hereafter "reformed code jurisdictions"), nineteen have analogous offenses.[42] Of these nineteen states, a majority require some wrongful intent.[43]

Second, regarding the bar on multiple convictions for the revised ABIN offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised ABIN offense and other overlapping property offenses. For example, where the offense most like the revised ABIN is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[44] statute or the proposed RCC § 22A-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[45] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[46]

[42] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260 ; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Del. Code Ann. tit. 21, § 6705; Haw. Rev. Stat. Ann. § 293-1; 720 Ill. Comp. Stat. Ann. 5/17-30; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; Mont. Code Ann. § 45-6-326; N.Y. Penal Law § 170.65; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; S.D. Codified Laws § 22-30A-39; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37. Note however, that only Hawaii's statute is specific to bicycles. The other statutes apply more broadly to alteration of identification numbers on any machine, vehicle, or product. For example, Connecticut's statute applies to a "number or other mark which identifies any product, other than a motor vehicle, and distinguishes it from other products of like model and kind produced by the same manufacturer[.]". Conn. Gen. Stat. Ann. § 53-132a.

[43] Ala. Code § 13A-8-22; Alaska Stat. Ann. § 11.46.260; Colo. Rev. Stat. Ann. § 18-5-305; Conn. Gen. Stat. Ann. § 53-132a; Ky. Rev. Stat. Ann. § 514.120; Me. Rev. Stat. tit. 17-A, § 705; Minn. Stat. Ann. § 609.52; Mo. Ann. Stat. § 570.085; N.D. Cent. Code Ann. § 12.1-23-08.1; Ohio Rev. Code Ann. § 4549.62; 18 Pa. Stat. Ann. § 7703; Tenn. Code Ann. § 39-14-134; Wash. Rev. Code Ann. § 9A.56.180; Wis. Stat. Ann. § 943.37.

[44] D.C. Code § 22-3203.

[45] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[46] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Chapter 25. Property Damage.

RCC § 22E-2501. Arson.

Relation to National Legal Trends. *The revised arson offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[1]

The first substantive change to District law in the revised arson statute is that the revised offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[2] Even where malice is used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[3] The majority of the 35 states that do not have a "malice" culpable mental state requirement instead specify "knowingly," "purposely," or "intentionally" in some or all of their arson statutes.[4] The MPC arson statute requires that the defendant "starts a fire or causes an

[1] There is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses in this manner. Research for this commentary section considered the following as arson, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "arson"; 2) Any statutes that pertain to burning property, or starting a fire, etc., including those that require an intent to defraud or injure another; and 3) Any statutes that name offenses codified therein as "reckless burning" or burning with a higher mental state, or substantively similar statutes. The following were excluded: 1) Felony arson offenses; 2) Statutes that name the offenses codified therein "negligent burning" or substantively similar statutes; and 3) Offenses or gradations that pertain to burning, starting a fire, etc., and the production of drugs.

[2] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.

[3] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

[4] For the purposes of this specific survey, state statutes for "reckless burning," "knowingly burning," and substantively similar offenses, which this commentary otherwise considers "arson," were excluded. *See, e.g.*, N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Tex. Penal Code § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Minn. Stat. Ann. §§ 609.561, .562, .563, .5631; Mo. Ann. Stat. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Code Ann. § 12.1-21-02; Ohio Rev. Code Ann. §§ 2909..02, .03; Or. Rev. Stat. Ann. § 164.325, .3315; 18 Pa. Stat. Ann. § 3301; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-102, -103; Wis. Stat. Ann. §§ 943.02, .03, .04.

explosion with the purpose" of destroying or damaging certain property[5] and the Proposed Federal Criminal Code arson statute does not specify a mental state specified for prohibited conduct.[6] Due to the varying rules of statutory interpretation or lack thereof in these states and models, however, it is unclear whether these mental states apply to the prohibited conduct, such as starts a fire or causes an explosion.

The mental state "reckless" as to "the fact that a person who is not a participant in the crime is present in the dwelling or building" in the revised arson statute also generally reflects national trends. Arson statutes in the 50 states overwhelmingly protect arson that endangers human life more seriously than arson that endangers or damages property,[7] but they do so in different ways, making generalization difficult. For example, some states include in their higher levels of arson damaging or endangering an occupied dwelling or building, with varying mental state requirements as to that fact.[8] Other states, like the revised arson statute, use "reckless" as to the fact that human life is endangered in their highest grade of arson, although the precise language varies.[9] Unlike the revised arson statute, these states do not exclude a participant in the crime from the scope of the offense.

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[5] For the purposes of this specific survey, the MPC statute for "reckless burning," which this commentary otherwise considers "arson," was excluded. MPC § 220.1(1).

[6] For the purposes of this specific survey, the Proposed Federal Criminal Code offense for "endangering by fire or explosion," which this commentary otherwise considers "arson," was excluded. Proposed Federal Criminal Code § 1701.

[7] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[8] *See, e.g.*, Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. §18.2-127(A); N.Y. Penal Law §§ 150.15, .20; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Cal. Penal Code § 451; Colo. Rev. Stat. Ann. § 18-4-102; Conn. Gen. Stat. Ann. § 53a-111; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01; Idaho Code Ann. § 18-802; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; Minn. Stat. Ann. § 609.5632(2); Neb. Rev. Stat. Ann. § 28-502; N.H. Rev. Stat. Ann. § 634:1; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[9] Tex. Penal Code § 28.02(a)(2)(F) ("when the person is reckless about whether the burning or explosion will endanger the life of some individual or the safety of the property of another."); Alaska Stat. Ann. § 11.46.400(a) ("recklessly places another person in danger of serious physical injury."); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2) ("recklessly endangers any person or the property of another."); Mo. Ann. Stat. § 569.040(1)(1) "recklessly places such person in danger of death or serious physical injury."); N.D. Cent. Code Ann. § 12.1-21-02(12)(1)(a) ("recklessly places another person in danger of death or bodily injury."); Or. Rev. Stat. Ann. § 164.325(1)(a) ("recklessly places another person in danger of physical injury or protected property of another in danger of damage."); 18 Pa. Stat. Ann. § 3301(a.1) "thereby attempts to cause, or intentionally, knowingly, or recklessly causes bodily injury to another person, including, but not limited to a firefighter, police officer, or other person actively engaged in fighting the fire.").

However, such an exclusion is more common in other states' arson statutes that require damage to or threatening an occupied dwelling or a building.[10] The MPC and the Proposed Federal Criminal Code use "recklessly places another person in danger of death or bodily injury" in the closely-related offenses of reckless burning[11] and endangering by fire or explosion,[12] which essentially function as a second grade of arson in these models. The arson offenses in these models require, in part, starting a fire or causing an explosion with the purpose of destroying a building or occupied structure of another.[13]

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause an explosion." There is a clear national trend towards including explosions in arson statutes. A large majority of the 50 states include "causes an explosion" in some or all of their arson statutes or damaging or destroying "by explosives," or similar language.[14] The MPC arson offense also includes "causes an explosion,"[15] as does the Proposed Federal Criminal Code.[16]

A third substantive change to current District law is that the revised arson statute applies to motor vehicles. Aggravated arson and first degree arson include motor vehicles that qualify as "dwellings" as defined in RCC § 22E-2001, and any motor vehicle will suffice for second degree arson that satisfies the definition of "motor vehicle" in RCC § 22E-2001. At least 37 of the 50 states' arson statutes,[17] as well as the Proposed Federal

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[10] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[11] MPC § 220.1(2) ("recklessly places another person in danger of death or bodily injury.").

[12] Proposed Federal Criminal Code § 1702 ("recklessly places another person in danger of death or bodily injury.").

[13] MPC § 220.1(1); Proposed Federal Criminal Code § 1701.

[14] N.Y. Penal Law §§ 150.01, .05, .10, .15 Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705, -1702; Ark. Code Ann. § 5-38-301, -302; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen Stat. Ann. §§ 53a-111, -112, -113, -114; Del. Code Ann. tit. 11, §§ 801, 802, 803, -804; Fla. Stat. Ann. § 806.01; Ky. Rev. Stat. Ann. §§ 513.020, .030, 040; Me. Rev. Stat. Ann. tit. 17-A, § 802; Mo. Ann. Stat. §§ 569.040, .05, .055, .060; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§, 28-502, -503, -504; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.M. Stat. Ann. §§ 30-17-5, -6; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. § 2909.02, .03, .06; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Or. Rev. Stat. Ann. §§ 164.325, .315, .335; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4, -6; S.C. Code Ann. § 16-11-110; S.D. Codified Laws §§ 22-33-9.1, 9.2, 9.3; Tenn. Code Ann. §§ 39-14-301, -302, -303, -304; Utah Code Ann. §§ 76-6-103, -102, -104; Wash. Rev. Code Ann. §§ 9A.48.020, .030, .040, .050; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.1, .5; Kan. Stat. Ann. § 21-5182; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, -.78; Minn. Stat. Ann. §§ 609.561, .562.

[15] MPC § 220.1(1).

[16] Proposed Federal Criminal Code § 1701.

[17] For this survey, offenses of "reckless burning," "negligent burning," and substantively similar offenses, which this commentary otherwise considers arson, were excluded, as were lower grades of arson. Many of these states have requirements for the motor vehicle or building, such as it must be used for or adapted for the lodging of persons. These requirements exist in the revised aggravated arson and revised first degree arson grades because they only include motor vehicles that satisfy the definition of "dwelling" in 22E-2001. Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-102; N.Y. Penal Law §§ 150.20, .15; Tex. Penal Code Ann. § 28.01(a), (d); Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements), -41; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining "occupied structure"

Criminal Code[18] and the MPC,[19] include motor vehicles in the grades of arson that prohibit endangering human life, either specifically including "motor vehicles" in the arson statute or in the definition of "building" or similar term. Half of the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life, like the revised second degree arson offense.[20] The MPC includes vehicles adapted for overnight accommodation of persons, or for carrying on business therein, in the closely-related offense of reckless burning,[21] which is essentially a second grade of arson in this model. An additional 14 states have arson statutes that include vehicles because they apply to any property, but have a monetary limit to the value of the

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to include vehicles that meet certain requirements), -1704; Ark. Code Ann. § 5-38-301; Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles that meet certain requirements), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -111, -112; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), 803; Fla. Stat. Ann. § 806.01(1), (3); Ga. Code Ann. § 16-7-60; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -802, -803; 720 Ill. Comp. Stat. Ann. 5/20-1.1; Kan. Stat. Ann. §§ 21-5111 (defining "dwelling" to include vehicles that meet certain requirements), -5812; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .020; Mich. Comp. Laws Ann. §§ 750.71 (defining "dwelling" to include vehicles that meet certain requirements), -.72, -73; Minn. Stat. Ann. §§ 609.556 (defining "building" to include "vehicle" that meets certain requirements), -.561; Mo. Ann. Stat. §§ 569.010 (defining "inhabitable structure" to include vehicles that meet certain requirements), -.040; Neb. Rev. Stat. Ann. §§ 28-501 (defining "building" to include vehicles), -502; N.H. Rev. Stat. Ann. § 634:1 (through definition of "occupied structure"); N.M. Stat. Ann. §§ 30-17-5 (through definition of "occupied structure"), -6; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements), -01, -02; Ohio Rev. Code Ann. §§ 2909.01 (defining "occupied structure" to include vehicles that meet certain requirements), .02; S.D. Codified Laws §§ 22-33-9.5 (defining "occupied structure" to include vehicles that meet certain requirements), -9.1; Utah Code Ann. §§ 76-6-101 (defining "habitable structure" to include vehicles that meet certain requirements), -103; Wyo. Stat. Ann. §§ 6-1-104 (defining "occupied structure" to include vehicles that meet certain requirements), -101.

Several other states include motor vehicles because their arson statutes apply to any property if there is danger to human life. Haw. Rev. Stat. Ann. §§ 708-8251(1)(a), -8252(1)(a), -8253(1)(a); Alaska Stat. Ann. § 11.46.400; Ind. Code Ann. § 35-43-1-1(a)(2); Iowa Code Ann. § 712.1, .2; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(c); Or. Rev. Stat. Ann. § 164.325(1)(a)(B), (C); S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; N.J. Stat. Ann. § 2C:17-1(a)(1), (b)(1); Wash. Rev. Code Ann. § 9A.48.020(1)(a); 18 Pa. Stat. Ann. § 3301(a.1)(1)(i).

[18] Proposed Federal Criminal Code §§ 1701, 1706 (defining "inhabited structure" to include vehicles that meet certain requirements).

[19] MPC §220.1(1)(a), (4).

[20] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;

Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. § 9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

[21] MPC § 220.1(2)(b), (4).

property or the amount of damage done.[22] The Proposed Federal Criminal Code's closely-related offense endangering by fire or explosion,[23] which essentially functions as a second grade of arson in this model, prohibits damage to property of another constituting pecuniary loss in excess of $5,000.

The fourth substantive change to District law is that the revised arson statute does not require that the dwelling, building, or business yard be another person's property. The 50 states overwhelmingly include all property, without distinguishing as to ownership, in their grades of arson that protect human life[24] with few exceptions.[25] The Proposed Federal Criminal Code arson offense requires "a building or inhabited structure of another,"[26] but the closely-related offense of endangering by fire or explosion, which essentially functions as a second grade of arson in this model, does not have any ownership requirement for the property when the fire or explosion "place[] another person in danger of death or bodily injury."[27] The MPC maintains a requirement that the property at issue be "of another," but defines "of another" broadly, applicable "if anyone other than the actor has a possessory or proprietary interest therein."[28] Similar to the Proposed Federal Criminal Code, the MPC does not require that the property be "of another" in the closely-related offense reckless

[22] 720 Ill. Comp. Stat. Ann. 5/20-1(a)(1) (any property or any personal property with a value of $150 or more); Ind. Code Ann. § 35-43-1-1(a)(3) (property of another if the pecuniary loss is at least $5,000); Iowa Code Ann. § 712.3(personal property with a value that exceeds $500); Mich. Comp. Laws Ann. §§ 750.74 (personal property with a value of $20,000 or more), .75 (personal property with a value of $1,000 or more, but less than $20,000) , .77 (personal property having a value of $1,000 or less and defendant has one or more specified prior convictions), .78 (personal property of varying values, including $200 or more, but less than $1,000, and less than $200); Minn. Stat. Ann. § 609.562 (real or personal property with a value of more than $1,000); Miss. Code Ann. § 97-17-7 (personal property of the value of $25); Nev. Rev. Stat. Ann. § 205.020 (any unoccupied personal property with a value of $25 or more); N.H. Rev. Stat. Ann. § 634:1(III)(d) (pecuniary loss in excess of $1,000); N.D. Cent. Code Ann. § 12.1-21-02(1)(c) (pecuniary loss in excess of $2,000); Okla. Stat. Ann. tit. 21, § 1403(A) (property worth not less than $50); Or. Rev. Stat. Ann. § 164.315(1)(a)(B) (damage to property exceeds $750); Vt. Stat. Ann. tit. 13, § 504 (personal property with a value of not less than $25.00); W. Va. Code Ann. § 61-3-3 (personal property with a value of not less than $500); Wyo. Stat. Ann. § 6-3-103(a)(ii) (property which has a value of $200 or more).

[23] Proposed Federal Criminal Code § 1702(1)(c).

[24] Md. Code Ann., Crim. Law § 6-102; Va. Code Ann. § 18.2-77; N.Y. Penal Law §§ 150.15, .20; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253; Alaska Stat. Ann. § 11.46.400; Ala. Code § 13A-7-41; Ariz. Rev. Stat. Ann. § 13-1704; Ark. Code Ann. § 5-38-301(a)(1)(C); Cal. Penal Code §§ 451, 451.5; Conn. Gen. Stat. Ann. §§ 53a-111, -112; Del. Code Ann. tit. 11, § 803; Fla. Stat. Ann. § 806.01(1); Idaho Code Ann. §18-802; 720 Ill. Comp. Stat. Ann. 5/20-1(b), 5/20-1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. § 712.2; Ky. Rev. Stat. Ann. § 513.020; La. Stat. Ann. § 14:51.1; Me. Rev. Stat. tit. 17-A, § 802; Mass. Gen. Laws Ann. ch. 266, § 1; Mich. Comp. Laws Ann. §§ 750.72, .73 Minn. Stat. Ann. § 609.561; Miss. Code Ann. § 97-17-1; Mo. Ann. Stat. § 569.040; Mont. Code Ann. § 45-6-102; Neb. Rev. Stat. Ann. §28-502; Nev. Rev. Stat. Ann. § 205.010; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.C. Gen. Stat. Ann. §§ 14-58, -58.2; N.D. Cent. Code Ann. §§ 12.1-21-01, -02; Ohio Rev. Code Ann. §§ 2909.02, .03; Okla. Stat. Ann. tit. 21, 1401; Or. Rev. Stat. Ann. § 164.325; 18 Pa. Stat. Ann. § 3301; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1; S.C. Code Ann. § 16-11-110; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 76-6-103; Vt. Stat. Ann. tit. 13, § 502; Wash. Rev. Code Ann. § 9A.48.020; W. Va. Code Ann. § 61-3-1; Wyo. Stat. Ann. § 6-3-101.

[25] Ga. Code Ann. §16-7-60; Kan. Stat. Ann. § 21-5812(a); N.M. § 30-17-5; S.D. Codified Laws § 22-33-9.1; Colo. Rev. Stat. Ann. § 18-4-102; La. Stat. Ann. § 14:51.1.

[26] Proposed Federal Criminal Code § 1701.

[27] Proposed Federal Criminal Code § 1702.

[28] MPC § 220.1(4).

burning when the defendant "recklessly places another person in danger of death or bodily injury."[29]

The fifth substantive change in the revised arson offense is the affirmative defense in subsection (d), which applies only to second degree arson when there is no danger to human life. The affirmative defense reflects a minority position amongst the 50 states. At least ten states have an affirmative defense or exception to liability when only property is at risk and not human life.[30] However, the Proposed Federal Criminal Code has a consent defense when the property is of another,[31] which would apply to arson[32] and the closely-related offense of endangering by fire or explosion,[33] and the MPC has a narrow affirmative defense to arson for insurance fraud purposes that the defendant's conduct "did not recklessly endanger any building or occupied structure of another or place any person in danger of death or bodily injury."[34]

The sixth substantive change to District law is that the revised arson statute no longer includes "attempt to burn" that is in the current arson statute. A small minority of the 50 states include attempt to burn or similar attempt language in their arson statutes,[35] but they are all non-reformed jurisdictions and generally punish attempt lower than completed arson, although there is some overlap with the lower grades of arson. Neither the Proposed Federal Criminal Code[36] nor the MPC[37] include attempt to burn or similar language in their arson statutes.

The seventh substantive change that the revised arson statute makes to current District law is to create three gradations of arson. There does not appear to be any other state with one grade of arson as there is in the District's current arson statute.[38] If the closely-related offense of burning one's own property with intent to injure or defraud another person[39] is considered a grade of arson, the current District law has two grades of arson. Even then, however, the District is in the minority of the 50 states. There appear to be only five states that are limited to two arson gradations.[40] Although it is difficult to compare gradations amongst states given the variety in arson offenses, the vast majority of states have more than two arson gradations, with three and four gradations being the most

[29] MPC § 220.1(2).
[30] N.Y. Penal Law §§ 150.05, .10; Tex. Penal Code Ann. § 28.02(c); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-42, -43; Del. Code Ann. tit. 11, §§ 801, 802; Ky. Rev. Stat. Ann. §§ 513.030, .040; Me. Rev. Stat. tit. 17-A, § 802; Mo. Ann. Stat. § 569.050; Neb. Rev. Stat. Ann. § 28-504; Iowa Code Ann. § 712.1(1)
[31] Proposed Federal Criminal Code § 1708.
[32] Proposed Federal Criminal Code § 1701.
[33] Proposed Federal Criminal Code § 1702.
[34] MPC § 220.1(1)(b).
[35] Cal. Penal Code § 455; Miss. Code Ann. §97-17-9; Nev. Rev. Stat. § 205.025; Okla. Stat. Ann. tit. 21, § 1404; 11 R.I. Gen. Laws Ann. § 11-4-6; S.C. Code Ann. § 16-11-190; Vt. Stat. Ann. tit. 13, § 505; W. Va. Code Ann. § 61-3-4; Mass. Gen. Laws Ann. ch. 266, § 5A.
[36] Proposed Federal Criminal Code § 1701.
[37] MPC § 220.1(1).
[38] D.C. Code § 22-301.
[39] D.C. Code § 22-302.
[40] N.J. Stat. Ann. § 2C:17-1(a), (b); Or. Rev. Stat. Ann. §§ 164.325, 164.315; Wash. Rev. Code Ann. § 9A.48.020; Wis. Stat. Ann. §§ 943.02, 04; N.D. Cent. Code Ann. §§ 12.1-21-01, 02; Mo. Ann. Stat. §§ 569.040, .0505.

common.[41] The Proposed Federal Criminal Code has one arson grade,[42] but essentially two additional grades in the closely-related endangering by fire or explosion offense.[43] Similarly, the MPC[44] has a single arson offense, but the closely related offense of reckless burning essentially operates as a second grade of arson.

The substance of the revised arson gradations also reflects national trends. The higher grades of the revised arson offense, aggravated arson and first degree arson, are reserved for arson that endangers human life. The majority of jurisdictions, the MPC,[45] and the Proposed Federal Criminal Code[46] grade arson that protects human life more seriously than arson that protects property.[47] At least 35 states, like the revised second

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[41] Md. Code Ann., Crim. Law §§ 6-102, -103, 6-1-06; Va. Code Ann. §§ 18.2-77, -79, -80, -81; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Conn. Gen. Stat. Ann. §§ 53a-111,-112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; Iowa Code Ann. §§ 712.2, .3, .4; 720 Ill. Comp. Stat. Ann. 5/20-1; -1.1; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mont. Code Ann. §§ 45-6-102, -103; Minn. Stat. Ann. §§ 609.561, .562; N.H. Stat. Ann. § 634:1; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Kan. Stat. Ann. §§ 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, 030, 040, .060; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14.53; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, -102; Tex. Penal Code Ann. § 28.02; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Ind. Code Ann. § 35-43-1-1.

[42] Proposed Federal Criminal Code §§ 1701, 1702.

[43] Proposed Federal Criminal Code § 1702.

[44] MPC § 220.1.

[45] MPC § 220.1. Although the MPC has just one "arson" offense in subsection (1), the closely-related offense of reckless burning in subsection (2) essentially operates as a second grade of arson. The MPC commentary notes that the intent of the "arson" offense in subsection (1) is "to confine the arson offense to specially cherished property whose burning or endangering by explosion would typically endanger life." *Id.* cmt. at 18.

[46] The arson offense in the Proposed Federal Criminal Code is limited to "a building or inhabited structure of another or a vital public facility." Proposed Federal Criminal Code § 1701. Although the Proposed Federal Criminal Code has just one "arson" offense in § 1701, the closely-related offense of endangering by fire or explsion in § 1702 essentially operates as a second grade of arson. The commentary states that "human endangerment is the principle concern" in the arson offense, but notes that the arson offense does not distinguish based upon the awareness of, or consequences of actual human occupation, and some kinds of property are included at which humans may rarely be present. *Id.* cmt. at 194. "The policy thus expressed is that the difference between arson accompanied and arson unaccompanied by the awareness, or consequences, of actual human occupation of the property is insufficient to warrant requiring proof as to the awareness of consequences in order to distinguish between the availability of Class B and Class C felony penalties." *Id.*

[47] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52, 14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified

degree arson offense, have a grade of arson that prohibits damaging specific types of property like dwellings or buildings, without regard to whether they are occupied.[48] These states' definitions of "dwelling," "building," and similar terms frequently include motor vehicles and watercraft and could include "business yard" as defined in RCC § 22E-2001. In addition, as discussed earlier in this section, half the states include vehicles in their grades of arson that protect property, without any explicit requirement that the arson endanger human life.[49]

There is limited support in the 50 states for including, with strict liability, that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation. At least 15 states specifically include death, bodily injury, or both as a gradation of arson,[50] with most of these states reserving it for the most

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Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[48] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure"), -103; N.Y. Penal Law §§ 150.00 (defining "building") .05, .10; Tex. Penal Code Ann. § 28.02(a)(2)(A), (C), (D), (E), (a-2); Alaska Stat. Ann. § 11.46.410; Ala. Code §§ 13A-7-40 (defining "building"), -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1701 (defining structure), -1703; Ark. Code Ann. §§ 5-38-101 (defining "occupiable structure"), (a)(1)(A); Cal Penal Code §§ 450 (defining "structure"), 451(c), (d); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building"), -102; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building"), 53a-113; Del. Code Ann. tit. 11, §§ 222 (defining "building"), 801, -802; Fla. Stat. Ann. § 806.01(1)(a), (b), (2), (3) (definition of "structure"); Ga. Code Ann. § 16-7-61(a); Idaho Code Ann. §§ 18-801 (defining "structure"), -802(1), (2), -803; Iowa Code Ann. § 712.3; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building"), .030(1)(a), .040; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2; Mich. Comp. Laws Ann. §§ 750.73, .74; Minn. Stat. Ann. §§ 609.556 (defining "building"), .561, .562; Miss. Code Ann. §§ 97-17-1, -5; Mo. Ann. Stat. § 569.010 (defining "inhabitable structure"), .050(1)(1); Mont. Code Ann. § 45-6-103(1)(a); Neb. Rev. Stat. Ann. §§ 28-501 (defining "building"), -503; Nev. Rev. Stat. Ann. §§ 205.010(1), .014 (defining "building"), .015; N.M. Stat. Ann. § 30-17-5(A)(1), (I) (defining "occupied structure"); Or. Rev. Stat. Ann. §§ 154.305 (defining "protected property"), .325(1)(a)(A), .315(1)(a)(A); 18 Pa. Stat. Ann. § 3301(c)(1), (2); 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3; S.D. Codified Laws § 22-33-9.2(1); Tenn. Code Ann. §39-14-301(a)(1); Utah Code Ann. §§ 76-6-101 (defining "habitable structure"), -103(1)(a); Vt. Stat. Ann. tit. 13, §§ 502, 503; Wash. Rev. Code Ann. § 9A.48.010 (defining "building"), .030; W. Va. Code Ann. §§ 61-3-1, -2; Wis. Stat. Ann. § 943.020(1)(a); Wyo. Stat. Ann. §§ 6-3-104 (defining "occupied structure"), -101.

[49] Md. Code Ann., Crim. Law §§ 6-101 (defining "structure" to include "a vehicle"), 6-103; N.Y. Penal Law §§ 150.10, .05, .01; Tex. Penal Code Ann. § 28.02(a-1); Haw. Rev. Stat. Ann. §§ 708-8251(1)(B), -8252(1)(b), -8253(1)(B), -8254; Colo. Rev. Stat. Ann. §§ 18-4-103; Conn. Gen. Stat. Ann. §§ 53a-100 (defining "building" to include "vehicle"), -113; Del. Code Ann. tit. 11, §§ 222 (defining "building" to include "vehicle"), -801, -802; Fla. Stat. Ann. § 806.01(2), (4) (through the definition of "structure"); Ga. Code Ann. § 16-7-61; Idaho Code Ann. §§ 18-801 (defining "structure" to include "vehicle"), -803; Ky. Rev. Stat. Ann. §§ 513.010 (defining "building" to include "vehicle"), .030, .040; La. Stat. Ann. §§ 14:52(A)(1); Mo. Ann. Stat. §§ 569.055;
Mont. Code Ann. § 45-6-103(1)(a); N.J. Stat. Ann. § 2C:17-1(a)(2), (b)(2), (f) (through definition of "structure"); N.M. Stat. Ann. § 30-17-5; Ohio Rev. Code Ann. § 2909.03(A)(1); 18 Pa. Stat. Ann. § 3301(d); Tenn. Code Ann. § 39-14-303; Utah Code Ann. § 76-6-102(1)(b);Wash. Rev. Code Ann. § 9A.48.030; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); Mont. Code Ann. §§ 45-6-103(1)(a), -103; Neb. Rev. Stat. Ann. § 28-504; Kan. Stat. Ann. § 21-5812(a)(1)(C).

[50] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451(a); Fla. Stat. Ann. § 806.031(1); N.M. Stat. Ann. §§ 30-17-5, -6; S.C. Code Ann. § 16-11-110; Utah Code Ann. § 76-6-102(3).

serious gradation.[51] It is uncommon in these states to explicitly exclude a participant in the crime.[52] However, excluding a participant in a crime is a more common requirement in other states' arson statutes that require the presence of a person in a building.[53] One state specifies strict liability for the fact that a person suffered death bodily injury.[54] Due to the varying rules of statutory interpretation or lack thereof in the states, it is unclear whether the other states apply a culpable mental state or strict liability. As stated in the earlier discussion of "Relation to Current District Law," the aggravated arson gradation is intended to bring within the scope of the revised offense firefighters and first responders who may be injured or killed in responding to the fire or explosion. At least fourteen states specifically include injury or risk to firefighters or other first responders in their arson statutes.[55]

The eighth substantive change to current District law is that the RCC deletes two statutes that are closely related to the current arson statute, burning one's own property with intent to injure or defraud another person[56] and placing explosives with intent to destroy or injure property.[57] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "arson," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[58] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

Similarly, for burning one's own property with intent to injure or defraud another person, very few states' arson statutes use "intent to injure any other person,"[59] nor does the MPC or the Proposed Federal Criminal Code. As already noted, a majority of states,[60]

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[51] N.Y. Penal Law § 150.20; Tex. Penal Code § 28.02(d); Conn. Gen. Stat. Ann. § 53a-111(a)(2); 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); Ky. Rev. Stat. Ann. § 513.020(1)(b); Mich. Comp. Laws Ann. § 750.72(1)(b); Okla. Stat. Ann. tit. 21, § 1401(A); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c).

[52] N.Y. Penal Law § 150.20; Utah Code Ann. § 76-6-102(3).

[53] Md. Code Ann., Crim. Law § 6-102; N.Y. Penal Law §§ 150.15, .20; Del. Code Ann. tit. 11, § 803; Minn. Stat. Ann. § 609.5632(2); Utah Code Ann. § 76-6-103; Wash. Rev. Code Ann. § 9A.48.020.

[54] Fla. Stat. Ann. § 806.031.

[55] 720 Ill. Comp. Stat. Ann. 5/20-1.1(a)(2); 18 Pa. Stat. Ann. § 3301(a.1); Tenn. Code Ann. § 39-14-302(a)(2); Wyo. Stat. Ann. § 6-3-101(c); Cal. Penal Code §§ 451.1(a)(2); Fla. Stat. Ann. § 806.031; Conn. Gen. Stat. Ann. § 53a-111(4); 720 Ill. Comp. Stat. Ann. 5/20-1.1(3); Iowa code Ann. § 712.2; Kan. Stat. Ann. § 21-5812(b)(2); La. Stat. Ann. § 14:51.1; Or. Rev. Stat. Ann. § 164.325(1)(a)(C); Miss. Code Ann. § 97-17-14; N.C. Gen. Stat. Ann. § 14-69.3.

[56] D.C. Code § 22-302.

[57] D.C. Code § 22-3305.

[58] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

[59] *See, e.g.*, Cal. Penal Code § 451.5.

[60] *See, e.g.*, Md. Code Ann., Crim. Law §§ 6-102, 6-103; 6-106; Va. Code Ann. § 18.2-77, -79, -80, -81; N.Y. Penal Law §§ 150.01, .05, .10, .15. 20; Tex. Penal Code Ann. § 28.02; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code §§ 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§ 13-1703, -1704, -1705; Colo. Rev. Stat. Ann. §§ 18-4-102, -103, -104, -105; Conn. Gen. Stat. Ann. §§ 53a-111, -112, -113; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.01; Ga. Code Ann. §§ 16-7-60, -61, -62; Idaho Code Ann. §§ 18-802, -803, -804; 720 Ill. Comp. Stat. Ann. 5/20-1, -1.1; Ind. Code Ann. § 35-43-1-1; Iowa Code Ann. §§ 712.2, .3, .4; Kan. Stat. Ann. § 21-5812; Ky. Rev. Stat. Ann. §§ 513.020, .030, .040; La. Stat. Ann. §§ 14:51.1, 14:52,

the MPC,[61] and the Proposed Federal Criminal Code[62] grade arson more seriously where there is danger to human life, but the language used varies. Another change to current District law is deleting "with intent to defraud . . . any other person" that is in the current statute for burning one's own property with intent to injure or defraud another person. Although at least ten states, mostly jurisdictions with reformed criminal codes, do not include intent to defraud in their arson statutes,[63] a majority of states do.

Ninth, regarding the bar on multiple convictions for the revised arson offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised arson offense and other overlapping property offenses. For example, where the offense most like the revised arson is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[64] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[65] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[66]

Specifically for arson, at least two states define their general property damage offenses to exclude damage caused by fire,[67] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Tenth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element

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14:52.1, 14:53; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A, 10; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77; Minn. Stat. Ann. §§ 609.561, .562; Mo. Stat. Ann. §§ 569.040, .050; Mont. Code Ann. §§ 45-6-102, -103; Neb. Rev. Stat. Ann. §§ 28-502, -503, -504, -505; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025, .030; N.H. Rev. Stat. Ann. § 634:1; N.J. Stat. Ann. § 2C:17-1; N.D. Cent. Codified Laws §§ 12.1-21-01, -02; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403; Or. Rev. Stat. Ann. §§ 164.325, .315; 18 Pa. Stat. Ann. § 3301; S.C. Code Ann. §§ 16-11-110, -130; 11 R.I. Gen. Laws Ann. §§ 11-4-2, -2.1, -3, -4-, -6; S.D. Codified Laws §§ 22-33-9.1, -9.2, -10; Tenn. Code Ann. §§ 39-14-301, -302, -303; Utah Code Ann. §§ 76-6-103, 102; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504, 505, 506; Wash. Rev. Code Ann. §§ 9A.48.020, .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4, -5, -7; Wyo. Stat. Ann. §§ 6-3-101, -102, -103, -104.

[61] MPC § 220.1(1), (2).

[62] Proposed Federal Criminal Code §§ 1701, 1702.

[63] N.Y. Penal Law §§ 150.01, .05, .10, .15, .20; Haw. Rev. Stat. Ann. §§ 708-8251, -8252, -8253, -8254; Alaska Stat. Ann. §§ 11.46.400, .410, .420; Ala. Code § 13A-7-41, -42, -43; Ariz. Rev. Stat. Ann. §§13-1703, -1704, -1705; Del. Code Ann. tit. 11, §§ 801, 802, 803; Fla. Stat. Ann. § 806.031; Iowa Code Ann. §§ 712.2, .3, .4; Minn. Stat. Ann. § § 609.561, .562; Mo. Ann. Stat. § § 569.040, .050.

[64] D.C. Code § 22-3203.

[65] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[66] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[67] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

"may be negatived by intoxication" whenever it "negatives the required knowledge."[68] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[69] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[70]

RCC § 22E-2502. Reckless Burning.

Relation to National Legal Trends. *The RCC reckless burning offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

The first substantive change to District law is that the RCC reckless burning offense no longer uses the "malice" mental state that is in the current arson statute. Only 15 of the 50 states use malice in one of their arson statutes.[71] Even where malice is used, the recognition of a mitigation defense to arson is rare and disapproved by experts.[72] At least

[68] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[69] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

[70] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[71] Md. Code Ann., Crim. Law §§ 6-102, -103, -104, -105; Va. Code Ann. § 18.2-77, -79, -80, -81; Cal. Penal Code §§ 451, 451.5, 454; Mass. Gen. Laws Ann. ch. 266, §§ 1, 2, 5A; Mich. Comp. Laws Ann. §§ 750.72, .73, .74, .75, .76, .77, .78; Miss. Code Ann. §§ 97-17-1, -3, -5, -7, -9; Nev. Rev. Stat. Ann. §§ 205.010, .015, .020, .025; N.M. Stat. Ann. §§ 30-17-5 and 30-17-6; N.C. Stat. Ann. § 14-58.2; Okla. Stat. Ann. tit. 21, §§ 1401, 1402, 1403, 1404; S.C. Code Ann. § 16-11-110; Vt. Stat. Ann. tit. 13, §§ 502, 503, 504; Wash. Rev. Code Ann. §§ 9A.48.020 and .030; W. Va. Code Ann. §§ 61-3-1, -2, -3, -4; Wyo. Stat. Ann. § 6-3-101.

[72] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 10.4 (2d ed.) ("Outside of homicide law, the concept of [mitigation] doesn't [really] exist."); John Poulos, *The Metamorphosis of the Law of Arson*, 51 MO. L. REV. 295, 404 n. 573 (1986) (rejecting the argument of R. Perkins & R. Boyce that a mitigated burning should not be arson and stating that "why should the rule of provocation be applied outside the law of homicide? I find neither history nor policy which supports the application of the rule of provocation to arson."); Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter As Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1041 (2011) (categorically stating that "[p]rovocation is available as a partial defense only to murder" and that it is not "a defense, partial or otherwise" to non-homicide offenses, which is incorrect in light of District law.

20 states have reckless burning offenses,[73] as well as the MPC[74] and the Proposed Federal Criminal Code.[75] None of the states, the MPC, or the Proposed Federal Criminal Code use "malice" in their reckless burning statutes.

Instead, 11 of the 20 states[76] with reckless burning statutes instead specify "knowingly," "purposely," or "intentionally" in some or all of their reckless burning statutes. The varying rules of construction amongst states make it difficult to generalize whether these culpable mental states apply to the prohibited conduct in these states, such as start a fire or cause an explosion. However, the MPC reckless burning offense requires that the defendant "purposely" start a fire or cause an explosion[77] and the Proposed Federal Criminal Code requires that the defendant "intentionally" start or maintain a fire or causes an explosion.[78] The vast majority of the states with reckless burning statutes require "recklessly" as to the damage or destruction of the property or endangering of the property,[79] as do the MPC[80] and the Proposed Federal Criminal Code.[81] The RCC reckless burning offense reflects national trends with its culpable mental states of "knowingly" starts a fire or causes an explosion and "recklessly damages or destroys."

The second substantive change is that subsection (a)(1) requires, in part, that the defendant "cause[] an explosion." There is a clear national trend towards including explosions in reckless burning statutes. All of the 20 states with reckless burning statutes,[82]

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[73] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.
[74] MPC § 220.1(2).
[75] Proposed Federal Criminal Code § 1702.
[76] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; 18 Pa. Stat. Ann. § 3301(d); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; Wash. Rev. Code Ann. §§ 9A.48.040, .050; S.D. Codified Laws § 22-33-9.3.
[77] MPC § 220.1(2).
[78] Proposed Federal Criminal Code § 1702.
[79] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.
[80] MPC § 220.1(2).
[81] Proposed Federal Criminal Code § 1702.
[82] Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. §

except one,[83] include "causes an explosion" or damaging or destroying "by explosives" or similar language in the offenses, as do the MPC[84] and the Proposed Federal Criminal Code.[85]

A third substantive change to current District law is that the RCC reckless burning statute applies to motor vehicles. Of the 20 states that have reckless burning statutes,[86] nine include motor vehicles in their reckless burning statutes.[87] A few of these states have requirements for the motor vehicle, such as it must be used for or adapted for the lodging of persons,[88] but the majority do not, and an additional nine states include any property in their reckless burning statutes.[89] The MPC reckless burning offense is limited to a building or occupied structure, which includes vehicles that meet certain requirements.[90] The Proposed Federal Criminal Code endangering by fire or explosion offense is similarly limited to a building or inhabited structure, which includes vehicles that meet certain

712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[83] Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b).

[84] MPC § 220.1(2).

[85] Proposed Federal Criminal Code § 1702.

[86] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.

Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[87] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements); 18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[88] Ark. Code Ann. §§ 5-38-101 (defining occupiable structure" to include vehicles that meet certain requirements), -302; Conn. Gen. Stat. Ann. §§ 53a-101 (defining "building" to include vehicles), -114; Mo. Ann. Stat. §§ 569.010 (defining "habitable structure" to include vehicles that meet certain requirements); 18 Pa. Stat. Ann. § 3301(d)(2); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; N.Y. Penal Law § 150.05; Ala. Code §§ 13A-7-40 (defining "building" to include vehicles that meet certain requirements); Colo. Rev. Stat. Ann. §§ 18-4-101 (defining "building" to include vehicles), -105; N.D. Cent. Code Ann. §§ 12.1-21-08 (defining "inhabited structure" to include vehicles that meet certain requirements).

[89] Del. Code Ann. tit. 11, § 804; Or. Rev. Stat. Ann. § 164.335; Utah Code Ann. § 76-6-104(1)(c); Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2);

[90] MPC § 220.1(2), (4).

requirements, and also includes damage to property of another constituting pecuniary loss in excess of $5,000.[91]

The fourth substantive change to District law is that the RCC reckless burning statute does not require that the dwelling, building, business yard, watercraft, or motor vehicle be another person's property. This is a minority position. Of the 20 states with reckless burning statutes,[92] all but four require that the property be of another person when the reckless burning endangers or damages property.[93]

The fifth substantive change in the RCC reckless burning statute is the affirmative defense in subsection (d). The affirmative defense reflects a minority position amongst the states. As already noted, of the 20 states with reckless burning statutes,[94] all but four require that the property be of another person when the reckless burning endangers or damages property.[95] Two of these four states have an affirmative defense or exception to liability that requires the defendant to establish that no one person other than the defendant had a possessory interest in the property.[96]

The sixth substantive change to District law is that the RCC reckless burning statute does not include "attempt to burn" that is in the current arson statute.[97] None of the states

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[91] Proposed Federal Criminal Code §§ 1702, 1709.

[92] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[93] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[94] There is signification variation in the 50 states as to what conduct constitutes "arson" as opposed to "reckless burning." This commentary considered the following as reckless burning, unless otherwise specifically noted: 1) All statutes that name the offenses codified therein "reckless burning" or any substantively similar offenses; and 2) Any statutes that pertain to burning property, or starting a fire, etc. that "recklessly" or "knowingly" endangers or damages property and/or human life. Negligent arson or negligent burning statutes were excluded.
Ark. Code Ann. § 5-38-302; Conn. Gen. Stat. Ann. § 53a-114; Del. Code Ann. tit. 11, § 804; Mo. Ann. Stat. § 569.060; Or. Rev. Stat. Ann. § 164.335; 18 Pa. Stat. Ann. § 3301(d); Utah Code Ann. § 76-6-104(1)(a), (c); Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; Iowa Code Ann. § 712.5; Ohio Rev. Code Ann. § 2909.06(A)(2); N.Y. Penal Law § 150.05; Tex. Penal Code Ann. § 28.02(a-2); Haw. Rev. Stat. Ann. §§ 708-8251(1)(b), -8252(1)(b), -8253(1)(b); Ala. Code § 13A-7-43; Colo. Rev. Stat. Ann. § 18-4-105; Me. Rev. Stat. tit. 17-A, § 802(1)(B)(2); N.J. Stat. Ann. § 2C:17-1(b)(1), (2); N.D. Cent. Code Ann. § 12.1-21-02; S.D. Codified Laws § 22-33-9.3.

[95] Wash. Rev. Code Ann. §§ 9A.48.040, .050, .060; Ariz. Rev. Stat. Ann. § 13-1702; N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[96] N.Y. Penal Law § 150.05; Ala. Code § 13A-7-43.

[97] D.C. Code § 22-301.

with reckless burning statutes include "attempt" or similar language in the offense, nor do the MPC[98] or the Proposed Federal Criminal Code.[99]

The seventh substantive change to current District law is that the RCC deletes a statute that is closely related to the current arson statute and RCC reckless burning statute: placing explosives with intent to destroy or injure property.[100] It is difficult to assess national trends for this change because there is significant variation in the 50 states as to what conduct constitutes "reckless burning," and some states do not name their offenses. However, in the 50 states' arson statutes, placing explosives near property with a certain intent is specifically an attempt to commit arson, and it is not a separate offense.[101] There is no equivalent offense in the MPC or the Proposed Federal Criminal Code.

Finally, regarding the bar on multiple convictions for the reckless burning offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the reckless burning offense and other overlapping property offenses. For example, where the offense most like the reckless burning is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[102] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[103] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[104]

RCC § 22E-2503. Criminal Damage to Property.

Relation to National Legal Trends. *The revised CDP offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends in equivalent property damage offenses.*[105]

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[98] MPC § 220.1.

[99] Proposed Federal Criminal Code § 1702.

[100] D.C. Code § 22-3305 ("Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not more than the amount set forth in § 22-3571.01 and by imprisonment for not less than 2 years or more than 10 years.").

[101] *See, e.g.*, Md. Code Ann., Crim. Law § 6-109; Cal. Penal Code §455(b); Miss. Code Ann. § 97-17-9(2); Nev. Rev. Stat. Ann. § 205.025(2); Okla. Stat. Ann. tit. 21, § 1404(B); Vt. Stat. Ann. tit. 13, § 509; W. Va. Code Ann. § 61-3-4(b); Wis. Stat. Ann. § 943.05.

[102] D.C. Code § 22-3203.

[103] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[104] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[105] Unless otherwise specifically noted, this survey of national legal trends is limited to states' most general property damage or destruction statute. More specific statutes, such as those pertaining to the damage or destruction of specific types of property, tampering offenses, interfering with public utilities or services, especially dangerous means of damage or destruction, and graffiti were excluded.

First, the revised CDP offense replaces "malice" as the culpable mental state in the current MDP statute with requirements of knowledge, recklessness, and strict liability with respect to various elements. Deleting "malice" reflects national trends. Only 12 states, mostly with unreformed criminal codes, use "malice" in their damage to property statutes.[106] Neither the MPC[107] nor the Proposed Federal Criminal Code[108] criminal mischief statutes require "malice." Three states require "recklessly" in all grades of their damage to property offenses.[109] An additional 10 states differentiate gradations, at least in part, based on the defendant's culpable mental state and include "recklessly" in the lowest or lower grades of the offense.[110] The MPC's criminal mischief offense uses this grading scheme, requiring either "purposely" or "recklessly," with reckless damage limited to the lower grades of the offense.[111] Similarly, the Proposed Federal Criminal Code's criminal mischief offense requires "willfully," with reckless damage limited to the lower grades of the offense.[112] Most of the remaining states, at least 19, require "knowingly" or a higher mental state, such as intentionally or purposely, for all grades of their property damage statutes.[113]

Second, using the amount of damage to the property as the basis for measuring the damage or destruction reflects a clear national trend. The majority of the 50 states use the amount of damage or destruction as the gradation for the equivalent property damage

[106] Md. Code Ann., Crim. Law § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws Ann. ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. § 9A.48.090; Cal. Penal Code § 594; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.

[107] MPC § 220.3.

[108] Proposed Federal Criminal Code § 1705.

[109] Ariz. Rev. Stat. Ann. § 13-1602(A)(1)-(5); Ind. Code Ann. § 35-43-1-2(a), (a)(1), (a)(2)(A); Me. Rev. Stat. Ann. tit. 17-A, §§ 805, 806.

[110] N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Coe Ann. §§ 28.03(a)(1), (b), .04; Ark. Code Ann. §§ 5-38-203(a)(1), (b), -204(a)(1); Conn. Gen. Stat. Ann. §§ 53a-115(a)(1), -116(a)(1), -117(a)(1); Del. Code Ann. tit. 11, § 811(a)(1), (b); Neb. Rev. Stat. Ann. § 28-519(1)(a), (2)-(5); N.H. Rev. Stat. Ann. § 634:2; Or. Rev. Stat. Ann. §§ 164.365(1)(a)(A); 18 Pa. Stat. Ann. § 3304(a)(1), (a)(6), (b); N.D. Cent. Code Ann. § 12.1-21-05(1)(b), (2).

[111] MPC § 220.3.

[112] Proposed Federal Criminal Code § 1705.

[113] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21(a)(1), -22(a), -23; Colo. Rev. Stat. Ann. § 18-4-501; Ga. Code Ann. §§ 16-7-23(a)(1), -21(a); Ill. Comp. Stat. Ann. 5/21-1(a)(1), (d); Iowa Code Ann. §§ 716.1, .3(1)(a), .4, .5(1)(a), .6(1)(a)(1), (b), Kans. Stat. Ann. § 21-5813(a)(1), (c); Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; La. Stat. ann. § 14:56; Minn. Stat. Ann. § 609.595(1)(3), (2)(a), (3); Mont. Code Ann. § 45-6-101(1)(a); N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(1)(c); Vt. Stat. Ann. tit. 13, § 3701; Wis. Stat. Ann. § 943.01(1), (2)(d); Wyo. Stat. Ann. § 6-3-201.

offense.[114] Four states use the costs of repairs or replacement.[115] Six states grade based on the value of the property, and two of these states also partially grade based on the amount of damage.[116] The MPC criminal mischief offense grades, in part, based on the amount of "pecuniary loss" that results,[117] with the commentary suggesting that "pecuniary loss" is limited to the amount of physical harm or damage done.[118] The Proposed Federal Criminal Code criminal mischief offense also grades, in part, based on the amount of "pecuniary loss."[119]

Third, it appears that only one state treats attempts the same as the completed property damage offense.[120] The MPC[121] and the Proposed Federal Criminal Code[122] do not include attempt in their criminal mischief offenses.

Fourth, regarding increasing the number and type of gradations, it appears that the District's current two gradations and $1,000 value cutoff in its MDP statute make it an outlier, with its 10 year penalty for the higher grade being one of the harshest, if not the harshest, in the country. One state appears to not have any gradations in its property damage offense, but the offense is a misdemeanor.[123] Of the remaining 49 states, only two permit 10 year maximum penalties for gradations that are equal to or less than D.C.'s $1,000 threshold.[124] However, one of these states requires a mental state of "knowingly,"[125] which is a higher mental state than the "malice" culpable mental state in the current District MDP statute. Other states generally have far higher dollar value requirements for gradations with 10 year maximum penalties.[126] The District's current

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[114] Md. Code Ann., Crim. Law § 6-301; Alaska Code Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(1); N.Y. Penal Law §§ 145.00(1), (6), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code § 13A-7-21(a)(1), -22(a), -23; Ariz. Rev. Stat. § 13-1602; Ark. Code Ann. Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823 ("without the other's consent."); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); Idaho Code Ann. § 18-7001; 720 Ill. Comp. Stat. Ann. 5-21-1; Me. Rev. Stat. tit. 17-A, §§ 806(1)(A), 805(A)(1); Mich. Comp. Laws Ann. § 750.377a; N.M. Stat. Ann. § 30-15-1; Or. Rev. Stat. Ann. §§ 164.365, .364; Tenn. Code Ann. § 39-14-408; Wash. Rev. Code Ann. §§ 9A.48.070(1)(A), .080(1)(A), .090(1)(A); Cal. Penal Code § 594; Mo. Ann. Stat. §§ 569.100, .120.

[115] Wis. Stat. Ann. § 943.01; Iowa Code Ann. §§ 716.3, .4, .5, .6; Minn. Stat. Ann. § 609.595; W. Va. Code Ann. § 61-3-30.

[116] Nev. Rev. Stat. Ann. § 206.310 ("value of the property affected or the loss resulting."); Va. Code Ann. § 18.2-137(B) ("value of or damage to the property."); Tenn. Code Ann. § 39-14-408(c)(1) ("value"); Vt. Stat. Ann. tit. 13, § 3701 ("valued at" or "valued."); Miss. Code Ann. § 97-17-67 ("value of the property."); Mass. Gen. Laws Ann. ch. 266, § 127 ("value of the property.").

[117] MPC § 220.3.

[118] MPC § 220.3 cmt. at 47, 53 (stating that "damages" in the MPC criminal mischief offense is meant to "refer to actual physical destruction or harm to the tangible property" and discussing the grading of the offense as based on "a mixture of culpability and amount of harm done."). The MPC commentary also characterizes states' property damage statutes that require "pecuniary loss" as requiring damage. *Id.* at 55-56.

[119] Proposed Federal Criminal Code § 1705.

[120] N.H. Rev. Stat. Ann. § 634:2.

[121] MPC § 220.3.

[122] Proposed Federal Criminal Code § 1705.

[123] 11 R.I. Gen. Laws Ann. § 11-44-1.

[124] Wyo. Stat. Ann. § 6-3-201; Mass. Gen. Laws. Ann. ch. 266, § 127.

[125] Wyo. Stat. Ann. § 6-3-201.

[126] *See, e.g.*, Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; Ala. Code §§ 13A-7-22, -23; La. Stat. Ann. § 14:56; S.C. Code Ann. § 16-11-510; S.D. Codified Laws § 22-34-1; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Iowa Code Ann. §§ 716.4, .5, .6; Ark. Code Ann. §§ 5-3-203, -204.

MDP statute is similarly an outlier when compared to the criminal mischief offenses in the MPC and the Proposed Federal Criminal Code. The MPC punishes purposely causing pecuniary loss in excess of $5,000 with a maximum penalty of 5 years imprisonment.[127] The Proposed Federal Criminal Code punishes intentionally causing pecuniary loss in excess of $5,000 with a maximum penalty of 7 years imprisonment.[128]

A majority of the 50 states have more than two gradations, with three and four[129] being the most common number. The MPC[130] and the Proposed Federal Criminal Code[131] criminal mischief offense each have three gradations. As noted earlier, ten states, [132] the MPC,[133] and the Proposed Federal Criminal Code[134] grade their property damage offenses partially based on the defendant's mental state. While a minority approach, this appears to reflect the fact that damage done with a lower culpable mental state, such as malice in the current MDP statute, or reckless in the criminal damage to property statute, can still create significant harm.

There is significant support for treating the special types of property specified in second degree CDP differently amongst the 50 states. At least 17 states have special gradations in their damage to property offenses or separate offenses for damage to cemeteries and similar places for the internment of human remains.[135] At least nine states have gradations in their damage to property statutes or separate offenses that are specific to damage places of worship.[136] A small number of states, possibly as few as four,[137] have separate gradations for damaging public monuments. However, neither the MPC nor the Proposed Federal Criminal Code select places such as cemeteries, places of worship, and public monuments for different grading.

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[127] MPC §§ 220.3, 6.06.

[128] Proposed Federal Criminal Code §§ 1705, 3201.

[129] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); Ala. Code §§ 13A-7-21, -22, -23; Fla. Stat. Ann. § 806.13; La. Stat. Ann. § 14:55; Me. Rev. Stat. tit. 17-A, §§ 805, 807; S.C. Code Ann. § 16-11-510; Wash. Rev. Code Ann. §§ 9A.48.070, .080, .090; Cal. Penal Code § 594; Ind. Code Ann. § 35-43-1-2; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040; N.J. Stat. Ann. § 2C:17-3; Minn. Stat. Ann. § 609.595; Conn. Gen. Stat. Ann. §§ 53a-115, -116, -117; Del. Code Ann. tit. 11, § 811; Or. Rev. Stat. Ann. §§ 164.365, .354; N.H. Rev. Stat. Ann. § 634:2; Va. Code Ann. § 18.2-137; Vt. Stat. Ann. tit. 13, § 3701; Mass. Gen. Laws Ann. ch. 266, § 127; Ohio Rev. Code § 2909.07; Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823; 720 Ill. Comp. Stat. Ann. 5/21-1; Mich. Comp. Laws Ann. § 750.377a; Nev. Rev. Stat. Ann. § 206.310; Kan. Stat. Ann. § 28-5813; 18 Pa. Stat. Ann. § 3304; N.D. Cent. Code Ann. § 12.1-21-05; N.Y. Penal Law §§ 145.00, .05, .10; Neb. Rev. Stat. Ann. § 28-519; Miss. Code Ann. § 97-17-67.

[130] MPC § 220.3.

[131] Proposed Federal Criminal Code § 1705.

[132] Proposed Federal Criminal Code § 1705.

[133] MPC § 220.3.

[134] Proposed Federal Criminal Code § 1705.

[135] Wis. Stat. Ann. § 943.012(2); Mont Code Ann. § 45-6-104(2); Ind. Code Ann. § 35-43-1-2.1; Ala. Code § 13A-7-23.1; N.Y. Penal Law §§145.22, .23; Ark. Code Ann. § 5-38-207; N.H. Rev. Stat. Ann. § 635:6(I)(a); Ohio Rev. Code Ann. § 2909.05(C); 18 Pa. Stat. Ann. § 3307(a)(2); Alaska Stat. Ann. § 11.46.482(a)(3)(A); N.J. Stat. Ann. § 2C:17-4(b)(6); Ariz. Rev. Stat. Ann. § 13-1604(A)(3); Tex. Penal Code Ann. § 28.03(f); Kan. Stat. Ann. § 21-5813(b)(4); Idaho Code Ann. § 18-7027; Nev. Rev. Stat. Ann. § 206.125(1)(b); N.C. Gen. Stat. Ann. § 14-148.

[136] Wis. Stat. Ann. § 943.012(1); Mont Code Ann. § 45-6-104(2); 18 Pa. Stat. Ann. § 3307(a)(1); Kan. Stat. Ann. § 21-5813(b)(1); Ariz. Rev. Stat. Ann. § 13-1604(A)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(d); N.M. Stat. Ann. § 30-15-1.1; Nev. Rev. Stat. Ann. § 206.125 (1)(a); S.C. Code Ann. § 16-11-535.

[137] Mont Code Ann. § 45-6-104(2); Tex. Penal Code Ann. § 28.03(f); 720 Ill. Comp. Stat. Ann. 5/21-1(d); Idaho Code Ann. § 18-7021.

Fifth, regarding the deletion of several statutes that are closely related to the current MDP statute, the 50 states take different approaches to reducing overlap between the main criminal damage to property offense and separate offenses for damaging certain kinds of property. Some states have a main criminal damage to property offense with separate offenses that pertain to specific property, although the number of separate offenses varies greatly.[138] Other states, however, appear to have only one property damage statute.[139] The RCC has one main property damage property statute with gradations for specific types of property to prevent defendants from receiving multiple convictions for the same act or course of conduct. In doing so, the RCC follows several states and the MPC[140] and the Proposed Federal Criminal Code[141] which have criminal mischief offenses that were meant to consolidate the numerous specific property damage offenses that existed at the time the model legislation was proposed. Neither the MPC nor the Proposed Federal Criminal Code has property damage statutes for specific types of property.

Sixth, regarding the bar on multiple convictions for the CDP offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the CDP offense and other overlapping property offenses. For example, where the offense most like the CDP offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[142] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[143] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[144]

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[138] *See, e.g.*, Ala. Code §§ 13A-21, -22, -23, -23.1; Va. Code Ann. §§ 18.2-137, -138, -139.1, -140; 18 Pa. Stat. Ann. §§ 3304, 3305, 3307, 3309, 3310, 3312; Ky. Rev. Stat. Ann. §§ 512.020, .030, .040, .090; Conn. Gen. Stat. Ann. §§ 53a-115 through -117m; S.C. Code Ann. §§ 16-11-510, -520, -535, -560, -570, -580, -590.

[139] Me. Rev. Stat. tit. 17-A, §§ 805, 806 (two degrees of criminal mischief); Alaska Stat. Ann. §§ 11.46.475, .480, .482, .484, .486 (five degrees of criminal mischief); Md. Code Ann., Crim. Law § 6-301; Neb. Rev. Stat. Ann. § 28-519.

[140] MPC § 220.3 cmt. at 41 ("Typical legislation at the time the Model Penal Code was drafted consisted of numerous specifically prohibited types of harm to particular property, often supplemented by a catch-all offense dealing with injury or destruction to real or personal property in cases not specifically covered by other provisions. . . . Section 220.3 consolidates all forms of malicious mischief into a single generic offense.").

[141] Proposed Federal Criminal Code § 1705 cmt. at 197 ("This section is intended to provide a rational grading structure for the numerous property-damage and property-tampering provisions in existing law which are consolidated in it.").

[142] D.C. Code § 22-3203.

[143] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[144] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Specifically for CDP, at least two states define their general property damage offenses to exclude damage caused by fire,[145] prohibiting convictions for both arson and property damage for the same act or course of conduct.

Seventh, regarding the aggregation of amounts of damage in a single scheme or systematic course of conduct, the revised CDP offense follows many jurisdictions[146] which have statutes that closely follow the Model Penal Code (MPC)[147] provision authorizing aggregation of amounts for a single scheme or course of conduct in determining theft-type gradations. Consequently, RCC offenses which are similar to MPC consolidated theft provisions are frequently aggregated in other jurisdictions, including: theft, unauthorized use of a vehicle, fraud, deception, and receiving stolen property.[148] However, these other jurisdictions' aggregation statutes are silent as to damage to property offenses, nor does the MPC's Criminal Mischief[149] offense explicitly provide for aggregation.

Eighth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[150] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[151] Among those reform jurisdictions that expressly codify a

[145] Haw. Rev. Stat. Ann. §§ 708-820, -821, -822, -823, -823.5 ("other than fire"); La. Stat. Ann. §§ 14:55 ("other than fire or explosion"), 14:56 ("other than fire or explosion.").

[146] Alaska Stat. Ann. § 11.46.980; Ark.Code Ann. § 5-36-102; Conn.Gen.Stat.Ann. § 53a-121; Idaho Code § 18-2407; Iowa Code Ann. § 714.3; Md.Code Ann.Crim.Law § 7-103; Me.Rev.Stat.Ann. tit. 17-A, § 352; Neb.Rev.St. § 28-518; N.H.Rev.Stat.Ann. § 637:2; N.J. Stat. Ann. § 2C:20-2; N.D.Cent.Code § 12.1-23-05; Or. Rev. Stat. Ann. § 164.055; Pa.Cons.Stat.Ann. tit. 18, § 3903; S.D.Cod.Laws § 22-30A-18; Tex. Penal Code § 31.09.

[147] Model Penal Code § 223.1(2)(c) ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard…[a]mounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade or the offense.")

[148] Compare MPC § 223.2 Theft by Unlawful Taking or Disposition with RCC § 2101 Theft; MPC § 223.3 Theft by Deception with RCC § 2201 Fraud; MPC § 223.4 Theft by Extortion with RCC § 2301 Extortion; MPC § 223.6 Receiving Stolen Property with RCC § 2401 Possession of Stolen Property; MPC § 223.9 Unauthorized Use of Automobiles and Other Vehicles with RCC § 2103 Unauthorized Use of a Vehicle.

[149] Model Penal Code § 220.3

[150] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[151] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 at 2 (Westlaw 2017).

principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[152]

National legal trends also support other changes to the revised CDP offense.

For example, regarding the replacement of "injures or breaks" in the current MDP statute with "damages," a majority of the 50 states use "damage" or similar language in the equivalent property damage offenses,[153] as do the MPC[154] and the Proposed Federal Criminal Code.[155] Fifteen states include "injures,"[156] at least three of which also include "damage."[157] None of the 50 states appear to use "breaks" in their equivalent property damage offenses.

Also, regarding the replacement of "not his or her own" in the current MDP statute with "property of another," the majority of the 50 states' criminal damage to property statutes require that the property be "of another" or use similar language.[158] Both the MPC[159] and the Proposed Federal Criminal Code[160] require that the property at issue be "property of another." Only four states use "not his own" or "not his or her own" in their

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[152] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[153] Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Tex. Penal Code Ann. §§ 28.03(a)(1), .04; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ala. Code §§ 13A-7-21, -22, -23; Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); La. Stat. Ann. §§ 14:55, 14:56; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Stat. Ann. § 30-15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Vt. Stat. Ann. tit. 13, § 3701; Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Cal. Penal Code § 594(a)(2), (3); Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2).

[154] MPC § 220.3.

[155] Proposed Federal Criminal Code § 1705.

[156] Md. Code Ann., Crim Law. § 6-301; Fla. Stat. Ann. § 806.13; Idaho Code Ann. § 18-7001; Mass. Gen. Laws ch. 266, § 127; Mich. Comp. Laws Ann. § 750.377a; Miss. Code Ann. § 97-17-67; Mont. Code Ann. § 45-6-101; N.C. Gen. Stat. Ann. §§ 14-127, -160; Okla. Stat. Ann. tit. 21, § 1760; S.C. Code § 16-11-510; S.D. Codified Laws § 22-34-1; W. Va. Code Ann. § 61-3-30; Wyo. Stat. Ann. § 6-3-201; Nev. Rev. Stat. Ann. § 206.310; 11 R.I. Gen. Laws Ann. § 11-44-1.

[157] Fla. Stat. Ann. § 806.13; Mont. Code Ann. § 45-6-101; S.D. Codified Laws § 22-34-1.

[158] *See, e.g.*, Md. Code Ann., Crim Law. § 6-301; Alaska Stat. Ann. §§ 11.46.482(a)(1), .484(a)(1), .486(a)(2); N.Y. Penal Law §§ 145.00(1), (3), .05(2), .10; Haw. Rev. Stat. Ann. §§ 708-820(1)(b), -821(1)(b), -822(1)(b), -823; Ariz. Rev. Stat. Ann. § 13-1602(A)(1); Ark. Code Ann. §§ 5-38-203(a)(1), -204(a)(1); Colo. Rev. Stat. Ann. § 18-4-501; Conn. Gen. Stat. Ann. §§ 53a-115(1), -116(1), -117(1); Del. Code Ann. tit. 11, § 811(a)(1); Fla. Stat. Ann. § 806.13; Ga. Code Ann. § 16-7-23(a)(1); 720 Ill. Comp. Stat. Ann. 5/21-1(a)(1); Ind. Code Ann. § 35-43-1-2(a); Kan. Stat. Ann. § 21-5813(a)(1); Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Mich. Comp. Laws Ann. § 750.377a; Me. Rev. Stat. tit. 17-A, §§ 805(1)(A), 806(1)(A); Minn. Stat. Ann. § 609.595; Mont. Code Ann. § 45-6-101(1)(a); Neb. Rev. Stat. Ann. § 28-519(1)(a); N.H. Rev. Stat. Ann. § 634:2; N.J. Stat. Ann. § 2C:17-3(a)(1); N.M. Sat. Ann. § 30-15-1; N.D. Cent. Code Ann. § 12.1-21-05(1)(b); Or. Rev. Stat. Ann. §§ 164.365, .354; 18 Pa. Stat. Ann. § 3304(a)(1), (6); Tenn. Code Ann. § 39-14-408(b)(1); Utah Code Ann. § 76-6-106(2)(c); Wash. Rev. Code Ann. § 9A.48.070(1)(a), .080(1)(a), .090(1)(a); Wis. Stat. Ann. § 943.01(1); Wyo. Stat. Ann. § 6-3-201; Mo. Ann. Stat. §§ 569.100(1)(1), .120(1)(2); Ohio Rev. Code Ann. § 2909.07(A)(1).

[159] MPC § 220.3.

[160] Proposed Federal Criminal Code § 1705.

damage to property statutes.[161] However, it is difficult to generalize about whether other jurisdictions' language is directly comparable to the definition of "property of another" used in the revised CDP statute because not all jurisdictions define that term or adopt an MPC-based definition of that term. At least some states specifically exclude security interests from their property damage statutes through the definition of "property of another."[162] However, the majority of states and the Proposed Federal Criminal Code appear to include such property with security interests in their equivalent property damage statutes, even though many of these states and the Proposed Federal Criminal Code adopt the MPC definition of "property of another" and exclude these interests from theft and related offenses. The MPC applies the same definition of "property of another," and the exclusion of certain security interests to both the criminal mischief offense and theft offenses.[163]

RCC § 22E-2504. Criminal Graffiti.

Relation to National Legal Trends. *The revised criminal graffiti offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, the revised criminal graffiti offense replaces the current possessing graffiti materials offense. At least 17 states have separate offenses for placing graffiti on property, or have a specific gradation to that effect in their broader property damage statutes.[164] Neither the Model Penal Code (MPC) nor the Proposed Federal Criminal Code has graffiti offenses or provisions in their criminal mischief statutes. It appears only four[165] of the 17 states with graffiti offenses have similar offenses that prohibit possessing graffiti materials.

Second, the revised criminal graffiti offense replaces the "willfully" mental state in the current graffiti offense[166] with a "knowingly" culpable mental state and applies the "knowingly" culpable mental state to each element of the offense. Of the 17 states with

[161] Va. Code Ann. § 18.2-137; Idaho Code Ann. § 18-7001; Okla. Stat. Ann. tit. 21, § 1760; Cal. Penal Code § 594.

[162] Haw. Rev. Stat. Ann. § 708-800; N.H. Rev. Stat. Ann. §§ 637:2, 634:2.

[163] MPC § 220.3 cmt. at 45 ("With respect to the element 'of another' in the Model Code, there would seem to be no reason not to apply the term 'property of another' as defined in Section 223.0(7)."). The MPC has a separate offense that prohibits destroying or "otherwise deal[ing] with" property subject to a security interest with purpose to hinder enforcement of that interest. MPC § 224.10 ("A person commits a misdemeanor if he destroys, removes, conceals, encumbers, transfers or otherwise deals with property subject to a security interest with purpose to hinder enforcement of that interest.").

[164] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[165] Or. Rev. Stat. Ann. § 164.388; N.Y. Penal Law §§ 145.65; Del. Code Ann. tit. 11, § 812; Nev. Rev. Stat. Ann. § 206.335.

[166] D.C. Code § 22-3312.04(e).

graffiti offenses,[167] six states require an "intentionally"[168] culpable mental state, two require "knowingly,"[169] and two require "recklessly."[170] Several states do not specify a mental state in the statute[171] or use old, common law mental states.[172] Varying rules of construction amongst the states or lack thereof make it difficult to determine whether the states apply the culpable mental states to each element as the revised criminal graffiti offense does.

Third, regarding the bar on multiple convictions for the revised criminal graffiti offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the criminal graffiti offense and other overlapping property offenses. For example, where the offense most like the revised criminal graffiti offense is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[173] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[174] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[175]

Specifically, for graffiti, one state avoids overlap with the broader property damage statute by making graffiti a gradation of the broader property damage offense[176] and another state applies the graffiti statute "unless a greater penalty is provided by a specific statute."[177] At least four states avoid overlap between graffiti and the broader property damage statute by codifying a special penalty when damage to property is done by graffiti.[178] These states do not have graffiti offenses and were not otherwise analyzed in

[167] For the purposes of this survey, states with statutes that described the penalties for damage to property when caused by graffiti, without specifying elements of a graffiti offense, were excluded. States with statutes that did not use the term "graffiti," but had elements that substantively established a graffiti offense were included. Or. Rev. Stat. Ann. §§ 164.381, .383, .388; Wis. Stat. Ann. § 943.017; Idaho Code Ann. § 18-7036; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 11 R.I. Gen. Laws Ann. § 11-44-21.1; N.Y. Penal Law §§ 145.60, .65; Tex. Penal Code § 28.08; Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Utah Code Ann. §§ 76-6-107, -107.1; 18 Pa. Stat. Ann. § 3304; Del. Code Ann. tit. 11, § 812; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[168] Or. Rev. Stat. Ann. §§ 164.383, .388; Wis. Stat. Ann. § 943.017; Neb. Rev. Stat. Ann. § 28-524; N.M. Stat. Ann. § 30-15-1.1; La. Rev. Stat. Ann. § 14:56.4; 18 Pa. Stat. Ann. § 3304.

[169] Idaho Code Ann. § 18-7036; Tex. Penal Coded Ann. § 28.08.

[170] Ariz. Rev. Stat. Ann. § 13-1602(A)(5); Del. Code Ann. tit. 11, § 812

[171] N.Y. Penal Law §§ 145.60, .65; Utah Code Ann. §§ 76-6-107, -107.1; Md. Code, Crim. Law § 6-301; Nev. Rev. Stat. Ann. §§ 206.335, .330; S.C. Code Ann. § 16-11-770; N.C. Gen. Stat. Ann. § 14-127.1.

[172] 11 R.I. Gen. Laws Ann. § 11-44-21.1.

[173] D.C. Code § 22-3203.

[174] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[175] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[176] Ariz. Rev. Stat. Ann. § 13-1602(A)(5).

[177] Nev. Rev. Stat. Ann. § 206.330(1).

[178] Haw. Rev. Stat. Ann. § 708-823.6; N.J. Stat. Ann. § 2C:17-3(c), (d); Fla. Stat. Ann. § 806.13; Ind. Code Ann. § 35-43-1-2(c).

this commentary, but they prevent overlap between graffiti and the broader property damage offense.

Chapter 26. Trespass Offenses

RCC § 22E-2601. Trespass.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, nearly all of the twenty-nines states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[1] require that the defendant have at least knowledge of the owner's wishes;[2] only four states permit conviction based on recklessness.[3] And not a single reformed jurisdiction permits conviction based on the defendant's negligence or based on strict liability. One commentator flatly states that it is "exceedingly rare" for a state to adopt "an express utilization of either of the lesser mental states . . . ."[4] Both the Model Penal Code and the Brown Commission recommended a mental state of recklessness. Also, as one commentator has noted, not requiring a culpable mental state would make the crime of trespass equivalent to the tort of trespass.[5] This fact has significance because it is generally known that "as to civil trespass . . . the interest of the landowner is protected at the expense of those who would make mistakes," while "more is required in the criminal arena."[6]

Second, no reformed code jurisdiction treats attempted trespass and completed trespass the same.

Third, Third, the provision in RCC § 22E-2003, "Limitation on Convictions for Multiple Related Property Offense," bars multiple convictions for the revised trespass offense and other offenses in Chapters 26 and 27 based on the same act or course of conduct. Under current law, consecutive sentences are statutorily barred for some property offenses based on the same act or course of conduct. However, the current unlawful entry offense is not among those offenses and, as described in the commentary to section 22E-2003, even if the sentences run concurrent to one another, multiple convictions for these substantially-overlapping offenses can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. To improve the proportionality of the revised trespass offense and other closely-related

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[1] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2] Ala. Code § 13A-7-2; Ark. Code Ann. § 5-39-203; Ariz. Rev. Stat. Ann. § 13-1504; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Ind. Code Ann. § 35-43-2-2; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Minn. Stat. Ann. § 609.605; Mo. Ann. Stat. § 569.140; Mont. Code Ann. § 45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.05; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Cons. Stat. Ann. § 3503; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070.

[3] Alaska Stat. Ann. § 11.46.320; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; Wis. Stat. Ann. § 943.13.

[4] LAFAVE, CRIMINAL LAW 1087 (5th ed. 2010).

[5] *See* LAFAVE, CRIMINAL LAW 1081 (5th ed. 2010).

[6] *Id*.

offenses, 22E-2003 allows a judgment of conviction to be entered for only the most serious such offense based on the same act or course of conduct.

Fourth, regarding the defendant's ability to claim he or she did not act "knowingly" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[7] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as] the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[8] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[9]

Fifth, nearly all reformed code jurisdictions use the phrase "enter or remains in."[10] "Enter or remain" is the language used by the Model Penal Code,[11] and was also the language recommended by the Brown Commission in its review of the federal criminal code.[12] Only Indiana varies, and its statute uses the phrase, "enters or refuses to leave," which is substantially similar to "enter or remains."[13]

Sixth, the revised trespass is largely in line with respect to the types of property that are protected, and the words used to describe them. Although there is no true uniformity in the reformed code jurisdictions, "real property" is used by a plurality of the states. This is roughly equivalent to "land." Five states use the term "real property" in their trespass

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[7] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

[8] LAFAVE, *supra* note__, AT 2 SUBST. CRIM. L. § 9.5.

[9] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[10] Ala. Code § 13A-7-2; Alaska Stat. Ann. § 11.46.320; Ariz. Rev. Stat. Ann. § 13-1504; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-502; Conn. Gen. Stat. Ann. § 53a-107; Del. Code Ann. tit. 11, § 823; Haw. Rev. Stat. Ann. § 708-813; 720 Ill. Comp. Stat. Ann. 5/21-3; Kan. Stat. Ann. § 21-5808; Ky. Rev. Stat. Ann. § 511.060; Me. Rev. Stat. tit. 17-A, § 402; Mo. Ann. Stat. § 569.140; Mont. Code Ann. § 45-6-203; N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.Y. Penal Law § 140.17; N.D. Cent. Code Ann. § 12.1-22-03; Ohio Rev. Code Ann. § 2911.21; Or. Rev. Stat. Ann. § 164.255; 18 Pa. Stat. and Cons. Stat. Ann. § 3503; Tenn. Code Ann. § 39-14-405; Tex. Penal Code Ann. § 30.05; S.D. Codified Laws § 22-35-5; Utah Code Ann. § 76-6-206; Wash. Rev. Code Ann. § 9A.52.070; Wis. Stat. Ann. § 943.14. One state uses only "enters." Minn. Stat. Ann. § 609.605.

[11] Model Penal Code § 221.2 ("A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or surreptitiously remains in any building or occupied structure, or separately secured or occupied portion thereof.").

[12] Proposed Federal Criminal Code § 1712 ("A person is guilty [of an offense] if, knowing that he is not licensed or privileged to do so, he (a) enters or remains in any building, occupied structure or storage structure, or separately secured or occupied portion thereof . . . .").

[13] Ind. Code Ann. § 35-43-2-2 (West).

statutes; none of these states provide a definition of the term in their definition sections.[14] The word "premises" is used by eight states;[15] however, six of these states simply define "premises" to include "real property," which brings the total of "real property" states to eleven.[16] Four states simply use the word "land,"[17] and four others use the very broad term, "any place."[18] "Dwelling" is often defined as "a building which is used or usually used by a person for lodging."[19] The word "lodging" is frequently used across all states, though some states also use a mixture of terms including "residence,"[20] and reference to "overnight accommodation."[21]

Seventh, the revised trespass offense uses the phrase "effective consent," which is not commonly found in other reformed code jurisdictions. "[W]ithout license or privilege to do so" is used by eight of the reformed code jurisdictions,[22] as well as the language used by the Model Penal Code.[23] Additionally, thirteen states use the phrase "unlawfully" in the criminal trespass statute itself, which is then separately defined as entering or remaining without "license[], invit[ation] or privilege[] to do so."[24] Thus, the total number of

[14] Ariz. Rev. Stat. Ann. § 13-1502; Del. Code Ann. tit. 11, § 821; Ind. Code Ann. § 35-43-2-2; Mo. Ann. Stat. § 569.140; N.Y. Penal Law § 140.10.

[15] Ala. Code § 13A-7-4; Ark. Code Ann. § 5-39-203; Colo. Rev. Stat. Ann. § 18-4-504; Conn. Gen. Stat. Ann. § 53a-109; Haw. Rev. Stat. § 708-815; Ky. Rev. Stat. Ann. § 511.080; Mont. Code Ann. § 45-6-203; Or. Rev. Stat. Ann. § 164.245.

[16] Ala. Code § 13A-7-1; Ark. Code Ann. § 5-39-101; Colo. Rev. Stat. Ann. § 18-4-504.5; Haw. Rev. Stat. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Or. Rev. Stat. Ann. § 164.205.

[17] Alaska Stat. Ann. § 11.46.320; 720 Ill. Comp. Stat. Ann. 5/21-3; Ohio Rev. Code Ann. § 2911.21.

[18] Me. Rev. Stat. tit. 17-A, § 402; N.H. Rev. Stat. Ann. § 635:2; N.D. Cent. Code Ann. § 12.1-22-03; 18 Pa. Cons. Stat. Ann. § 3503.

[19] Haw. Rev. Stat. § 708-813; see also Ala. Code § 13A-7-1 ("Dwelling. A building which is used or normally used by a person for sleeping, living or lodging therein."); Del. Code Ann. tit. 11, § 829 (""Dwelling" means a building which is usually occupied by a person lodging therein at night."); Ky. Rev. Stat. Ann. § 511.010; N.Y. Penal Law § 140.00; N.D. Cent. Code Ann. § 12.1-05-12; Or. Rev. Stat. Ann. § 164.205; Utah Code Ann. § 76-6-201.

[20] Ariz. Rev. Stat. Ann. § 13-1501.

[21] Ark. Code Ann. § 5-39-101(4)(A); N.J. Stat. Ann. § 2C:18-1; 18 Pa. Cons. Stat. Ann. § 3501; Tenn. Code Ann. § 39-14-401; Tex. Penal Code Ann. § 30.01.

[22] Conn. Gen. Stat. Ann. § 53a-107; Kan. Stat. Ann. § 21-5808; Me. Rev. Stat. tit. 17-A, § 402; Mont. Code Ann. § 45-6-203 (another statute defines "entering or remaining unlawfully" as "not licensed, invited, or otherwise privileged to do so"); N.H. Rev. Stat. Ann. § 635:2; N.J. Stat. Ann. § 2C:18-3; N.D. Cent. Code Ann. § 12.1-22-03 ; 18 Pa. Stat. and Cons. Stat. Ann. § 3503.

[23] Model Penal Code § 221.2.

[24] Ala. Code § 13A-7-1. See also, Alaska Stat. Ann. § 11.46.350 ("enter or remain in or upon premises or in a propelled vehicle when the premises or propelled vehicle, at the time of the entry or remaining, is not open to the public and when the defendant is not otherwise privileged to do so"); Ariz. Rev. Stat. Ann. § 13-1501 ("an act of a person who enters or remains on premises when the person's intent for so entering or remaining is not licensed, authorized or otherwise privileged"); Ark. Code Ann. § 5-39-101 ("enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises"); Colo. Rev. Stat. Ann. § 18-4-201 ("A person 'enters unlawfully' or 'remains unlawfully' in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Conn. Gen. Stat. Ann. § 53a-107 ("A person is guilty of criminal trespass in the first degree when: (1) Knowing that such person is not licensed or privileged to do so . . . ."); Del. Code Ann. tit. 11, § 829 ("A person 'enters or remains unlawfully' in or upon premises when the person is not licensed or privileged to do so."); Haw. Rev. Stat. Ann. § 708-800 ('Enter or remain unlawfully' means to enter or remain in or upon premises when the person is not licensed, invited, or otherwise privileged to do so."); Kan. Stat. Ann. § 21-5808 ("Criminal trespass is entering or remaining upon or in any . . .[l]and . . . by a person who knows such person is not authorized or privileged to do so,"); Ky.

reformed jurisdictions using some variant of "license or privilege" is twenty-four states.[25] However, four states do use the term "consent" or the phrase "effective consent."[26]

The precise meaning of "license" and "privilege" is not clear from other jurisdictions' statutory text. Some courts in states adopting the language have drawn a distinction between the two. For example, the Supreme Court of Vermont observed that "[w]hile the decisions are not entirely consistent, they generally support the interpretation that 'licensed' refers to a consensual entry while 'privileged' refers to a nonconsensual entry."[27] It would seem that a person does not commit trespass when that person is invited into a friend's home because the person is "licensed" to enter. On the other hand, a police officer who searches a home pursuant to a warrant does not commit trespass because the officer is "privileged" to enter the home – the officer is in the home lawfully due to his or

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Rev. Stat. Ann. § 511.090 ("A person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so."); Me. Rev. Stat. tit. 17-A, § 402 ("A person is guilty of criminal trespass if, knowing that that person is not licensed or privileged to do so, that person . . . enters any dwelling place."); Mo. Ann. Stat. § 569.010 ("a person 'enters unlawfully or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Mont. Code Ann. § 45-6-201 ("A person enters or remains unlawfully in or upon any vehicle, occupied structure, or premises when the person is not licensed, invited, or otherwise privileged to do so."); N.Y. Penal Law § 140.00 ("A person 'enters or remains unlawfully' in or upon premises when he is not licensed or privileged to do so."); Or. Rev. Stat. Ann. § 164.205 ("'Enter or remain unlawfully' means: (a) To enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public and when the entrant is not otherwise licensed or privileged to do so; (b) To fail to leave premises that are open to the public after being lawfully directed to do so by the person in charge; (c) To enter premises that are open to the public after being lawfully directed not to enter the premises; or (d) To enter or remain in a motor vehicle when the entrant is not authorized to do so."); Utah Code Ann. § 76-6-201 ("'Enter or remain unlawfully' means a person enters or remains in or on any premises when: (a) at the time of the entry or remaining, the premises or any portion of the premises are not open to the public; and (b) the actor is not otherwise licensed or privileged to enter or remain on the premises or any portion of the premises."); Wash. Rev. Code Ann. § 9A.52.010 ("A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain."). One state uses "without lawful authority." 720 Ill. Comp. Stat. Ann. 5/21-3. Minnesota uses a variety of terms, including "without claim of right" and "without consent." Minn. Stat. Ann. § 609.605.

[25] Given its widespread use, this language was considered for the revised trespass offense, but ultimately rejected because it appeared to be practically identical to "consent," but unnecessarily legalistic. Compare LICENSE, Black's Law Dictionary (10th ed. 2014) ("A permission, usu. revocable, to commit some act that would otherwise be unlawful; esp., an agreement [not amounting to a lease or profit à prendre] that it is lawful for the licensee to enter the licensor's land to do some act that would otherwise be illegal, such as hunting game."), with CONSENT, BLACK'S LAW DICTIONARY (10th ed. 2014) ("A voluntary yielding to what another proposes or desires; agreement, approval, or permission regarding some act or purpose, esp. given voluntarily by a competent person; legally effective assent. • Consent is an affirmative defense to assault, battery, and related torts, as well as such torts as defamation, invasion of privacy, conversion, and trespass. Consent may be a defense to a crime if the victim has the capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent.").

[26] Ind. Code Ann. § 35-43-2-2 (trespass occurs when a person "knowingly or intentionally interferes with the possession or use of the property of another person without the person's consent;"); Minn. Stat. Ann. § 609.605; Tenn. Code Ann. § 39-14-405 ("A person commits criminal trespass if the person enters or remains on property, or any portion of property, without the consent of the owner."); Tex. Penal Code Ann. § 30.05 ("A person commits an offense if the person enters or remains on or in property of another . . . without effective consent . . . ."); Wis. Stat. Ann. § 943.14 "Whoever intentionally enters or remains in the dwelling of another without the consent of some person lawfully upon the premises . . . .").

[27] *State v. Kreth*, 553 A.2d 554, 556 (Vt. 1988).

her status as a peace officer, but most likely does not have the consent of the home's owner.[28]

In other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary; generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[29] Although it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[30]

RCC § 22E-2602. Trespass of a Motor Vehicle.
[Now RCC § 22E-2601. Trespass.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

Regarding the bar on multiple convictions for the revised TMV offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised TMV offense and other overlapping property offenses. For example, where the offense most like revised TMV is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[31] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[32] while some jurisdictions statutorily

[28] *See* WAYNE R. LAFAVE, CRIMINAL LAW 1083-84 (5th ed. 2010).
[29] *E.g*., *Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).
[30] *E,g*., *Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").
[31] D.C. Code § 22-3203.
[32] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[33]

RCC § Criminal Obstruction of a Public Road or Walkway.
[Now RCC § 22E-4203. Blocking a Public Way.]

Relation to National Legal Trends. *The above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[34] twenty-three have some type of obstruction of public ways statute.[35] Of these twenty-three jurisdictions, at least twenty-one appear to statutorily require some subjective awareness on the part of the defendant as to the results of his or her actions.[36] Fourteen reform jurisdictions statutorily require a mental state of recklessness.[37] The commonality of this culpable mental state may be due to the MPC's adoption of recklessness.[38] Three states statutorily require a mental state of "intentionally,"[39] and two states use knowledge.[40] Last, two jurisdictions' obstruction of public ways statutes require proof that the defendant "intend to" engage in some other disruptive conduct or created a risk of harm.[41]

Second, with respect to the places protected, states vary and often combine various terms in their obstruction statutes. Thirteen states include "highway" in their list of

[33] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.
[34] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[35] Alaska Stat. Ann. § 11.61.150; Ala. Code § 13A-11-7; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ind. Code Ann. § 35-44.1-2-13; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; Mont. Code Ann. § 45-8-101; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030.
[36] Two states do not apply a mental state at all in their obstruction statute, though default culpable mental states may apply. Ark. Code Ann. § 5-71-214; 720 Ill. Comp. Stat. Ann. 5/47-5.
[37] Ariz. Rev. Stat. Ann. § 13-2906; Colo. Rev. Stat. Ann. § 18-9-107; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; N.J. Stat. Ann. § 2C:33-7; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; N.Y. Penal Law § 240.20; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03; Utah Code Ann. § 76-9-102.
[38] Model Penal Code § 250.7 ("A person, who, having no legal privilege to do so, purposely or recklessly obstructs any highway or other public passage, whether alone or with others, commits a violation, or, in case he persists after warning by a law officer, a petty misdemeanor.")
[39] Ky. Rev. Stat. Ann. § 525.140 ("intentionally or wantonly"); Minn. Stat. Ann. § 609.74; Wash. Rev. Code Ann. § 9A.84.030.
[40] Alaska Stat. Ann. § 11.61.150; Mont. Code Ann. § 45-8-101.
[41] Ala. Code § 13A-11-7; Ind. Code Ann. § 35-44.1-2-13.

protected places.[42] The generic phrases "public passage," "public thoroughfare," or "public way" are used by fourteen states.[43] Only two states statutorily extend liability for obstruction to private property.[44]

Third, regarding the bar on multiple convictions for the revised COPW offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised COPW offense and other overlapping property offenses. For example, where the offense most like revised COPW is a lesser included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[45] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[46] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[47]

Last, it is notable that eleven states either define this element of their obstruction statute (often using the word "obstruct") to mean "render impassable without unreasonable inconvenience or hazard," or simply codify that phrase as the element itself.[48] This definition of "obstruct" was proposed by the Model Penal Code.[49]

RCC § 22E-2604. Unlawful Demonstration.
[Now RCC § 22E-4204. Unlawful Demonstration.]

Relation to National Legal Trends. The current unlawful demonstration offense has no equivalent in other jurisdictions, and no other jurisdiction divides prosecutorial

[42] Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107; Haw. Rev. Stat. Ann. § 711-1105; 720 Ill. Comp. Stat. Ann. 5/47-5; Ky. Rev. Stat. Ann. § 525.140; Minn. Stat. Ann. § 609.74; N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.

[43] Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Colo. Rev. Stat. Ann. § 18-9-107 ("any other place used for the passage of persons, vehicles, or conveyances"); Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; Me. Rev. Stat. tit. 17-A, § 505; Minn. Stat. Ann. § 609.74 ("public right-of-way"); N.J. Stat. Ann. § 2C:33-7; Ohio Rev. Code Ann. § 2917.11 ("right-of-way"); Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307 ("any other place used for the passage of persons, vehicles, or conveyances"); Tex. Penal Code Ann. § 42.03 ("any other place used for the passage of persons, vehicles, or conveyances"); Utah Code Ann. § 76-9-102 ("vehicular or pedestrian traffic in a public place").

[44] 720 Ill. Comp. Stat. Ann. 5/47-5; Ohio Rev. Code Ann. § 2917.11.

[45] D.C. Code § 22-3203.

[46] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[47] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[48] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.150; Ariz. Rev. Stat. Ann. § 13-2906; Ark. Code Ann. § 5-71-214; Del. Code Ann. tit. 11, § 1323; Haw. Rev. Stat. Ann. § 711-1105; Ky. Rev. Stat. Ann. § 525.140; N.J. Stat. Ann. § 2C:33-7; 18 Pa. Stat. and Cons. Stat. Ann. § 5507; Tenn. Code Ann. § 39-17-307; Tex. Penal Code Ann. § 42.03.

[49] MPC § 250.7 (""Obstructs" means renders impassable without unreasonable inconvenience or hazard.").

authority in the way it is divided in the District. Therefore, no comparable statutes exist from which one can draw meaningful comparisons for the change in law proposed.

RCC § 22E-2605. Unlawful Obstruction of a Bridge to the Commonwealth of Virginia.
[Now RCC § 22E-4203. Blocking a Public Way.]

Relation to National Legal Trends. There are no comparable statutes in other jurisdictions. Some states that have obstructing bridges within their more general "obstructing highways" offenses, similar to the District's criminal obstruction of a public way offense, RCC § 22E-2603.

Chapter 27. Burglary Offenses

RCC § 22E-2701. Burglary.

Relation to National Legal Trends. *The above-mentioned substantive changes to current District burglary law are broadly supported by national legal trends.*

First, regarding the revised burglary offense's requirement that the defendant's presence in the location is "without effective consent" or trespassory, nearly all jurisdictions require some kind of trespass or otherwise limit the sort of entry to one that is unlawful or somehow illicit by statute. Within the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[1] the most common means of imposing this requirement is through the use of the word "unlawfully."[2] Some states' statutes say that the entry must be "without authority,"[3] "unauthorized,"[4] or (following the MPC[5]) that the defendant is not "licensed or privileged" to enter.[6] The remaining approaches vary. One state codifies a requirement that the place burgled be "of another,"[7] and another requires that the defendant "break" into the building.[8] Only one reformed jurisdiction seems to omit a trespassory element from the statutory offense definition entirely.[9] That state, however, also codifies a defense that applies when the defendant is "licensed or privileged to enter."[10] Finally, two states use the phrase "without effective consent" as proposed in the revised burglary offenses for the RCC, and two other states use the phrase "without consent.[11] Tennessee and Texas both use this phrase in their burglary offenses.[12] Finally, one state codifies this element by stating that "[n]o person, by force, stealth, or deception, shall . . . trespass in an occupied structure[.]"[13]

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[1] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev. Stat. Ann. § 708-810; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Or. Rev. Stat. Ann. § 164.225; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

[3] Kan. Stat. Ann. § 21-5807; 720 Ill. Comp. Stat. Ann. 5/19-1; Wyo. Stat. Ann. § 6-3-301.

[4] N.M. Stat. Ann. § 30-16-4.

[5] Model Penal Code § 221.1.

[6] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; S.D. Codified Laws § 22-32-1.

[7] Ind. Code Ann. § 35-43-2-1.

[8] Neb. Rev. Stat. Ann. § 28-507.

[9] 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[10] *Id*.

[11] Two states use effective consent. Tenn. Code Ann. § 39-14-402; Tex. Penal Code Ann. § 30.02. Two states use consent. Minn. Stat. Ann. § 609.582; Wis. Stat. Ann. § 943.10.

[12] *Id*.

[13] Ohio Rev. Code Ann. § 2911.12.

Among jurisdictions that have not undergone comprehensive reform of their codes based on the MPC, five states' statutes require no proof of that the entry was trespassory.[14] It may be that, like the District, courts of these five states require proof that the building be "of another" or otherwise that the entry be something similar to a trespass; nothing, however, is required by the statutory language in these jurisdictions. Five other states retain the use of the common law requirement, "breaks."[15] Additionally, twelve unreformed jurisdictions use some trespass-like element in their burglary statutes. Four states use the phrase, "without authority,"[16] four use the phrase, "without consent,"[17] and four follow the MPC and use the phrase, "without license or privilege."[18] Although these

[14] Cal. Penal Code § 459 ("Every person who enters any house . . .with intent to commit grand or petit larceny or any felony is guilty of burglary."); Idaho Code Ann. § 18-1401 ("Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary."); Nev. Rev. Stat. Ann. § 205.060 ("Except as otherwise provided in subsection 5, a person who, by day or night, enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house trailer, airplane, glider, boat or railroad car, with the intent to commit grand or petit larceny, assault or battery on any person or any felony, or to obtain money or property by false pretenses, is guilty of burglary."); W. Va. Code Ann. § 61-3-11 ("If any person shall, in the daytime, enter without breaking a dwelling house, or an outhouse adjoining thereto or occupied therewith, of another, with intent to commit a crime therein, he shall be deemed guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than ten years.").

[15] Md. Code Ann., Crim. Law § 6-202 ("A person may not break and enter the dwelling of another with the intent to commit theft."); Mich. Comp. Laws Ann. § 750.110 ("A person who breaks and enters, with intent to commit a felony or a larceny therein, a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car is guilty of a felony punishable by imprisonment for not more than 10 years."); Neb. Rev. Stat. Ann. § 28-507 ("A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value."); Okla. Stat. Ann. tit. 21, § 1431 ("Every person who breaks into and enters the dwelling house of another, in which there is at the time some human being, with intent to commit some crime therein, either . . . ."); Va. Code Ann. § 18.2-90 ("If any person in the nighttime enters without breaking or in the daytime breaks and enters or enters and conceals himself in a dwelling house or an adjoining, occupied outhouse or in the nighttime enters without breaking or at any time breaks and enters or enters and conceals himself in any building permanently affixed to realty, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation, with intent to commit murder, rape, robbery or arson in violation of §§ 18.2-77, 18.2-79 or § 18.2-80, he shall be deemed guilty of statutory burglary, which offense shall be a Class 3 felony.").

[16] Ga. Code Ann. § 16-7-1 ("A person commits the offense of burglary in the first degree when, without authority and with the intent to commit a felony or theft therein, he or she enters or remains within an occupied, unoccupied, or vacant dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure designed for use as the dwelling of another."); La. Stat. Ann. § 14:62 ("Simple burglary is the unauthorized entering of any dwelling, vehicle, watercraft, or other structure, movable or immovable, or any cemetery, with the intent to commit a felony or any theft therein, other than as set forth in R.S. 14:60."); Wyo. Stat. Ann. § 6-3-301 ("A person is guilty of burglary if, without authority, he enters or remains in a building, occupied structure or vehicle, or separately secured or occupied portion thereof, with intent to commit theft or a felony therein.").

[17] S.C. Code Ann. § 16-11-311 ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and either . . . .")

[18] Fla. Stat. Ann. § 810.02 (burglary is "[e]ntering a dwelling, a structure, or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter . . . ."); Iowa Code Ann. § 713.1 ("Any person, having the intent to commit a felony, assault

terms all lack the precision of the Revised Criminal Code's "effective consent," one scholar has concluded that in those jurisdictions that use the term "breaks," most of these jurisdictions "permit 'constructive breaking,' meaning entry gained by artifice, trick, fraud or threat."[19] In some instances, state case law has highlighted the absurdities that can happen without requiring burglary to be trespassory.[20]

Second, the inclusion of an alternative element of "remaining" is also present among other nearly all the reform jurisdictions.[21] However, these states generally codify "remaining" alone, without that the requirement that the remaining be surreptitious. Five states do codify "surreptitious remaining" or similar language.[22] And finally, four states only use "enters" and do not permit convictions based on remaining at all.[23]

Third, jurisdictions vary in the types of places that are protected by burglary. Burglary historically protected dwellings,[24] and that history has carried forward: nearly all reformed jurisdictions make use of dwelling (or its functional equivalent) in their definitions of burglary.[25] Protecting "buildings" or some functional equivalent (e.g.,

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or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary."); Vt. Stat. Ann. tit. 13, § 1201 ("A person is guilty of burglary if he or she enters any building or structure knowing that he or she is not licensed or privileged to do so, with the intent to commit a felony, petit larceny, simple assault, or unlawful mischief.").

[19] Helen A. Anderson, *From the Thief in the Night to the Guest Who Stayed Too Long: The Evolution of Burglary in the Shadow of the Common Law*, 45 IND. L. REV. 629, 644 (2012).

[20] *See*, *e.g.*, *In re T.J.E.*, 426 N.W.2d 23, 25 (S.D. 1988). The South Dakota Supreme Court reversed a conviction where an eleven-year-old girl was charged with burglary after she entered a store with her aunt, took a piece of Easter candy off the shelf, and ate it without paying for it. *Id*. at 23. The court read in a requirement that there be an "unlawful remaining," largely on the basis of avoiding a perceived "absurdity." *Id*. One concurring justice described the result as "a type of horror/nonsensical situation" that arises from not requiring the remaining be somehow trespassory. *Id*. at 26. Subsequent to the case, South Dakota amended its statute to say directly that a person is not guilty of burglary if the person is licensed or privileged to remain. *See State v. Miranda*, 776 N.W.2d 77, 82 (S.D. 2009).

[21] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Ark. Code Ann. § 5-39-201; Colo. Rev. Stat. Ann. § 18-4-202; Conn. Gen. Stat. Ann. § 53a-101; Del. Code Ann. tit. 11, § 826; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807; Ky. Rev. Stat. Ann. § 511.020; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.Y. Penal Law § 140.30; Ohio Rev. Code Ann. § 2911.12 (Ohio uses the element "trespasses," which includes entry and remaining); Or. Rev. Stat. Ann. § 164.225; S.D. Codified Laws § 22-32-1; Utah Code Ann. § 76-6-203; Wash. Rev. Code Ann. § 9A.52.020.

[22] Me. Rev. Stat. tit. 17-A, § 401; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02.

[23] Ind. Code Ann. § 35-43-2-1; Minn. Stat. Ann. § 609.582; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wis. Stat. Ann. § 943.10.

[24] Sir Edward Coke, The Third Part of the Institutes of the Laws of England 63 (London, W. Clarke & Sons 1809) (1644).

[25] Ala. Code § 13A-7-5; Alaska Stat. Ann. § 11.46.300; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Del. Code Ann. tit. 11, § 825; 720 Ill. Comp. Stat. Ann. 5/19-3; Ind. Code Ann. § 35-43-2-1.5; Ky. Rev. Stat. Ann. § 511.030; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.30; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-403; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.025.

"structure" or "non-residential structure") is also nearly universal.[26] Less common is something akin to the Revised Criminal Code's "business yard."[27] However, two jurisdictions incorporate places like business yards in their definitions of "building."[28] Although some jurisdictions include "watercraft" in their definition of "building," they generally do so only if the "vehicle, aircraft, or watercraft [is] used for the lodging of persons or carrying on business therein."[29] Eleven states include railcars by statute, which the revised burglary omits.[30] Of course, such places, if they are used for lodging, would be covered under the Revised Criminal Code's definition of dwelling.

Fourth, the factors used to grade burglary vary widely across reform jurisdictions, but generally these states tend to penalize the invasion of a dwelling more severely than invasion of a non-dwelling. The use of the presence of another person is also a grading distinction adopted in six other reformed jurisdictions.[31] Eleven jurisdictions have two grades of burglary, while fifteen have three or more grades of burglary.[32]

Fifth, regarding the bar on multiple convictions for the revised burglary offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. However it does appear to be the case that, in other jurisdictions, trespass is commonly considered a lesser-included offense (LIO) of burglary. Generally, a determination of the LIO relationship is matter of case law, and most states appear to determine the LIO relationship on the basis of examining statutory elements.[33] Although

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[26] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.310; Ariz. Rev. Stat. Ann. § 13-1506; Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Haw. Rev. Stat. Ann. § 708-811; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.170; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.M. Stat. Ann. § 30-16-3; N.Y. Penal Law § 140.20; N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.12; Or. Rev. Stat. Ann. § 164.215; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Tenn. Code Ann. § 39-14-402; Utah Code Ann. § 76-6-202; Wash. Rev. Code Ann. § 9A.52.030; Wyo. Stat. Ann. § 6-3-301.

[27] Ariz. Rev. Stat. Ann. § 13-1506.

[28] Ala. Code § 13A-7-1; Wash. Rev. Code Ann. § 9A.04.110.

[29] Ala. Code § 13A-7-1; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-39-101; Haw. Rev. Stat. Ann. § 708-800; Ky. Rev. Stat. Ann. § 511.010; Minn. Stat. Ann. § 609.556.

[30] Ala. Code § 13A-7-1; Ariz. Rev. Stat. Ann. § 13-1501; Conn. Gen. Stat. Ann. § 53a-100; Haw. Rev. Stat. Ann. § 708-800; 720 Ill. Comp. Stat. Ann. 5/19-1; Kan. Stat. Ann. § 21-5807 (West 2017; Miss. Code. Ann. § 97-17-33; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-14-402; Wash. Rev. Code Ann. § 9A.04.110; Wis. Stat. Ann. § 943.10.

[31] Colo. Rev. Stat. Ann. § 18-4-203; Conn. Gen. Stat. Ann. § 53a-102; Mo. Ann. Stat. § 569.160; N.H. Rev. Stat. Ann. § 635:1; Ohio Rev. Code Ann. § 2911.11; 18 Pa. Stat. and Cons. Stat. Ann. § 3502.

[32] One jurisdiction has one grade of burglary. Neb. Rev. Stat. Ann. § 28-507. Eleven jurisdictions have two grades of burglary. Alaska Stat. Ann. § 11.46.300-10; 720 Ill. Comp. Stat. Ann. 5/19-3; Mo. Ann. Stat. § 569.160-70; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.D. Cent. Code Ann. § 12.1-22-02; Or. Rev. Stat. Ann. § 164.215-25; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.020-30; Wyo. Stat. Ann. § 6-3-301. Seven jurisdictions have three grades of burglary. Ala. Code § 13A-7-5-7; Ariz. Rev. Stat. Ann. § 13-1506-08; Conn. Gen. Stat. Ann. § 53a-101-03; Ky. Rev. Stat. Ann. § 511.020-030; Haw. Rev. Stat. Ann. § 708-810-11; N.M. Stat. Ann. § 30-16-3-4; N.Y. Penal Law § 140.20-30. Six jurisdictions have four grades of burglary. Colo. Rev. Stat. Ann. § 18-4-202-04; Del. Code Ann. tit. 11, § 824-26; Me. Rev. Stat. tit. 17-A, § 401; Tenn. Code Ann. § 39-14-402-04; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-202-03. Two jurisdictions have five grades of burglary. Ind. Code Ann. § 35-43-2-1; Ohio Rev. Code Ann. § 2911.11-13.

[33] *E.g., Aguilar v. State*, 682 S.W.2d 556, 558 (Tex. Crim. App. 1985) ("Criminal trespass can be a lesser included offense of burglary of a building."); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) ("we

it appears to be more common than not that trespass is an LIO of burglary, some reformed code jurisdiction takes the opposite view.[34] Aside from these cases, research has not identified any equivalent statutory provision to either the current Consecutive sentences[35] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[36] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[37]

Sixth, reform jurisdictions vary in the required semi-inchoate intent that distinguishes burglary from trespass. At common law, intent to commit a felony was required, but that standard has loosened. Seventeen states have at least one grade of burglary that requires proof the defendant intended to commit any offense (felony or misdemeanor).[38] Thirteen states do require that the defendant intend to commit a felony, but they almost always permit proof of intent to commit theft (felony or misdemeanor) and sometimes an assault (felony or misdemeanor).[39] But since it appears most burglaries are based on the defendant's intent to steal, the inclusion of an intent to commit any theft would

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conclude that aggravated criminal trespass is a lesser-included offense of aggravated burglary. Thus, we also conclude that attempted aggravated criminal trespass is a lesser-included offense of attempted aggravated burglary."); People v. Devonish, 843 N.E.2d 1120, 1120 (2005) ("It was error to refuse defendant's request that the jury be charged with the lesser included offense of criminal trespass in the second degree."); *State v. Singleton*, 675 A.2d 1143, 1146 (N.J. App. Div. 1996) (trespass is a lesser-included offense of burglary, and therefore, judge erred when failing to instruct jury on trespass in burglary case); *State v. Williams*, 708 P.2d 834, 835 (Haw. 1985) ("Criminal trespass in the first degree is a lesser included offense of burglary in the first degree."); *State v. Harvey*, 713 P.2d 517, 520 (Mont. 1986) ("A reading of the criminal trespass and burglary statutes clearly shows that criminal trespass is a lesser included offense of burglary."); *State v. Smith*, No. SC 95461, 2017 WL 2952325, at *3 (Mo. July 11, 2017).

[34] E,g., *Commonwealth v. Quintua*, 56 A.3d 399, 402 (Penn. Super. Ct. 2012) (trespass is not a lesser-included offense of burglary, because trespass requires proof the defendant knew he or she was not permitted to enter, while burglary does not). *People v. Satre*, 950 P.2d 667, 668 (Colo. App. 1997) ("we conclude that first degree criminal trespass is not a lesser included offense of first degree burglary."); *State v. Malloy*, 639 P.2d 315, 320–21 (Ariz. 1981) ("Since in [burglary] the phrase "entering or remaining unlawfully" is not modified by the term "knowingly", in order to convict a defendant of burglary in the third degree, the prosecution need not prove that the defendant was aware of the unlawfulness of his entry. There need only be shown that the entry was knowingly or voluntarily made. Criminal trespass is not necessarily a lesser included offense of burglary.").

[35] D.C. Code § 22-3203.

[36] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.

[37] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

[38] Ala. Code § 13A-7-7; Alaska Stat. Ann. § 11.46.300; Colo. Rev. Stat. Ann. § 18-4-204; Conn. Gen. Stat. Ann. § 53a-103; Del. Code Ann. tit. 11, § 824; Ky. Rev. Stat. Ann. § 511.040; Me. Rev. Stat. tit. 17-A, § 401; Mo. Ann. Stat. § 569.160; Mont. Code Ann. § 45-6-204; N.H. Rev. Stat. Ann. § 635:1; N.J. Stat. Ann. § 2C:18-2; N.Y. Penal Law § 140.30 (McKinney); N.D. Cent. Code Ann. § 12.1-22-02; Ohio Rev. Code Ann. § 2911.11; Or. Rev. Stat. Ann. § 164.225; 18 Pa. Stat. and Cons. Stat. Ann. § 3502; Wash. Rev. Code Ann. § 9A.52.030.

[39] Ala. Code § 13A-7-6; Ariz. Rev. Stat. Ann. § 13-1508; Colo. Rev. Stat. Ann. § 18-4-202; Haw. Rev. Stat. Ann. § 708-810; 720 Ill. Comp. Stat. Ann. 5/19-1; Ind. Code Ann. § 35-43-2-1; Neb. Rev. Stat. Ann. § 28-507; N.M. Stat. Ann. § 30-16-4; Ohio Rev. Code Ann. § 2911.13; Tenn. Code Ann. § 39-14-404; Tex. Penal Code Ann. § 30.02; Utah Code Ann. § 76-6-203; Wyo. Stat. Ann. § 6-3-301.

seemingly broaden the scope of burglary in these jurisdictions to substantially match the others.[40]

Lastly, it is notable that a recent study funded by the Department of Justice also provides a sensible basis for the RCC's grading scheme.[41] This study suggest two important empirical facts: first, burglaries as a whole are typically not violent: only 2.7% of burglaries involved actual physical injury, only 2.4% involved a defendant who was armed with a weapon, and only 4.9% involved a defendant who threatened violence or placed victims in fear.[42] When burglaries were of a dwelling, the authors state that a person other than the defendant was present 26% of the time.[43] Additionally, of the burglaries that are violent, 91% occur within a dwelling.[44] However, violent burglaries are still rare: only a small fraction of dwelling burglaries involve violence.[45] Nevertheless, distinguishing between occupied dwellings and other buildings sensibly reflects the greater risk of harm in burglaries of dwellings.

RCC § 22E-2702. Possession of Tools to Commit Property Offenses.
[Previously RCC § 22E-2702. Possession of Burglary and Theft Tools.]

Relation to National Legal Trends. *The revised possession of burglary and theft tools offense's above-mentioned substantive changes to current District law are not well supported by national legal trends because the District is an outlier in criminalizing possession of implements of crime*.

Most jurisdictions do not have analogous statutes, though some states have similar statutes that are limited to possession of burglary tools.[46] However, some states have broader statutes that criminalize possession of any tool with intent to use it criminally[47], or any tool that is specifically adapted for criminal use.[48]

Regarding the bar on multiple convictions for the revised possession of burglary and theft tools offense and overlapping property offenses, a generalization to other jurisdictions would be prohibitively complex. Jurisdictions vary widely on whether and how they bar convictions for property offenses similar to the revised possession of burglary and theft tools offense and other overlapping property offenses. For example, where the offense most like the revised possession of burglary and theft tools offense is a lesser

[40] Additionally, a few states mix both sorts of intents, and use the intended offense as a basis for grading the offense. *E.g*., compare Ala. Code § 13A-7-7 (second-degree burglary requiring proof of intent to commit a theft or felony) with Ala. Code § 13A-7-6 (third-degree burglary requiring proof of intent to commit any crime).
[41] RICHARD F. CULP ET AL., IS BURGLARY A CRIME OF VIOLENCE? AN ANALYSIS OF NATIONAL DATA 1998-2007 ii (2015), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf (last visited Aug. 4, 2017).
[42] *Id*. at 29-30. The report's authors also noted that the incidence of violence differed based on the database used. However, the authors stated that, "Expressed as a range, an average of between .9% and 7.6% of burglaries between 1998 and 2007 resulted in actual physical violence, or threats of violence." *Id*. at 34.
[43] *Id*. at 38.
[44] *Id*. at 40.
[45] *Id*. at 39. The authors state that 30,133 burglaries over the relevant time period (1998 -2007) involved violence. Of these, 27,293 were residential burglaries. However, 3,401,559 burglaries were non-violent. Of these non-violent burglaries, 2,277,069 were residential burglaries.
[46] Cal. Penal Code § 466; Idaho Code Ann. § 18-1406; N.M. Stat. Ann. § 30-16-5; Wis. Stat. Ann. § 943.12.
[47] Ohio Rev. Code Ann. § 2923.24.
[48] 18 Pa. Stat. Ann. § 907.

included offense of another offense, or has a lesser included offense, multiple convictions for those overlapping offenses are precluded—but jurisdictions vary widely in the exact elements of overlapping property offenses. Research has not identified any equivalent statutory provision to either the current Consecutive sentences[49] statute or the proposed RCC § 22E-2003 in other jurisdictions that covers multiple property offenses. However, some jurisdictions statutorily bar multiple convictions arising out of the same act or course of conduct for most or all (not just property) crimes,[50] while some jurisdictions statutorily allow multiple convictions arising from the same act or course of conduct but provide for concurrent sentences.[51]

[49] D.C. Code § 22-3203.
[50] Minn. Stat. Ann. § 609.035; Cal. Penal Code § 654.
[51] Tex. Penal Code Ann. § 3.03; Ariz. Rev. Stat. Ann. § 13-116.

Subtitle IV. Offenses Against Government Operation.

Chapter 32. Perjury and Other Official Falsification Offenses.

§ 22E-3201. Impersonation of an Official.

[No national legal trends section.]

§ 22E-3202. Misrepresentation as a District of Columbia Entity.

[No national legal trends section.]

Chapter 34. Government Custody Offenses.

RCC § 22E-3401. Escape from Institution or Officer.

Relation to National Legal Trends. *The revised escape statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[1] All 29 reform jurisdictions have one or more criminal escape statutes.[2]

First, most reform jurisdictions and the Model Penal Code[3] have multiple sentencing gradations for escape. Nineteen reform jurisdictions grade offenses based on use of force, threat of force, or possession of a weapon.[4] Fifteen reform jurisdictions consider the seriousness of the charge underlying the detention (felony or misdemeanor).[5] Although few reform jurisdictions explicitly distinguish between fleeing from custody and

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[1] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2] Ala. Code §§ 13A-10-30, 13A-10-31, 13A-10-32, 13A-10-33, and14-8-42; Alaska Stat. Ann. §§ 11.56.300, 11.56.310, 11.56.320, 11.56.330, and 11.56.370; Ariz. Rev. Stat. Ann. § 13-2501, 13-2502, 13-2503, and 13-2504; Ark. Code Ann. §§ 5-54-101, 5-54-110, 5-54-111, 5-54-112, and 5-54-131; Colo. Rev. Stat. Ann. §§ 18-8-208 and 18-8-208.1; Conn. Gen. Stat. Ann. §§ 53a-168, 53a-169, 53a-170, and 53a-171; Del. Code Ann. tit. 11, §§ 1251, 1252, 1253, and 1258; Haw. Rev. Stat. Ann. §§ 710-1020 and 710-1021; 720 Ill. Comp. Stat. Ann. 5/31-6 and 720 Ill. Comp. Stat. Ann. 5/31-7; Ind. Code Ann. § 35-44.1-3-4; Kan. Stat. Ann. § 21-5911; Ky. Rev. Stat. Ann. §§ 520.010, 520.015, 520.020, 520.030, and 520.040; Me. Rev. Stat. tit. 17-A, § 755; Minn. Stat. Ann. § 609.485; Mo. Ann. Stat. §§ 575.195, 575.200, 575.210, and 575.220; Mont. Code Ann. § 45-7-306; N.H. Rev. Stat. Ann. § 642:6; N.J. Stat. Ann. § 2C:29-5; N.Y. Penal Law §§ 205.00, 205.10, 205.15, 205.16, 205.17, 205.18, and 205.19; N.D. Cent. Code Ann. § 12.1-08-06; Ohio Rev. Code Ann. § 2921.34; Or. Rev. Stat. Ann. §§ 162.145, 162.155, 162.165, and 162.175; 18 Pa. Stat. and Cons. Stat. Ann. § 5121; S.D. Codified Laws §§ 22-11A-1, 22-11A-2, and 22-11A-2.1; Tenn. Code Ann. § 39-16-605; Tex. Penal Code Ann. § 38.06; Utah Code Ann. § 76-8-309; Wash. Rev. Code Ann. §§ 9A.76.110, 9A.76.115, 9A.76.120, and 9A.76.1130; Wis. Stat. Ann. § 946.42.

[3] Model Penal Code § 242.6(4).

[4] Ala. Code §§ 13A-10-31(a)(1) and 13A-10-32(a)(1); Alaska Stat. Ann. §§ 11.56.300(a) and 11.56.310(a)(1)(C); Ariz. Rev. Stat. Ann. § 13-2504; Ark. Code Ann. §§ 5-54-110, 5-54-111; Del. Code Ann. tit. 11, § 1253; Haw. Rev. Stat. Ann. § 710-1020; Ind. Code Ann. § 35-44.1-3-4(Sec. 4(a)); Kan. Stat. Ann. § 21-5911(b)(1)(G); Ky. Rev. Stat. Ann. § 520.020; Me. Rev. Stat. tit. 17-A, § 755; N.H. Rev. Stat. Ann. § 642:6; N.J. Stat. Ann. § 2C:29-5; N.D. Cent. Code Ann. § 12.1-08-06(2); Or. Rev. Stat. Ann. §§ 162.145, 162.155, 162.165, and 162.175; 18 Pa. Stat. and Cons. Stat. Ann. § 5121(d); S.D. Codified Laws § 22-11A-2(1); Tex. Penal Code Ann. § 38.06; Utah Code Ann. § 76-8-309(2)(a); and Wis. Stat. Ann. § 946.42; *see also* Model Penal Code § 242.6(4)(b).

[5] Ala. Code §§ 13A-10-31(a)(2), 13A-10-32(a)(2), and 13A-10-33; Alaska Stat. Ann. §§ 11.56.320(a)(1), 11.56.330(a)(1); Ariz. Rev. Stat. Ann. §§ 13-2502(A), 13-2503(A)(2); Colo. Rev. Stat. Ann. § 18-8-208; Conn. Gen. Stat. Ann. § 53a-171(b); 720 Ill. Comp. Stat. Ann. 5/31-6; Kan. Stat. Ann. § 21-5911(b)(1)(A); Ky. Rev. Stat. Ann. § 520.030; Minn. Stat. Ann. § 609.485 (Subd. 4); N.Y. Penal Law §§ 205.10, 205.15, and 205.16; N.D. Cent. Code Ann. § 12.1-08-06(2)(b); Ohio Rev. Code Ann. § 2921.34(C)(2); 18 Pa. Stat. and Cons. Stat. Ann. § 5121(d); Tenn. Code Ann. § 39-16-605(c)(1); and Wash. Rev. Code Ann. §§ 9A.76.110, 9A.76.120, and 9A.76.130; *see also* Model Penal Code § 242.6(4)(a).

failing to timely return,[6] several others punish prison breaks more harshly than other unlawful absences.[7]

Second, the removal of attempted escapes from the offense definition is broadly supported by national trends. Only four reform jurisdictions punish attempted escapes as harshly as the completed offense.[8]

Third, the revised statute's omission of an accomplice liability provision specific to escape is supported by national trends. Sixteen reform states punish permitting or facilitating an escape.[9] However, most of these provisions apply only to public servants who violate their official duties, in contrast to D.C. Code § 10-509.01a, which states, "No person shall aid or abet any person to violate this section."[10] Notably, there is variance among states with respect to how the act of harboring a fugitive is punished. Some, like the District, punish it as accessory-after-the-fact to escape, whereas others punish it as obstruction of justice or hindering prosecution.[11]

Fourth, support for the revised statute's restriction to flight from the lawful custody of a "law enforcement officer" as defined throughout the RCC is difficult to assess. States use a range of terminology to describe the person whose custody is escaped and the nature of the custody[12] and staff did not research statutory or case law definitions for that terminology.

Fifth, the reform jurisdictions do not include a merger provision for convictions of contempt based on the same course of conduct. Research was not conducted to determine whether the offenses would merge under a general merger provision or under the elements test in other states.

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[6] 720 Ill. Comp. Stat. Ann. 5/31-6; Ind. Code Ann. § 35-44.1-3-4; Mo. Ann. Stat. § 575.220; N.Y. Penal Law §§ 205.17 and 205.18 ("absconding"); S.D. Codified Laws §§ 22-11A-2 and 22-11A-2.1; Wash. Rev. Code Ann. § 9A.76.120(c); *see also* Wis. Stat. Ann. § 946.425 (Failure to report to jail).

[7] Some states grade escapes from the custody of an officer lower than escapes from an institution. Others grade escapes from a non-secure location (such as a halfway house or house arrest) lower than escapes from a secured facility. Others do not include failures to return in their escape statutes at all. *See e.g.,* Alaska Stat. Ann. §§ 11.56.335 and 11.56.340 ("unlawful evasion"); Ark. Code Ann. § 5-54-131 ("absconding" from house arrest); Conn. Gen. Stat. Ann. § 53a-170; Del. Code Ann. tit. 11, § 1251-1253; Me. Rev. Stat. tit. 17-A, § 755; Mo. Ann. Stat. § 575.200; Tex. Penal Code Ann. § 38.06.

[8] Ala. Code §§ 13A-10-31(a)(2), § 13A-10-32(a)(2), and 13A-10-33(a); Ariz. Rev. Stat. Ann. §§ 13-2502, 13-2503, and 13-2504; N.D. Cent. Code Ann. § 12.1-08-06(1); and Ohio Rev. Code Ann. § 2921.34.

[9] Ala. Code §§ 13A-10-35 and 36; Alaska Stat. Ann. § 11.56.370; Ark. Code Ann. §§ 5-54-113, 115, and 116; Colo. Rev. Stat. Ann. §§ 18-8-201, 201.1, and 205; 720 Ill. Comp. Stat. Ann. 5/31-7; Kan. Stat. Ann. § 21-5912; Me. Rev. Stat. tit. 17-A, § 756; Minn. Stat. Ann. § 609.485 (Subd. 2)(3); Mo. Ann. Stat. §§ 575.230 and 575.240; N.J. Stat. Ann. § 2C:29-5(c); N.D. Cent. Code Ann. § 12.1-08-07; Ohio Rev. Code Ann. § 2921.35; 18 Pa. Stat. and Cons. Stat. Ann. § 5121(b); Tenn. Code Ann. § 39-16-607; Tex. Penal Code Ann. § 38.07; Wis. Stat. Ann. § 946.44; *see also* Conn. Gen. Stat. Ann. § 53a-171a (concerning escapes from a hospital or sanitorium). States vary with respect to whether the act of harboring a fugitive is punished as accessory to escape, obstruction of justice, or hindering prosecution.

[10] [Public corruption offenses will be addressed in another section of the revised code.]

[11] *See, e.g.*, Haw. Rev. Stat. Ann. § 710-1028(1); 720 Ill. Comp. Stat. Ann. 5/31-5; Ky. Rev. Stat. Ann. § 520.120; Me. Rev. Stat. tit. 17-A, § 753; Minn. Stat. Ann. § 609.495; Mo. Ann. Stat. §§ 575.030, 575.159, Mont. Code Ann. § 45-7-303; N.H. Rev. Stat. Ann. § 642:3; N.Y. Penal Law §§ 205.50, 205.55, 205.60, and 205.65; S.D. Codified Laws § 22-11A-5; Tex. Penal Code Ann. § 38.05; Wash. Rev. Code Ann. §§ 9A.76.050, 9A.76.060, 9A.76.070, 9A.76.080, and 9A.76.090; Wis. Stat. Ann. § 946.47.

[12] For example, the Model Penal code uses terms that may be congruent with "the lawful custody of a law enforcement officer," such as "official detention," "arrest," and "public servant." Model Penal Code § 242.6.

RCC § 22E-3402. Tampering with a Detection Device.

Relation to National Legal Trends. *The revised tampering statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[13]

Twelve reform jurisdictions specifically criminalize tampering with a detection device as a form of escape or as a stand-alone offense.[14]

Seven reform jurisdictions' statutes specifically require knowing or intentional conduct.[15] The other statutes are silent as to the applicable culpable mental state.

No reform jurisdictions include attempts to interfere with the operation of the device as a completed offense.[16]

RCC § 22E-3403. Correctional Facility Contraband.

Relation to National Legal Trends. *The revised correctional facility contraband statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[17] Twenty-six

[13] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[14] Alaska Stat. Ann. § 11.56.330; Ariz. Rev. Stat. Ann. § 13-3725; Ark. Code Ann. § 12-12-923 (applies only to people labeled "sexually dangerous persons"); Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Ky. Rev. Stat. Ann. § 519.070; Minn. Stat. Ann. § 609.485; Mo. Ann. Stat. § 575.205; 18 Pa. Stat. and Cons. Stat. Ann. § 5121 (as interpreted in *Com. v. Wegley*, 829 A.2d 1148, 574 Pa. 190, Sup.2003); Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wash. Rev. Code Ann. § 9A.76.115 (applies only to people labeled "sexually violent predators"); Wis. Stat. Ann. § 946.465; *see also* Conn. Gen. Stat. Ann. § 53a-115 (requiring damage to the device).

[15] Ark. Code Ann. § 12-12-923; Colo. Rev. Stat. Ann. § 17-27.5-104; Ind. Code Ann. § 35-44.1-3-4; Mo. Ann. Stat. § 575.205; Tenn. Code Ann. § 40-39-304; Wash. Rev. Code Ann. § 9A.76.130; Wis. Stat. Ann. § 946.465.

[16] *But see* Wash. Rev. Code Ann. § 9A.76.130 (prohibiting knowingly violating the terms of an electronic monitoring program, which may include attempts to tamper).

[17] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

reform states criminalize trafficking contraband to a correctional facility.[18] Twenty-five reform states criminalize possession of contraband by a person who is incarcerated.[19]

First, the revised statute prohibits contraband in halfway houses, in addition to secure detention facilities. This change is broadly supported by national trends. Eighteen reform states explicitly define terms such as "detention facility," "correctional facility," "penal institution" and "official custody" to include any place used for the confinement of accused or convicted persons.[20]

Second, the revised statute requires that an incarcerated person know that she possesses the prohibited item and know she does not have the effective consent of the facility to possess it. No reform state punishes an incarcerated person for possession of contraband "regardless of the intent with which he or she possesses it," as the District's current law does.[21] Nineteen reform states statutorily require knowledge or intent.[22]

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[18] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-203; Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 53a-174; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-5; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-7-307; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Tex. Penal Code Ann. § 38.09; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1; Wash. Rev. Code Ann. § 9A.76.140; Wash. Rev. Code Ann. § 9A.76.150; Wash. Rev. Code Ann. § 9A.76.160.

[19] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Conn. Gen. Stat. Ann. § 53a-174b; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1023; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; 720 Ill. Comp. Stat. Ann. 5/31A-1.2; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09; Ohio Rev. Code Ann. § 2921.36; Or. Rev. Stat. Ann. § 162.185; 18 Pa. Stat. and Cons. Stat. Ann. § 5122; Tenn. Code Ann. § 39-16-201; Tex. Penal Code Ann. § 38.114; Utah Code Ann. § 76-8-311.3; Utah Code Ann. § 76-8-311.1.

[20] Ala. Code § 13A-10-30; Ariz. Rev. Stat. Ann. § 13-2501; Ark. Code Ann. § 5-54-101(2)(A); Colo. Rev. Stat. Ann. § 18-8-204; Conn. Gen. Stat. Ann. § 1-1(w); Del. Code Ann. tit. 11, § 1258(3); 720 Ill. Comp. Stat. Ann. 5/31A-0.1; Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Me. Rev. Stat. tit. 17-A, § 755(3); Mo. Ann. Stat. § 217.010; N.H. Rev. Stat. Ann. § 642:6(II); N.Y. Penal Law § 205.00 (1); N.D. Cent. Code Ann. § 12.1-08-06(3)(b); Or. Rev. Stat. Ann. § 162.135(2); Tex. Penal Code Ann. § 1.07 (14); Utah Code Ann. § 76-8-311.3(1)(c); Wash. Rev. Code Ann. § 9A.76.010(3)(e). Staff did not research case law for jurisdictions that do not define these terms or that define them using unclear language such as "any prison or any building appurtenant thereto."

[21] D.C. Code § 22-2603.02(b).

[22] Alaska Stat. Ann. § 11.56.380; Ariz. Rev. Stat. Ann. § 13-2505; Ark. Code Ann. § 5-54-119; Colo. Rev. Stat. Ann. § 18-8-204.1; Colo. Rev. Stat. Ann. § 18-8-204.2; Conn. Gen. Stat. Ann. § 53a-174a; Del. Code Ann. tit. 11, § 1256; Haw. Rev. Stat. Ann. § 710-1022; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-7; Ind. Code Ann. § 35-44.1-3-8; Ky. Rev. Stat. Ann. § 520.050; Ky. Rev. Stat. Ann. § 520.060; Me. Rev. Stat. tit. 17-A, § 757; Me. Rev. Stat. tit. 17-A, § 757-A; Me. Rev. Stat. tit. 17-A, § 757-B; Mo. Ann. Stat. § 221.111; Mont. Code Ann. § 45-8-318; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y.

Third, the revised statute follows the gradation approach in the Model Penal Code, by distinguishing between items that may be useful for an escape and other contraband.[23] Seven reform states have a gradation structure similar to the revised statute and the model penal code.[24]

Fourth, the revised statute decriminalizes possession of civilian clothing and "anything prohibited by rule." No reform states expressly punish possession of civilian clothing.[25] A minority of reform states (ten) define contraband to include any unauthorized item.[26] However, at least one of these statutes was held to violate due process as applied.[27]

Fifth, the revised code punishes "causing another to bring contraband" in its general accomplice liability provision instead of in the offense definition. Only four reform states specifically punish "causing another" to bring contraband in the contraband offense definition.[28]

Sixth, the revise offense does not criminalize an employee's failure to report the presence of contraband. No reform states punish a failure to report.[29]

Seventh, the revised statute leaves concurrent versus consecutive sentencing decisions to the discretion of the trial court. Only one reform state requires consecutive sentencing for promoting contraband.[30]

Penal Law § 205.25; N.Y. Penal Law § 205.20; Or. Rev. Stat. Ann. § 162.185; Tenn. Code Ann. § 39-16-201; Utah Code Ann. § 76-8-311.3.

[23] Model Penal Code § 242.7.

[24] Ala. Code § 13A-10-36; Ala. Code § 13A-10-37; Ala. Code § 13A-10-38; Alaska Stat. Ann. § 11.56.375; Alaska Stat. Ann. § 11.56.380; Ark. Code Ann. § 5-54-119; Ark. Code Ann. § 5-54-117; N.H. Rev. Stat. Ann. § 642:7; N.J. Stat. Ann. § 2C:29-6; N.Y. Penal Law § 205.25; N.Y. Penal Law § 205.20; N.D. Cent. Code Ann. § 12.1-08-09.

[25] Staff did not perform case law research to determine phrases such as "any item or article that could be used to facilitate an escape" have been interpreted by any state court to include all civilian clothing.

[26] Ala. Code § 13A-10-30(b)(4); Alaska Stat. Ann. § 11.56.390; Ark. Code Ann. § 5-54-119; Ind. Code Ann. § 35-44.1-3-5 (for trafficking, but not for possession); Kan. Stat. Ann. § 21-5914; Ky. Rev. Stat. Ann. § 520.010; Mo. Ann. Stat. § 221.111(4) (infraction only); N.H. Rev. Stat. Ann. § 642:7; ("anything contrary to law or regulation"); N.Y. Penal Law § 205.00 (3); Or. Rev. Stat. Ann. § 162.135(1)(a)(D); *see also* Mont. Code Ann. § 45-7-307 (barring "illegal articles"); N.J. Stat. Ann. § 2C:29-6 (barring "unlawful" articles).

[27] *See State v. Taylor*, 54 Kan. App. 2d 394 (2017) (holding a contraband statute violated due process as applied to a defendant was not provided individualized notice by correctional institution administrators of what items were prohibited).

[28] Conn. Gen. Stat. Ann. § 53a-174; 720 Ill. Comp. Stat. Ann. 5/31A-1.1; Ind. Code Ann. § 35-44.1-3-5; Utah Code Ann. § 76-8-311.3.

[29] *But see* Ariz. Rev. Stat. Ann. §§ 13-2505(B) and 13-2514(B) (requiring reporting without punishing a failure to report). Staff did not perform research to determine whether this conduct would violate other public corruption statutes in each state.

[30] Colo. Rev. Stat. Ann. § 18-8-209.

Subtitle V. Public Order and Safety Offenses.

Chapter 41. Weapon Offenses and Related Provisions.

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4102. Carrying a Dangerous Weapon.

Relation to National Legal Trends. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[1] The statutes in these reform jurisdictions provide strong support for the recommended changes to District law.

First, the revised offense applies only to people who are outside of their own home, place of business, or land. No reform jurisdictions impose categorical bans on carrying a firearm in one's home or place of business.[2] As for other dangerous weapons, staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.[3]

Second, the revised statute narrows the list of locations that elevate a carrying a dangerous weapon offense from second degree to first degree, so as to not include video arcades or public housing. No reform jurisdiction includes a statutory enhancement for mere possession of a firearm near public housing.[4] One reform jurisdiction explicitly exempts any building used for public housing by private persons from any restriction on the carrying or possession of a firearm.[5]

Third, the revised statute reduces the radius for a gun free zone from 1000 feet to 300 feet. Of the five reform jurisdictions that specify a 1000-foot radius for gun free school zones,[6] none includes every college, university, public swimming pool, public playground,

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[1] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[2] *See District of Columbia v. Heller*, 554 U.S. 570 (2008).

[3] For example, the terms "weapon," "dangerous weapon," and "dangerous instrument" are defined differently from state to state.

[4] *But see* 720 Ill. Comp. Stat. Ann. 5/24-3 (punishing selling or transferring a firearm); Minn. Stat. Ann. § 609.66 (punishing recklessly handling, using, or brandishing a firearm).

[5] Mo. Ann. Stat. § 571.107(1)(6); *see also Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014) (holding that public housing tenants have a right to bear arms in common areas).

[6] Del. Code Ann. tit. 11, § 1457; N.Y. Penal Law § 265.01-a; Tex. Penal Code Ann. § 46.03; Utah Code Ann. § 76-3-203.2 (requiring display or use of the firearm); Wis. Stat. Ann. § 948.605.

public youth center, public library, and children's day care center. Unlike the District, these jurisdictions are not comprised of a single, densely-populated city.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

Relation to National Legal Trends. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal statutes based in part on the Model Penal Code.[7] These statutes provide mixed support for the recommended changes to District law.

First, under the revised statute, a prior conviction for a nonviolent offense is a predicate for unauthorized possession liability only if it occurred within ten years. Currently, statutes in 11 reform jurisdictions account for the recency of the prior conviction in some manner, none precisely like the revised statute or current D.C. Code.[8]

Second, the revised statute specifies that an out-of-state conviction is a predicate for unauthorized possession liability if it has elements that would necessarily prove the elements of a corresponding District crime. Currently, 25 reform jurisdictions' statutes

[7] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[8] *See* Alaska Stat. Ann. § 11.61.200(b)(1)(C); Colo. Rev. Stat. Ann. § 18-12-108 (punishing recent convictions more severely than older convictions); Kan. Stat. Ann. § 21-6304 (imposing time limits for some convictions and not others); Me. Rev. Stat. tit. 15, § 393 (tolling time limits for any intervening criminal conviction); N.Y. Penal Law § 265.02(5)(i); N.D. Cent. Code Ann. § 62.1-02-01; Or. Rev. Stat. Ann. § 166.270 (4)(a); 18 Pa. Stat. and Cons. Stat. Ann. § 6105(d)(3) (allowing a person to petition for reinstatement of their Second Amendment rights after 10 years); S.D. Codified Laws § 22-14-15 (calculating time limit from the commission instead of the conviction or completion of sentence); Tex. Penal Code Ann. § 46.04 (permitting possession in the home after five years); Utah Code Ann. § 76-10-503 (imposing time limits for juvenile adjudications only).

explicitly provide some type of restrictions on offenses committed in other jurisdictions.[9] Of those jurisdictions, 11 require some degree of comparability (e.g., similar elements).[10]

Third, under the revised statute, the term "prior conviction" includes convictions that have been set aside under the Youth Rehabilitation Act, but does not include juvenile adjudications, convictions that have been vacated, or convictions that are subject to an agreement by the parties to be further reviewed. Currently, 14 reform jurisdictions' statutes specify that they do not apply their restrictions to otherwise-qualifying convictions that have been nullified.[11]

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[9] *See* Ala. Code § 13A-11-72(a); Alaska Stat. Ann. § 11.61.200(a)(1); Ariz. Rev. Stat. Ann. § 13-3101.A.7(b); Ark. Code Ann. §§ 5-1-106(a)(2), 73-103(a)(1); Colo. Rev. Stat. Ann. § 18-12-108(1); Del. Code. Ann. tit. 11 § 1448(a)(1); Haw. Rev. Stat. Ann. § 134-7(b); 720 Ill. Comp. Stat. Ann. 5/24-1.1(a); Ind. Code Ann. § 35-47-4-5(a)(1)(B), (2)(B); Kan. Stat. Ann. § 21-6304(a)(1)-(3)(B); Minn. Stat. Ann. § 624.712.10; Mo. Ann. Stat. § 571.070(1); Mont. Code Ann. § 45-8-313(1)(b); N.H. Rev. Stat. Ann. § 159:3.III; N.J. Stat. Ann. § 2C:39-7.c; N.D. Cent. Code Ann. § 62.1-02-01.1.a-b; Or. Rev. Stat. Ann. § 166.270(1); 18 Pa. Stat. and Cons. Stat. Ann. § 6105(b); S.D. Codified Laws §§ 22-14-15, 15.1; Tex. Penal Code Ann. § 46.04(f)(1)-(3); Utah Code Ann. §§ 76-3-203.5(a), 10-503(1)(a)(i)-(ii), (b)(i), (2)(a), (3)(a); Wash. Rev. Code Ann. §§ 9.41.010(8), 040(1)(a), (2)(a)(i); Wis. Stat. Ann. § 941.29(1m)(b).

[10] *See* Ind. Code Ann. § 35-47-4-5(a)(1)(B), (2)(B); Kan. Stat. Ann. § 21-6304(a)(1)-(3)(B); Me. Rev. Stat. Ann. tit. 15, § 393.1.A-1(4); Mo. Ann. Stat. § 571.070(1); Mont. Code Ann. § 45-8-313(1)(b); N.H. Rev. Stat. Ann. § 159:3.III; N.J. Stat. Ann. § 2C:39-7.c; 18 Pa. Stat. and Cons. Stat. Ann. § 6105(b); S.D. Codified Laws § 22-14-15.1; Wash. Rev. Code Ann. §§ 9.41.010(8), 040(2)(a)(i); Wis. Stat. Ann. § 941.29(1m)(b).

[11] *See* Ala. Code § 13A-11-72(k)(2) (declining to apply felon-in-possession restrictions to persons whose convictions were expunged or who were pardoned or had their civil rights restored unless any of above came with condition that convict could not ship, transport, possess, or receive firearms); Alaska Stat. Ann. § 11.61.200(b)(1)(A)-(B) (declining to apply felon-in-possession restrictions to persons who were pardoned or whose convictions were set aside); Ariz. Rev. Stat. Ann. § 13-3101.A.7(b) (declining to apply felon-in-possession restrictions to persons whose civil right to possess firearms have been restored); Ark. Code Ann. § 5-73-103(a), (b)(2)-(3), (d)(1) (declining to apply felon-in-possession restrictions to persons who have been authorized by a specified officials to possess firearms, who have had their rights restored by the governor, who have received a pardon that explicitly provides that such persons may possess firearms, or whose convictions have been dismissed or expunged); 720 Ill. Comp. Stat. Ann. 5/24-1.1(a) (declining to apply felon-in-possession restrictions to persons who have been granted relief by the Director of the Department of State Police); Kan. Stat. Ann. § 21-6304(a)(3)(A) (declining to apply felon-in-possession restrictions to persons who have been pardoned or whose convictions have been expunged); Ky. Rev. Stat. Ann. § 527.040(1)(a)-(b) (declining to apply felon-in-possession restrictions to persons who have received a full pardon or who have been granted relief by the United States Secretary of the Treasury under the Federal Gun Control Act of 1968); Minn. Stat. Ann. §§ 609.165.1a, 1d, 624.712.10 (declining to apply felon-in-possession restrictions to persons who received relief under 18 U.S.C. § 925, who have had their rights restored by a court, who have received a pardon or had their civil rights restored, or whose convictions have been expunged or set aside unless any of the above comes with an explicit condition that such ex-convicts are still prohibited from shipping, transporting, possessing, or receiving firearms); Ohio Rev. Code Ann. § 2923.13(A), (C) (declining to apply felon-in-possession restrictions to persons have been relieved from disability under operation of law or legal process aside from the mere completion, termination, or expiration of those ex-convicts' assigned sentences); Or. Rev. Stat. Ann. § 166.270(4)(b) (declining to apply felon-in-possession restrictions to persons who have been granted relief under either 18 U.S.C. § 925(c) or Or. Rev. Stat. § 166.274 or whose criminal records have been expunged); Tenn. Code Ann. § 39-17-1307(c)(1)(A)-(C) (declining to apply apply felon-in-possession restrictions to persons who have been pardoned, whose convictions have been expunged, or whose civil rights have been restored); Utah Code Ann. § 76-10-503(1)(c)(ii) (declining to apply felon-in-possession restrictions to persons whose convictions have been expunged, set aside, or reduced to misdemeanor convictions by court order, who have received a pardoned, or whose civil rights have been restored unless any of the above comes with the explicit condition that such ex-convicts are still prohibited from possessing firearms); Wash. Rev. Code Ann. § 9.41.040(3) (declining

Fourth, under the revised statute, a person's dependency on a controlled substance is not a predicate for unauthorized possession liability. The U.S. Code punishes possession by any person who "is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)."[12] However, only one reform state's statute—Hawaii—punishes possession of a firearm by a person who is addicted to drugs. Hawaii's statute applies only to minors who have received drug treatment and only until the minor has been medically documented to be no longer adversely affected by the addiction.[13]

RCC § 22E-4106. Negligent Discharge of Firearm.

Relation to National Legal Trends. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[14] No reform states' statutes criminalize discharge of a firearm, unless the discharge recklessly endangers persons or property or threatens a breach of a peace.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

[No national legal trends section.]

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

[No national legal trends section.]

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to apply felon-in-possession restrictions to persons who have received pardons or certificates of rehabilitation, whose convictions have been annulled, or who have been subject to any other equivalent procedure based on a finding of innocence); Wis. Stat. Ann. § 941.29(5)(a), (b) (declining to apply felon-in-possession restrictions to persons who have received pardons expressly allowing them to possess firearms or who have received relief from disabilities under 18 U.S.C. § 925(c)).

[12] 18 U.S.C. § 922(g)(3).

[13] Haw. Rev. Stat. Ann. § 134-7.

[14] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

RCC § 22E-4110. Civil Provisions on Issuance of a License to Carry a Pistol.

[No national legal trends section.]

RCC § 22E-4111. Unlawful Sale of a Pistol.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4112. Unlawful Transfer of a Firearm.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4113. Sale of Firearm Without a License.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

[No national legal trends section.]

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

[No national legal trends section.]

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

[No national legal trends section.]

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapons Offenses.

[No national legal trends section.]

RCC § 22E-4120. Endangerment with a Firearm.

National Legal Trends. *The revised endangerment with a firearm statute has limited support in reform jurisdictions.*[15] *Multiple jurisdictions separately criminalize discharging a firearm in a manner that endangers or frightens others nearby.*[16]

[15] Twenty-nine states ("reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code. The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part).

[16] *See, e.g.,* Ala. Code § 13A-11-61 (punishing shooting into a building or vehicle); Ark. Code Ann. § 5-74-107 (requiring "a substantial risk of physical injury to another person or property damage"); Colo. Rev. Stat. Ann. § 18-12-107.5 (punishing shooting into a building or vehicle); 720 Ill. Comp. Stat. Ann. 5/24-1.5 (punishing shooting that "endangers the bodily safety of an individual"); Kan. Stat. Ann. § 21-6308 (grading based on whether the location is occupied); Minn. Stat. Ann. § 609.66 (includes recklessly handling a gun in a way that endangers others); N.Y. Penal Law § 265.35; Wash. Rev. Code Ann. §§ 9.41.230(b) and 9A.36.045; Wis. Stat. Ann. § 941.20. *See also* Kirstin Garriss, *Shelby County Lawmakers Propose Community Terrorism Bill to Battle Drive-By Shootings*, FOX13 (Feb. 4, 2020) (discussing proposed "community terrorism legislation" that would increase penalties for those who shoot from a car, into a car, into a building or into a crowd of people.

Chapter 42. Breaches of Peace.

RCC § 22E-4201. Disorderly Conduct.

[No national legal trends section.]

RCC § 22E-4202. Public Nuisance.

Relation to National Legal Trends. *The revised public nuisance statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, the RCC's reorganization of the existing disorderly conduct statute to distinguish a public nuisance from other disorderly conduct has little precedent. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC).[1] While there is significant variance in how states organize breach of peace offenses, all twenty-nine have a provision criminalizing disorderly conduct as a low-level violation.[2] Unreasonably loud noise falls explicitly within the ambit of disorderly conduct in every reform jurisdiction.[3] Disruption of a public gathering or funeral qualifies as disorderly conduct in sixteen reform jurisdictions.[4] Twenty-three reform jurisdictions treat disruption of a public gathering or

[1] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2] Ala. Code § 13A-11-7; Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. Ann. § 13-2904; Ark. Code Ann. § 5-71-207; Colo. Rev. Stat. Ann. § 18-9-106; Conn. Gen. Stat. Ann. § 53a-182; Del. Code Ann. tit. 11, § 1301; Haw. Rev. Stat. Ann. § 711-1101; 720 Ill. Comp. Stat. Ann. 5/26-1; Ind. Code Ann. § 35-45-1-3; Kan. Stat. Ann. § 21-6203; Ky. Rev. Stat. Ann. § 525.060; Me. Rev. Stat. tit. 17-A, § 501-A; Minn. Stat. Ann. § 609.72; Mo. Ann. Stat. § 574.010 ("peace disturbance"); Mont. Code Ann. § 45-8-101; N.H. Rev. Stat. Ann. § 644:2; N.J. Stat. Ann. § 2C:33-2; N.Y. Penal Law § 240.20; N.D. Cent. Code Ann. § 12.1-31-01; Ohio Rev. Code Ann. § 2917.11; Or. Rev. Stat. Ann. § 166.025; 18 Pa. Stat. and Cons. Stat. Ann. § 5503; S.D. Codified Laws § 22-18-35; Tenn. Code Ann. § 39-17-305; Tex. Penal Code Ann. § 42.01; Utah Code Ann. § 76-9-102; Wash. Rev. Code Ann. § 9A.84.030; Wis. Stat. Ann. § 947.01.

[3] Ala. Code § 13A-11-7(a)(2); Alaska Stat. Ann. § 11.61.110(a); Ariz. Rev. Stat. Ann. § 13-2904(A)(2); Ark. Code Ann. § 5-71-207(a)(2); Colo. Rev. Stat. Ann. § 18-9-106(1)(c); Conn. Gen. Stat. Ann. § 53a-182(a)(3); Del. Code Ann. tit. 11, § 1301(1)(b); Haw. Rev. Stat. Ann. § 711-1101(1)(b); 720 Ill. Comp. Stat. Ann. 5/26-1("any act" that causes public alarm, presumably, including noise); Ind. Code Ann. § 35-45-1-3(a)(2); Kan. Stat. Ann. § 21-6203(a)(3); Ky. Rev. Stat. Ann. § 525.060(1)(b); Me. Rev. Stat. tit. 17-A, § 501-A(1)(A)(1); Mo. Ann. Stat. § 574.010(1)(1)(a); Mont. Code Ann. § 45-8-101(1)(b); N.H. Rev. Stat. Ann. § 644:2(III)(a); N.J. Stat. Ann. § 2C:33-2 (noise must be both unreasonably loud and offensively coarse); N.Y. Penal Law § 240.20(2); N.D. Cent. Code Ann. § 12.1-31-01(1)(b); Ohio Rev. Code Ann. § 2917.11(A)(2); Or. Rev. Stat. Ann. § 166.025(1)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 5503(2); S.D. Codified Laws § 22-18-35(2); Tenn. Code Ann. § 39-17-305(b); Tex. Penal Code Ann. § 42.01(a)(5); Utah Code Ann. § 76-9-102(1)(ii); Wash. Rev. Code Ann. § 9A.84.030 (noise must occur within 500 feet of a funeral); Wis. Stat. Ann. § 947.01(1).

[4] Ala. Code § 13A-11-7(a)(4); Ariz. Rev. Stat. Ann. § 13-2904(A)(4); Ark. Code Ann. § 5-71-207(a)(4); Conn. Gen. Stat. Ann. § 53a-182(a)(4); Del. Code Ann. tit. 11, § 1301(1)(c); Ind. Code Ann. § 35-45-1-3(a)(3); Kan. Stat. Ann. § 21-6203(a)(2); Me. Rev. Stat. tit. 17-A, § 501-A(1)(D); Mont. Code Ann. § 45-8-101(1)(f); N.H. Rev. Stat. Ann. § 644:2(III)(b)-(c); N.J. Stat. Ann. § 2C:33-8; N.Y. Penal Law §

funeral as a separate offense.[5] Two reform jurisdictions do not specifically criminalize disrupting a meeting.[6]

The revised public nuisance statute only proscribes conduct that occurs in a location that is open to the general public or the communal area of multi-unit housing. Many reform jurisdiction statutes are silent as to the location in which the conduct occurs. However, because the various types of conduct prohibited by the revised public nuisance statute often appear as multiple public order offenses in the reform jurisdictions, it is not possible to generalize whether the definition of "public" in each state is coextensive with the locations in the RCC.[7]

Lastly, eliminating urinating and defecating in a public place is broadly supported by criminal codes in reform jurisdictions. Only two reform jurisdictions punish public urination as disorderly conduct.[8] Both states punish public urination only "under circumstances which the person should know will likely cause affront or alarm to another."[9] The revised statute largely captures similar conduct in RCC § 22E-4001.

RCC § 22E-4203. Blocking a Public Way.

[No national legal trends section.]

RCC § 22E-4204. Unlawful Demonstration.

[No national legal trends section.]

RCC § 22E-4205. Breach of Home Privacy.

Relation to National Legal Trends. *The revised invasion of home privacy statute does not substantively change current District law.*

RCC § 22E-4206. Indecent Exposure.

Relation to National Legal Trends. *The revised indecent exposure statute's above-mentioned changes to current District law have mixed support in national legal trends.* Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have

240.20(A)(4); Or. Rev. Stat. Ann. § 166.025(1)(c); S.D. Codified Laws § 22-18-35(3); Tenn. Code Ann. § 39-17-305("lawful activities", presumably, includes gatherings or meetings); Wash. Rev. Code Ann. § 9A.84.030(1)(d).

[5] Ala. Code § 13A-11-17; Ariz. Rev. Stat. Ann. § 13-2930; Ark. Code Ann. § 5-71-230; Colo. Rev. Stat. Ann. § 18-9-125; Conn. Gen. Stat. Ann. § 53a-183c; Del. Code Ann. tit. 11, § 1303; 720 Ill. Comp. Stat. Ann. 5/26-6(a); Kan. Stat. Ann. § 21-6106; Ky. Rev. Stat. Ann. § 525.155; Minn. Stat. Ann. § 609.501; Mo. Ann. Stat. § 574.160; Mont. Code Ann. § 45-8-116; N.H. Rev. Stat. Ann. § 644:2-bI.; N.J. Stat. Ann. § 2C:33-8.1; N.Y. Penal Law § 240.21; N.D. Cent. Code Ann. § 12.1-31-01.1; Ohio Rev. Code Ann. § 2917.12; 18 Pa. Stat. and Cons. Stat. Ann. § 7517; S.D. Codified Laws § 22-13-17; Tenn. Code Ann. § 39-17-317; Tex. Penal Code Ann. § 42.055; Utah Code Ann. § 76-9-108; Wis. Stat. Ann. § 947.011

[6] Alaska and Hawaii.

[7] Research did not include a review of case law interpreting what locations qualify as public or private in each state.

[8] New Hampshire and Utah. N.H. Rev. Stat. Ann. § 645:1-a; Utah Code Ann. § 76-9-702.3.

[9] N.H. Rev. Stat. Ann. § 645:1-a(b); Utah Code Ann. § 76-9-702.3.

comprehensively modernized their criminal laws based in part on the Model Penal Code.[10] All 29 reform jurisdictions criminalize lewdness or indecent exposure.[11] Twenty-five out of 29 reform jurisdictions[12] do not require that the exposure occur in a public place. Eight reform jurisdictions[13] have multiple penalty gradations for indecent exposure based on something other than age[14] or prior criminal history.[15]

[10] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[11] Ala. Code § 13A-6-68; Alaska Stat. Ann. §§ 11.41.458; 11.41.460; Ariz. Rev. Stat. Ann. §§ 13-1402; 13-1403; Ark. Code Ann. § 5-14-112; Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302; Conn. Gen. Stat. Ann. § 53a-186; Del. Code Ann. tit. 11, §§ 764; 765; Haw. Rev. Stat. Ann. § 707-734; 720 Ill. Comp. Stat. Ann. 5/11-30; Ind. Code Ann. §§ 35-45-4-1; 35-45-4-1.5; Kan. Stat. Ann. § 21-5513; Ky. Rev. Stat. Ann. §§ 510.148; 510.150; Me. Rev. Stat. tit. 17-A, § 854; Mo. Ann. Stat. §§ 566.093; 566.095; Minn. Stat. Ann. § 617.23; Mont. Code Ann. § 45-5-504; N.H. Rev. Stat. Ann. § 645:1; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; N.J. Stat. Ann. § 2C:14-4; N.D. Cent. Code Ann. § 12.1-20-12.1; Ohio Rev. Code Ann. § 2907.09; Or. Rev. Stat. Ann. § 163.465; 18 Pa. Stat. and Cons. Stat. Ann. § 3127; S.D. Codified Laws §§ 22-24-1.1; 22-24-1.2; 22-24-1.3; Tenn. Code Ann. § 39-13-511; Tex. Penal Code Ann. § 21.08; Utah Code Ann. § 76-9-702; Wash. Rev. Code Ann. § 9A.88.010; Wis. Stat. Ann. § 944.20.

[12] Ala. Code § 13A-6-68; Alaska Stat. Ann. §§ 11.41.458; 11.41.460; Ariz. Rev. Stat. Ann. §§ 13-1402; 13-1403; Ark. Code Ann. § 5-14-112 ("in a public place or public view"); Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302 ("where the conduct may reasonably be expected to be viewed by members of the public"); Conn. Gen. Stat. Ann. § 53a-186 ("where the conduct may reasonably be expected to be viewed by others"); Del. Code Ann. tit. 11, §§ 764; 765; Haw. Rev. Stat. Ann. § 707-734; 720 Ill. Comp. Stat. Ann. 5/11-30 ("where the conduct may reasonably be expected to be viewed by others"); Ky. Rev. Stat. Ann. §§ 510.148; 510.150; Me. Rev. Stat. tit. 17-A, § 854; Mo. Ann. Stat. §§ 566.093; 566.095 ("open and obscene exposure"); Minn. Stat. Ann. § 617.23; Mont. Code Ann. § 45-5-504; N.H. Rev. Stat. Ann. § 645:1; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; N.J. Stat. Ann. § 2C:14-4; Ohio Rev. Code Ann. § 2907.09; Or. Rev. Stat. Ann. § 163.465 ("in, or in view of, a public place"); 18 Pa. Stat. and Cons. Stat. Ann. § 3127; S.D. Codified Laws § 22-24-1.2 ("in a public place, or in the view of a public place"); Tenn. Code Ann. § 39-13-511; Tex. Penal Code Ann. § 21.08; Utah Code Ann. § 76-9-702; Wash. Rev. Code Ann. § 9A.88.010; Wis. Stat. Ann. § 944.20.

[13] Alaska Stat. Ann. §§11.41.458; Ark. Code Ann. § 5-14-112; Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302; Ind. Code Ann. §§ 35-45-4-1; 35-45-4-1.5; Minn. Stat. Ann. § 617.23; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; S.D. Codified Laws § 22-24-1.3; Tenn. Code Ann. § 39-13-511.

[14] [The CCRC expects to update the draft RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304) to include liability for engaging in a sex act or masturbation in view of a minor, or engaging in or causing a minor to engage in a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.]

[15] RCC § 22E-606.

Chapter 43. Group Misconduct.

RCC § 22E-4301. Rioting.

Relation to National Legal Trends. *The revised rioting statute's above-mentioned substantive changes to current District law have mixed support in national legal trends.*

First, defining rioting as a form of group disorderly conduct is consistent with criminal codes in a minority of reform jurisdictions. Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[1] all but two have a rioting statute.[2] Six of these twenty-seven reform jurisdictions with a rioting statute explicitly define rioting as disorderly conduct in a group similar to the RCC.[3] Similarly, the MPC defines rioting as disorderly conduct in a group.[4] The remaining twenty-one rioting statutes do not reference "disorderly conduct",[5] but instead refer to "tumultuous or violent conduct" or a "disturbance of public peace" or similar language without specifying how such conduct relates to disorderly conduct.[6]

Second, eliminating incitement as a distinct basis for rioting liability is broadly supported by criminal codes in reform jurisdictions. Only eleven reform jurisdictions distinctly criminalize incitement to riot at all.[7] Nine of those eleven states punish

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[1] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[2] All reform jurisdictions except Washington and Wisconsin criminalize engaging in a public riot. Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Me. Rev. Stat. tit. 17-A, § 503; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.J. Stat. 2C:33-1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Ohio Rev. Code Ann. § 2917.03; Or. Rev. Stat. Ann. § 166.015; 18 Pa. Cons. Stat. Ann. § 5501; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104. Washington has a related offense called Criminal Mischief. Wash. Rev. Code Ann. § 9A.84.010.

[3] Delaware, Hawaii, Maine, New Jersey, Ohio, and Pennsylvania. Del. Code Ann. tit. 11 § 1302; Haw. Rev. Stat. Ann. § 711-1103; Me. Rev. Stat. tit. 17-A, § 503; N.J. Stat. § 2C:33-1; Ohio Rev. Code Ann. § 2917.03; 18 Pa. Cons. Stat. Ann. § 5501.

[4] Model Penal Code § 250.1. Riot; Failure to Disperse.

[5] Case law research was not performed to determine how many states have held that disorderly conduct is a lesser-included offense of rioting.

[6] Ala. Code § 13A-11-3; Alaska Stat. Ann. § 11.61.100; Ariz. Rev. Stat. Ann. § 13-2903; Ark. Code Ann. § 5-71-201; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-176; 720 Ill. Comp. Stat. Ann. 5/25-1 ("mob action"); Ind. Code Ann. § 35-45-1-2; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. § 525.030; Minn. Stat. Ann. § 609.71; Mo. Ann. Stat. § 574.050; Mont. Code Ann. § 45-8-103; N.H. Rev. Stat. § 644:1; N.Y. Penal Law § 240.05; N.D. Cent. Code Ann. § 12.1-25-03; Or. Rev. Stat. Ann. § 166.015; S.D. Codified Laws § 22-10-9; Tenn. Code Ann. § 39-17-302; Tex. Penal Code Ann. § 42.02; Utah Code Ann. § 76-9-104.

[7] Alabama, Arkansas, Colorado, Connecticut, Kansas, Kentucky, Montana, New York, North Dakota, South Dakota, and Tennessee. Ala. Code § 13A-11-4; Ark. Code § 5-71-203; Colo. Rev. Stat. Ann. § 18-9-102; Conn. Gen. Stat. Ann. § 53a-178; Kan. Stat. Ann. § 21-6201; Ky. Rev. Stat. Ann. § 525.040; Mont. Code Ann. § 45-8-104; N.Y. Penal Law § 240.08; N.D. Cent. Code Ann. § 12.1-25-01; S.D. Codified Laws §§ 22-10-6, 22-10-6.1; Tenn. Code Ann. § 39-17-304.

incitement as a misdemeanor or lower-level felony as compared to the 10-year penalty in the District.[8] Only the Dakotas have a maximum penalty for incitement that is as high as the District of Columbia's current law.[9] The MPC rioting statute does not include an incitement provision.[10]

Third, the revised rioting statute's single gradation structure is consistent with approximately half of the criminal codes in reformed jurisdictions and the MPC.[11] Fifteen reform jurisdictions have multiple gradations of rioting in a public place.[12] Most of these jurisdictions grade more severely either on the presence or use of a dangerous weapon during the rioting,[13] or on the infliction of physical injury or substantial property damage.[14]

Finally, there is strong support in revised statutes for requiring at least recklessness as to the predicate conduct. A majority of the 27 reform jurisdictions that outlaw rioting require at least recklessness as to whether the actor's conduct causes public alarm.[15]

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[8] Alabama punishes incitement as a misdemeanor. Ala. Code § 13A-11-4. Arkansas punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Ark. Code § 5-71-203. Colorado punishes incitement as a misdemeanor, unless there is resulting damage or injury, in which case it is a low-level felony. Colo. Rev. Stat. Ann. § 18-9-102. Connecticut punishes incitement as a misdemeanor. Conn. Gen. Stat. Ann. § 53a-178. Kansas punishes incitement as a low-level felony. Kan. Stat. Ann. § 21-6201. Kentucky punishes incitement as a misdemeanor. Ky. Rev. Stat. Ann. § 525.040. Montana punishes incitement outside a correctional institution as a misdemeanor. Mont. Code Ann. § 45-8-104. New York punishes incitement as a misdemeanor. N.Y. Penal Law § 240.08. Tennessee punishes incitement as a misdemeanor. Tenn. Code Ann. § 39-17-304.

[9] The rioting statutes in the Dakotas each include an additional limitation. North Dakota punishes incitement as a Class B felony only if: (1) the person incites five or more people or (2) the riot involves 100 or more people. N.D. Cent. Code Ann. § 12.1-25-01. South Dakota punishes incitement as a Class 2 felony only if the person also engages in rioting himself. S.D. Codified Laws §§ 22-10-6, 22-10-6.1.

[10] Model Penal Code § 250.1. Riot; Failure to Disperse.

[11] *Id*.

[12] Arkansas, Colorado, Connecticut, Illinois, Indiana, Kentucky, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Ohio, South Dakota, Tennessee, and Utah. Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b); Ind. Code Ann. § 35-45-1-2(Sec. 2); Ky. Rev. Stat. § 525.020; Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); N.Y. Penal Law § 240.06; N.D. Cent. Code Ann. § 12.1-25-01(4); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3). Some states recognize that a penal institution is not a public place or punish prison rioting as a distinct offense. *See* N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-301(3); Wash. Rev. Code Ann. § 9.94.010.

[13] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[14] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

[15] Ala. Code § 13A-11-3 ("intentionally or recklessly"); Ariz. Rev. Stat. Ann. § 13-2903 ("recklessly"); Ark. Code Ann. § 5-71-201 ("knowingly"); Conn. Gen. Stat. Ann. § 53a-176 ("intentionally or recklessly"); Del. Code Ann. tit. 11 § 1302 ("with intent to…"); Haw. Rev. Stat. Ann. § 711-1103 ("with intent to…" or with a weapon); 720 Ill. Comp. Stat. Ann. 5/25-1 ("knowing or reckless"); Ind. Code Ann. § 35-45-1-2 ("recklessly, knowingly, or intentionally"); Ky. Rev. Stat. § 525.030 ("knowingly"); Me. Rev. Stat. tit. 17-A, § 503 ("with intent to…" or with a weapon); Minn. Stat. Ann. § 609.71 ("by an intentional act"); Mo. Ann. Stat. § 574.050 ("knowingly"); Mont. Code Ann. § 45-8-103 ("purposely and knowingly"); N.H. Rev. Stat. § 644:1 ("purposely or recklessly"); N.J. Stat. 2C:33-1("with purpose to…"); N.Y. Penal Law § 240.05 ("intentionally or recklessly"); Ohio Rev. Code Ann. § 2917.03 ("with purpose to…"); Or. Rev. Stat. Ann. §

RCC § 22E-4302. Failure to Disperse.
[Previously RCC § 22E-4102. Failure to Disperse.]

Relation to National Legal Trends. *The revised failure to disperse statute is broadly supported by national legal trends.*

Of the twenty-nine states (hereafter "reform jurisdictions") that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[16] 27 criminalize failure to disperse as a separate low-level misdemeanor offense or as a type of disorderly conduct, unlawful assembly, or rioting.[17]

166.015 ("intentionally or recklessly"); 18 Pa. Cons. Stat. Ann. § 5501 ("with intent to…" or with a weapon); Tenn. Code Ann. § 39-17-302 ("knowingly"); Tex. Penal Code Ann. § 42.02 ("knowingly"); Utah Code Ann. § 76-9-104 ("knowingly or recklessly"). Case law research was not performed to determined the culpable mental states where statutes were silent in Alaska, Colorado, Kansas, North Dakota, and South Dakota.

[16] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[17] Ala.Code 1975 § 13A-11-6; Ala.Code 1975 § 13A-11-7(a)(6); Alaska Stat. Ann. § 11.61.110; Ariz. Rev. Stat. § 13-2902(A)(2); Ariz. Rev. Stat. § 13-2904(A)(5); Ark. Code Ann. § 5-71-206; Ark. Code Ann. § 5-71-207(a)(6); Del. Code Ann. tit. 11, § 1301(1)(e) and (2); Haw. Rev. Stat. Ann. § 711-1102; Haw. Rev. Stat. Ann. § 711-1101(b); 720 Ill. Comp. Stat. Ann. 5/25-1(b)(4); Kan. Stat. Ann. § 21-6202(c)(2); Ky. Rev. Stat. Ann. § 525.060 (1)(c); Me. Rev. Stat. tit. 17-A, § 502; Minn. Stat. Ann. § 609.715; Mo. Ann. Stat. § 574.060; Mont. Code Ann. § 45-8-102; N.H. Rev. Stat. § 644:1(II); N.H. Rev. Stat. § 644:2(IV)(c); N.J. Stat. Ann. § 2C:33-1(b); N.Y. Penal Law § 240.20(6); N.D. Cent. Code Ann. § 12.1-25-04; Ohio Rev. Code Ann. § 2917.04; Ohio Rev. Code Ann. § 2917.11(3)(a); 18 Pa.C.S.A. § 5502; S.D. Codified Laws § 22-10-11; Tenn. Code Ann. § 39-17-305(a)(2); Utah Code Ann. § 76-9-104; Utah Code Ann. § 76-9-102(1)(a); Wash. Rev. Code Ann. § 9A.84.020; Wis. Stat. Ann. § 947.06(3)-(4).

Chapter 44. Prostitution and Related Statutes.

§ 22E-4401. Prostitution.

[No national legal trends section.]

§ 22E-4402. Patronizing Prostitution.

[No national legal trends section.]

§ 22E-4403. Trafficking in Commercial Sex.

[No national legal trends section.]

§ 22E-4404. Civil Forfeiture.

[No national legal trends section.]

Chapter 46. Offenses Against the Family and Youth.

§ 22E-4601. Contributing to the Delinquency of a Minor.

[No national legal trends section.]

D.C. Code Statutes Outside Title 22 Recommended for Revision

RCC § 7-2502.01A. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.
[Previously RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.]

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 7-2502.15. Possession of a Stun Gun.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

Relation to National Legal Trends. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[1] None of these reform jurisdictions criminalize simple possession of a bean shooter, sling, projectile,[2] or dart.

RCC § 7-2507.02A. Unlawful Storage of a Firearm.
[Previously RCC § 7-2507.02. Unlawful Storage of a Firearm.]

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

[1] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.
[2] Some states prohibit *explosive* projectiles such as missiles, grenades, and ammunition.

RCC § 7-2509.06A. Carrying a Pistol in an Unlawful Manner.
[Previously RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner.]

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. The wide variability in other states' weapon possession statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 16-705. Jury trial; trial by court.

[No national legal trends.]

RCC § 16-1005A. Criminal Contempt for Violation of a Civil Protection Order.

[No national legal trends section.]

RCC § 16-1021. Parental Kidnapping Definitions.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 16-1022. Parental Kidnapping Criminal Offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

RCC § 16-1023. Protective Custody and Return of Child.

[No national legal trends section.]

RCC § 16-1024. Expungement of Parental Kidnapping Conviction.

[No national legal trends section.]

RCC § 23-586. Failure to Appear after Release on Citation or Bench Warrant Bond.

[No national legal trends section.]

RCC § 23-1327. Failure to Appear in Violation of a Court Order.

[No national legal trends section.]

RCC § 23-1329A. Criminal Contempt for Violation of a Release Condition.

[No national legal trends section.]

RCC § 24-241.05A. Violation of Work Release.

[No national legal trends section.]

§ 24-403.03. Modification of an imposed term of imprisonment.

[No national legal trends section.]

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

Relation to National Legal Trends. The changes to District law are broadly supported by national legal trends.

First, the revised statute includes an exception for passengers of commercial and recreational vehicles. Twenty-nine states (hereafter "reform jurisdictions") have comprehensively modernized their criminal laws based in part on the Model Penal Code.[3] Of these, all 29 have statutes that criminalize consumption of alcohol in a motor vehicle, consistent with 23 U.S.C. 154(b)(1),[4] and all but three include an exception for motor vehicles designed to transport many passengers, consistent with 23 U.S.C. 154(b)(2).[5]

[3] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which—Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[4] *See* Heather Morton, "Open Container and Consumption Statutes," National Conference of State Legislatures, May 13, 2013 (available at http://www.ncsl.org/research/financial-services-and-commerce/open-container-and-consumption-statutes.aspx); Ala. Code § 32-5A-330(b); Alaska Stat. § 28.35.029(a); Ariz. Rev. Stat. Ann. § 4-251(A); Ark. Stat. Ann. § 5-71-212(c)(2); Colo. Rev. Stat. § 42-4-1305(2)(a); Conn. Gen. Stat. § 53a-213; Del. Code Ann. tit. 21, § 4177J; Hawaii Rev. Stat. § 291-3.2; Ill. Rev. Stat. ch. 625, § 5/11-502(a)-(b); Ind. Code § 9-30-15-4; Kan. Stat. Ann. § 8-1599; Ky. Rev. Stat. § 189.530; Me. Rev. Stat. Ann. tit. 29-A, § 2112-A(2); Minn. Stat. § 169A.35(Subd. 2); Mo. Rev. Stat. § 577.017; Mont. Code Ann. § 61-8-460(1); N.H. Rev. Stat. Ann. § 265-A:44; N.J. Rev. Stat. § 39:4-51a; N.Y. Vehicle & Traffic Law § 1227; N.D. Cent. Code § 39-08-18; Ohio Rev. Code Ann. §§ 4301.62, 4301.64; Or. Rev. Stat. § 811.170; Pa. Cons. Stat. tit. 75, § 3809(a); S.D. Codified Laws Ann. § 35-1-9.1; Tenn. Code Ann. § 55-10-416; Tex. Penal Code Ann. § 49.031(b); Utah Code Ann. § 41-6a-526; Wash. Rev. Code § 46.61.519; Wis. Stat. § 346.935.

[5] Some statutes exclude all passengers and other statutes exclude passengers in commercial or recreational vehicles. Ala. Code § 32-5A-330(c); Alaska Stat. § 28.35.029(b)(3)-(4); Ariz. Rev. Stat. Ann. § 4-251(C); Colo. Rev. Stat. § 42-4-1305(2)(b); Conn. Gen. Stat. § 53a-213; Del. Code Ann. tit. 21, § 4177J; Hawaii Rev. Stat. § 291-3.4; Ill. Rev. Stat. ch. 625, §5/11-502(c); Ind. Code § 9-30-15-1; Kan. Stat. Ann. § 8-1599(b)(3); Ky. Rev. Stat. §189.530; Me. Rev. Stat. Ann. tit. 29-A, § 2112-A(3); Minn. Stat. § 169A.35(Subd. 6); Mont. Code Ann. § 61-8-460(2); N.H. Rev. Stat. Ann. § 265-A:44(V); N.J. Rev. Stat. § 39:4-51b(a); N.Y. Vehicle & Traffic Law § 1227; N.D. Cent. Code § 39-08-18; Ohio Rev. Code Ann. § 4301.62(D); Or. Rev. Stat. §

Second, the revised statute does not criminalize possession of an open container of alcohol outside of a motor vehicle or public intoxication. Only 11 of the 29 reform jurisdictions appear to criminalize possession of an open container of alcohol in public.[6] One of these statutes applies only to schools, churches, and courts,[7] and another applies only to buildings, parks, and stadiums.[8] At the municipal level, at least two other large cities have recently reexamined the criminalization of "quality-of-life" infractions. For example, in 2016, the New York City Council passed legislation that imposes a presumption of a civil summons only for eight minor offenses, including possession of an open container of alcohol (in a motor vehicle).[9] In the same year, San Francisco discarded 66,000 arrest warrants for petty offenses including public drunkenness, reasoning that jailing is a disproportionate remedy.[10] Several states forbid municipalities from criminalizing public drinking or public intoxication.[11] A 2013 national poll indicates few American adults support criminal charges being brought against people who drink in public.[12] A 2019 poll of District voters found that 48.5% rated possessing an open container of alcohol in a public place most similar to a non-crime such as a speeding ticket.[13]

RCC § 48-904.01a. Possession of a Controlled Substance.

Relation to National Legal Trends. *The revised possession of a controlled substance statute's above-mentioned substantive changes have mixed support from national legal trends.*

First, grading possession of a controlled substance based on the type of substance is not supported by national legal trends. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code

811.170; Pa. Cons. Stat. tit. 75, § 3809(b); Tenn. Code Ann. § 55-10-416; Tex. Penal Code Ann. § 49.031(c); Utah Code Ann. § 41-6a-526(4)-(5); Wash. Rev. Code § 46.61.519(4); Wis. Stat. § 346.935(4)(b).

[6] Ariz. Rev. Stat. Ann. § 4-244; Ark. Stat. Ann. § 5-71-212; Kan. Stat. Ann. § 41-719; Ky. Rev. Stat. § 222.202; Me. Rev. Stat. Ann. tit. 17, § 2003-A; Mo. Rev. Stat. § 574.075; Ohio Rev. Code Ann. § 4301.62; S.D. Codified Laws Ann. § 35-1-5.3; Tex. Alcoholic Beverage Code § 101.75; Utah Code Ann. § 32B-4-421; Wash. Rev. Code § 66.44.100.

[7] Mo. Rev. Stat. § 574.075.

[8] Utah Code Ann. § 32B-4-421.

[9] Only in extraordinary cases, such as a history of failing to pay a civil fine or a violation of supervision, may an officer arrest for a criminal offense. *See* J. David Goodman and Benjamin Mueller, *New York City Police Officers Told to Relax Stance on Petty Offenses*, THE NEW YORK TIMES (June 13, 2017); *see also* Michael Dresser, *Maryland Senate votes to make open alcohol container violations a civil offense*, THE BALTIMORE SUN (March 3, 2017) (concerning legislative efforts to decriminalize in Maryland); Kathy A. Bolten, *Should public drunkenness be a crime?*, DES MOINES REGISTER (Feb. 11, 2016) (concerning legislative efforts to decriminalize in Iowa); Eric Dexheimer, *Austin officials move to decriminalize public drunkenness*, STATESMAN (September 26, 2018) (concerning legislative efforts to decriminalize in Texas); Sean Webby, *San Jose's drunk-in-public arrests continue to plunge*, THE MERCURY NEWS (July 3, 2009).

[10] Bob Egelko, *SF judge explains why 66,000 arrest warrants were discarded*, SF GATE (Dec. 7, 2016).

[11] Ore. Rev. Stat. § 430.402; Kan. Stat. Ann. § 65-4059; Mo. Ann. Stat. § 67.305; Mont. Code Ann. § 53-24-107; Nev. Rev. Stat. Ann. § 458.260.

[12] *See* YouGov, "Poll Results: Public Drinking" (December 4, 2013) (available at https://today.yougov.com/topics/lifestyle/articles-reports/2013/12/04/poll-results-public-drinking).

[13] CCRC Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses (October 10, 2019).

(MPC) and have a general part (hereafter "reformed code jurisdictions")[14], a slight minority divide their possession of a controlled substance into more than one penalty grade based on the type of substance.[15]

Second, eliminating the separate penalty for liquid PCP is supported by national legal trends. Of the twenty-nine reformed code jurisdictions, none have a separate penalty provision for possession of liquid PCP.

RCC § 48-904.01b. Trafficking of a Controlled Substance.

Relation to National Legal Trends. *The revised trafficking of a controlled substance statute's above-mentioned substantive changes have mixed support from national legal trends.*

First, using quantities to grade the trafficking of a controlled substance offense is well supported by other states' statutes. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions")[16], 24 states grade their analogous trafficking offense based on the quantity of the controlled substance involved in the offense.[17]

Second, the drug quantity thresholds for first and second degree trafficking of a controlled substance have mixed support in other states' statutes. For opium, six states[18]

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[14] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[15] Alaska Stat. Ann. § 11.71.030, Alaska Stat. Ann. § 11.71.040; Ark. Code Ann. § 5-64-419; Del. Code Ann. tit. 16, § 4756, Del. Code Ann. tit. 16, § 4763; Haw. Rev. Stat. Ann. § 712-1241, Haw. Rev. Stat. Ann. § 712-1242, Haw. Rev. Stat. Ann. § 712-1243; 720 Ill. Comp. Stat. Ann. 570/402; Ind. Code Ann. § 35-48-4-6, Ind. Code Ann. § 35-48-4-6.1, Ind. Code Ann. § 35-48-4-7; Ky. Rev. Stat. Ann. § 218A.1415, Ky. Rev. Stat. Ann. § 218A.1416; Minn. Stat. Ann. § 152.021, Minn. Stat. Ann. § 152.022, Minn. Stat. Ann. § 152.023, Minn. Stat. Ann. § 152.024, Minn. Stat. Ann. § 152.025; N.H. Rev. Stat. Ann. § 318-B:2; N.Y. Penal Law § 220.21, N.Y. Penal Law § 220.18, N.Y. Penal Law § 220.16, N.Y. Penal Law § 220.09, N.Y. Penal Law § 220.06, N.Y. Penal Law § 220.03; Ohio Rev. Code Ann. § 2925.11; S.D. Codified Laws § 22-42-5; Tex. Health & Safety Code Ann. § 481.115.

[16] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[17] Ala. Code § 13A-12-231; Alaska Stat. Ann. § 11.71.030, Alaska Stat. Ann. § 11.71.040, Alaska Stat. Ann. § 11.71.050; Ark. Code Ann. § 5-64-422, Ark. Code Ann. § 5-64-426; Ariz. Rev. Stat. Ann. § 13-3407; Colo. Rev. Stat. Ann. § 18-18-405; Conn. Gen. Stat. Ann. § 21a-278; Del. Code Ann. tit. 16, § 4751C; Haw. Rev. Stat. Ann. § 712-1241, Haw. Rev. Stat. Ann. § 712-1242, Haw. Rev. Stat. Ann. § 712-1243; 720 Ill. Comp. Stat. Ann. 570/401; Ind. Code Ann. § 35-48-4-1; Ind. Code Ann. § 35-48-4-1.1; Ind. Code Ann. § 35-48-4-2; Kan. Stat. Ann. § 21-5705; Ky. Rev. Stat. Ann. § 218A.1412, Ky. Rev. Stat. Ann. § 218A.1413; Me. Rev. Stat. tit. 17-A, § 1103; Mo. Ann. Stat. § 579.065; Minn. Stat. Ann. § 152.021, Minn. Stat. Ann. § 152.022, Minn. Stat. Ann. § 152.023; N.H. Rev. Stat. Ann. § 318-B:26; N.J. Stat. Ann. § 2C:35-5; N.Y. Penal Law § 220.43, N.Y. Penal Law § 220.41, N.Y. Penal Law § 220.39, N.Y. Penal Law § 220.34, N.Y. Penal Law § 220.31; N.D. Cent. Code Ann. § 19-03.1-23.1; Ohio Rev. Code Ann. § 2925.03; Tenn. Code Ann. § 39-17-417; Tex. Health & Safety Code Ann. § 481.112; Tex. Health & Safety Code Ann. § 481.1121; Wash. Rev. Code Ann. § 69.50.401; Wis. Stat. Ann. § 961.41.

[18] Arkansas, Colorado, Illinois, Kansas, Texas, and Washington.

use 200 grams or more as the threshold quantity for their highest penalty grade, and seven states[19] use 20 grams or more as the threshold quantity for the second highest penalty grade. For cocaine, six states[20] use 400 grams or more as the threshold quantity for their highest penalty grade, and five states[21] use 50 grams or more as the threshold quantity for the second highest penalty grade. For methamphetamine, six states[22] use 200 grams or more as the threshold quantity for their highest penalty grade, and nine states[23] use 20 grams or more as the threshold quantity for the second highest penalty grade. For phencyclidine, seven states[24] use 100 grams or more as the threshold quantity for their highest penalty grade, and 11 states[25] use 10 grams or more as the threshold quantity for the second highest penalty grade. There were no clear legal trends as to quantity thresholds for opium poppy or poppy straw, ecgonine, or phenmatrazine. Different states use an array of penalties for various grades of their analogous trafficking offenses, and it is difficult to draw direct comparisons between different states' quantity thresholds.

Codifying defenses to trafficking of a controlled substance if the person distributed or possessed with intent to distribute a controlled substance when not in exchange for anything of value, or if the person labeled or relabeled a controlled substance for personal use is not supported by national legal trends. One of the 29 reformed code jurisdictions, Arkansas, clearly bars liability for distribution of controlled substances not in exchange for something of value.[26] Due to time and staffing constraints the CCRC did not review statutes in the non-reformed states, and did not review case law to determine if any states' courts have limited application of analogous trafficking offenses under these circumstances.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

Relation to National Legal Trends. *It is unclear whether the revised trafficking of a counterfeit substance statute's above-mentioned substantive changes have support from national legal trends.*

As discussed in commentary to RCC § 48-904.01b, grading controlled substance offenses based on the quantity of substance involved in the offense is supported by national legal trends. However, the CCRC did not comprehensively review analogous trafficking of counterfeit substance offenses in other jurisdictions due to time and staffing constraints.

[19] Alabama, Arkansas, Illinois, Kansas, Minnesota, Ohio, and Texas.
[20] Alabama, Illinois, Kansas, Tennessee, Texas, and Washington.
[21] Alabama, Illinois, Kansas, Missouri, Texas.
[22] Alabama, Arkansas, Illinois, Tennessee, Texas, and Washington.
[23] Alabama, Delaware, Illinois, Kansas, Missouri, New Hampshire, Ohio, Tennessee, and Texas.
[24] Arkansas, Colorado, Kansas, Minnesota, Tennessee, Texas, and Washington.
[25] Alabama, Colorado, Delaware, Illinois, Indiana, Kansas, Minnesota, Ohio, Tennessee, Texas, and Wisconsin.
[26] Ark. Code. Ann. § 5-64-101 (defining the term "deliver" as "the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance or counterfeit substance *in exchange for money or anything of value*, whether or not there is an agency relationship").

RCC § 48-904.10. Possession of Drug Manufacturing Paraphernalia.

Relation to National Legal Trends. *The revised possession of drug manufacturing paraphernalia statute's above-mentioned substantive changes have limited support from national legal trends.*

Limiting the scope of the possession of drug paraphernalia offense to objects that have been used or are intended for use in manufacturing of a controlled substance is not supported by national legal trends. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[27] none limit the scope of their analogous possession of paraphernalia statutes to objects used for manufacturing controlled substances. However, Alaska does not have an analogous possession of drug paraphernalia offense, and New Mexico recently decriminalized possession of *all* drug paraphernalia, regardless of its actual or intended use.[28]

RCC § 48-904.11. Trafficking of Drug Paraphernalia.

Relation to National Legal Trends. *The revised trafficking of drug paraphernalia statute's above-mentioned substantive changes are unsupported or have limited support in other states' statutes.*

First, criminalizing trafficking of any object with intent that the object will be used in conjunction with a controlled substance rather than criminalizing a defined term "paraphernalia" that includes a detailed list of items is not supported by national legal trends. Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (hereafter "reformed code jurisdictions"),[29] only one, Indiana, does not use the term "drug paraphernalia."

Second, it is unclear whether requiring that the actor has intent that the object will be used in conjunction with a controlled substance is supported by national legal trends. Due to time and staffing constraints, the CCRC staff did not review case law interpreting the analogous trafficking of drug paraphernalia statutes to determine the requisite mental state in the 29 reformed code jurisdictions.

§ 48-904.12. Maintaining Methamphetamine Production.

Relation to National Legal Trends Repealing D.C. Code § 48-904.03a has significant support in other states' statutes. Of the twenty-nine states that have comprehensively reformed

[27] See Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[28] N.M. Stat. Ann. § 30-31-25.1 (possession of drug paraphernalia is only punishable by a fine).

[29] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[30] a slight majority do not have an analogous offense.[31]

[30] *See,* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[31] These states are: Connecticut, Hawaii, Kansas, Kentucky, Maine, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Tennessee, and Texas.

D.C. Code Statutes Recommended for Repeal

D.C. Code § 3-206. Unlawful acts.

[No national legal trends section.]

D.C. Code § 4-125. Assisting child to leave institution without authority; concealing such child; duty of police.

[No national legal trends section.]

D.C. Code § 5-115.03. Neglect to Make Arrest for Offense Committed in Presence.

Relation to National Legal Trends. No other state has a similar criminal provision concerning a failure to make an arrest. Nevada and Oklahoma criminalize willfully refusing to arrest a person after being "lawfully commanded" to do so.[1] New Jersey punishes a public servant's refraining from performing a duty when it is done "with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit."[2] Twenty-five states explicitly allow law enforcement officers to issue a citation instead of arrest for some or all offenses, by statute or in the rules of criminal procedure.[3] Eleven additional states appear to allow officers to issue a citation instead of arrest (that is, the code has a citation procedure and does not explicitly require an arrest).[4] Ten states enforce a presumption that officers will issue a citation instead of arrest for certain offenses.[5]

D.C. Code §§ 7-2502.12 and 7-2502.13. Possession of Self-Defense Sprays.

Relation to National Legal Trends. Repealing D.C. Code §§ 7-2502.12 and 7-2502.13 has strong support in other states' statutes. Of the twenty-nine states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[6] only three have statutes that clearly criminalize possession

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[1] Nev. Rev. Stat. Ann. § 199.270; Okla. Stat. Ann. tit. 21, § 537.

[2] N.J. Stat. Ann. § 2C:30-2.

[3] Alaska, Arkansas, California, Colorado, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, South Dakota, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[4] Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Montana, North Carolina, Oregon, Texas, and Wyoming. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[5] Alaska, Kentucky, Louisiana, Maryland, Minnesota, Nebraska, Ohio, Pennsylvania, Rhode Island, and Vermont. *See* National Conference of State Legislatures, *Citation in Lieu of Arrest*, October 23, 2017, *available at* http://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx.

[6] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

of self-defense spray[7] and only two criminalize carrying spray with an unlawful intent.[8] Four states separately criminalize assaulting a person with spray.[9]

D.C. Code § 8-305. Penalty.

[No national legal trends section.]

D.C. Code § 9-433.01. Permit required; exceptions.

[No national legal trends section.]

D.C. Code § 9-433.02. Penalty; prosecution.

[No national legal trends section.]

D.C. Code § 22-1003. Rest, water and feeding for animals transported by railroad company.

[No national legal trends section.]

D.C. Code § 22-1012(a). Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.

[No national legal trends section.]

D.C. Code § 22-1308. Playing games in streets.

[No national legal trends section.]

D.C. Code § 22–1311. Allowing dogs to go at large.

Relation to National Legal Trends. Many states have prohibitions against allowing dogs to go at large in their criminal codes, though most do not apply only to dangerous dogs. However, the monetary penalties associated with this offense are significantly lower in other jurisdictions when compared to what is permitted under D.C. Code § 22-1311(a), even where dog attacks have occurred.[6] Conversely, while not many states have codified prohibitions for having female dogs in heat at large,[7] in those that do

[7] Tex. Penal Code Ann. § 46.05 (a)(4); *see also* Wash. Rev. Code Ann. § 9.91.160 (prohibiting possession by children); Wis. Stat. Ann. § 941.26.

[8] Arkansas criminalizes carrying spray, unless it is carried for self-defense (Ark. Code Ann. § 5-73-124); Delaware criminalizes carrying spray, unless it is carried for a lawful purpose without intent to injure or threaten (Del. Code Ann. tit. 11, § 1443).

[9] Alabama separately criminalizes using spray to assault a person (Ala. Code § 13A-6-27); Oregon separately criminalizes using spray to assault a police officer (Or. Rev. Stat. Ann. §§ 163.211-13); Maine separately criminalizes using spray to assault a person (Me. Rev. Stat. tit. 17-A, § 1002); Pennsylvania separately criminalizes using spray to assault a person in a labor dispute (18 Pa. Stat. and Cons. Stat. Ann. § 2708).

have such statues the penalties were much stricter than the maximum allowable of $20 under the current D.C. Code.[8]

[D.C. Code § 22-1317. Flying fire balloons or parachutes.]

[D.C. Code § 22-1402. Recordation of deed, contract, or conveyance with intent to extort money.]

D.C. Code §§ 22-1511 – 22-1513. Fraudulent Advertising.

[No national legal trends section.]

[D.C. Code § 22-1807. Punishment for offenses not covered by provisions of Code.]

D.C. Code §§ 22-2301 – 22-2306. Panhandling.

Relation to National Legal Trends. Many states do not codify panhandling or begging statutes, leaving the matter to local ordinance, if there is any criminal law.[10] Some jurisdictions, like Chicago, have repealed their panhandling statute and have moved to alternative methods of addressing homelessness without burdening citizens in need.[11] Other cities have either repealed their statutes or no longer enforce their panhandling bans.[12] For those state and local jurisdictions that continue to have a panhandling of begging statute, the penalties are typically lower than 90 days.[13]

Since the 2015 Supreme Court decision in *Reed*, there has been a growing trend of challenges to panhandling statutes based on First Amendment grounds.[14] These challenges

[10] For example, Michigan allows municipalities to draft their own panhandling statutes. "ACLU Puts Municipalities on Notice: Laws Banning Peaceful Panhandling Are Unconstitutional." American Civil Liberties Union of Michigan. October 29, 2013. https://www.aclu.org/press-releases/aclu-puts-municipalities-notice-laws-banning-peaceful-panhandling-are (ACLU of Michigan sent letters to 84 municipalities across the state of Michigan notifying them that their panhandling ordinances were unconstitutional and should be appealed). Arizona and Indiana, both have state panhandling statutes. *But see* Ariz. Rev. Stat. § 13-2914 (2019); Ind. Code § 35-45-17-1 (2019).

[11] "Chicago Repeals Unconstitutional Prohibition on Panhandling." American Civil Liberties Union Illinois. December 6, 2018. https://www.aclu-il.org/en/press-releases/chicago-repeals-unconstitutional-prohibition-panhandling.

[12] *See, e.g.,* Clift, Theresa. "Sacramento ordinance banned 'aggressive panhandling.' Now the law will be erased." The Sacramento Bee. May 14, 2019. https://www.sacbee.com/news/local/article230365514.html; Kiron, Andrew. "Superior Repeals Panhandling Ordinance." September 19, 2018; https://www.fox21online.com/2018/09/19/superior-repeals-panhandling-ordinance; "Rio Rancho Repeals Ordinance Making Panhandling Illegal." KRQE News. January 13, 2019. https://www.krqe.com/news/new-mexico/rio-rancho-repeals-ordinance-making-panhandling-illegal.

[13] In Ind. Code Ann. § 35-45-17-2, panhandling is classified as a Class C misdemeanor, punishable by up to 60 days in jail and a fine of up to $500. In Ariz. Rev. Stat. § 13-2914, panhandling is classified as a "petty offense," punishable by a maximum fine of $300 (and no incarceration). petty offense. Ariz. Rev. Stat. § 13-802.

[14] In the wake of *Reed,* the American Civil Liberties Union and the National Law Center on Homelessness & Poverty launched the #IAskForHelpBecause campaign aimed at challenging unconstitutional panhandling

have led to the repeal of panhandling statutes in many jurisdictions as federal courts are increasingly finding panhandling ordinances constitutionally deficient.[15] Many of these ordinances have language similar to the District's statute.[16]

D.C. Code § 22-3224. Fraudulent registration.

[No national legal trends section.]

D.C. Code § 22-3303. Grave robbery; burying or selling dead bodies.

[No national legal trends section.]

D.C. Code § 22-3309. Destroying boundary markers.

[No national legal trends section.]

D.C. Code § 22-3313. Destroying or defacing building material for streets.

[No national legal trends section.]

D.C. Code § 22-3314. Destroying cemetery railing or tomb.

[No national legal trends section.]

D.C. Code § 22-3320. Obstructing public road; removing milestones.

[No national legal trends section.]

D.C. Code § 34-701. False statements in securing approval for stock issue.

[No national legal trends section.]

D.C. Code § 34-707. Destruction of apparatus or appliance of Commission.

[No national legal trends section.]

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ordinances and promoting constructive alternative approaches to addressing homelessness and hunger. In collaboration with local partner organizations, letters were sent to 37 cities throughout the countries. *See* https://nlchp.org/panhandling/.

[15] *See, e.g. Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), vacated, 135 S. Ct. 2887 (2015), declaring ordinance unconstitutional on remand, 2015 WL 6872450, at *15 (D. Mass. Nov. 9, 2015)).

[16] For example, the City of Champaign's aggressive panhandling statute was repealed where it defined panhandling as "any act by which one person asks, begs, or solicits...by requesting an immediate donation of money or other thing of value," and placed restrictions on where one may engage in panhandling. Champaign, Ill. Code § 23-95.

D.C. Code § 36-153. Unauthorized use, defacing, or sale of registered vessel.

[No national legal trends section.]

D.C. Code § 37-131.08(b). Repeal of Penalties for Illegal Vending.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to the RCC's proposed changes in law. Street and sidewalk vending are often regulated at the municipal level and infrequently appear in state's criminal codes. The wide variability among local governments was prohibitive given agency staffing constraints. In 2018, California decriminalized public vending state-wide.[17] Other legislative efforts are underway, city by city.[18]

Notably, however, regulation of vending often results in litigation over fundamental legal rights. There have been a variety of lawsuits[19] and constitutional challenges concerning freedom of speech,[20] freedom of religious expression,[21] and freedom of artistic expression.[22]

D.C. Code § 47-102. Total indebtedness not to be increased.

[No national legal trends section.]

§ 48-904.07. Enlistment of minors to distribute.

Relation to National Legal Trends. Repealing D.C. Code § 48-904.07 is supported by national legal trends. Of the twenty-nine states that have comprehensively reformed

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[17] Josh Ocampo, *Selling street food is no longer a crime in California, easing fears of jail time and deportation*, MIC (September 20, 2018) (discussing concerns about police harassment and immigration detention and annual economic contributions exceeding $504 million).

[18] E.g., the Institute for Justice's National Street Vending Initiative has advocated for legislation in Birmingham, AL; Orlando, FL; Miami, FL; St. Petersburg, FL; Sarasota, FL; Sunrise, FL; Chicago, IL; Lexington, KY; New Orleans, LA; Las Vegas, NV; Buffalo, NY; Rochester, NY; Columbus, OH; Salem, OR; Pittsburgh, PA; York, PA; and Cranston, RI. *See National Street Vending Initiative* (available at https://ij.org/issues/economic-liberty/vending/) (last visited September 17, 2019).

[19] *See, e.g., Pizza di Joey, LLC v. Mayor & City Council of Baltimore*, 241 Md. App. 139.

[20] *See Enten*, *supra* note 66, (convicting a Korean war veteran of vending without a license for displaying, discussing, and selling historic and contemporary political buttons on sidewalks in order to "express his commitment to the American tradition of political pluralism and to convey his adherence to certain political viewpoints" despite his protestation that the restriction violated his First Amendment rights); *see also People v. Andujar*, 52 Misc. 3d 57 (Supreme Court, Appellate Term, NY 2016) (convicting man of vending without a license for selling condoms contained in packages with political messaging on a street corner).

[21] *See Al-Amin v. City of New York*, 979 F. Supp. 168 (E.D.N.Y. 1997) (in which four African-American Muslims were arrested and issued summonses for unlawful vending on several occasions in 1994 and 1995 for selling perfume oils and incense, and in which the men asserted violation of their free exercise of relation and expressive activity).

[22] *See People v. Howard*, 45 Misc. 3d 66 (Supreme Court, Appellate Term, NY 2014) (convicting a woman of unlicensed general vending for selling rings and costume jewelry in a public space made of "free-pressed flowers," despite her claim the rings were inherently artistic or expressive in nature); *see also People v. Samuels*, 28 N.Y.S. 2d 113 (Court of Special Sessions, NY 1941) (in which three men were convicted of vending song sheets in a public place without a license). *See also* Christen Martosella, *Refusing to Draw the Line: A Speech-Protective Rule for Art Vending Cases*, 13 N.Y.U.J. Legis. & Pub. Pol'y 603 (2010).

their criminal codes influenced by the Model Penal Code (MPC) and have a general part,[23] a slight majority do not have an analogous enlistment of minors to distribute offense.[24]

[23] *See,* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code*: A Brief Overview, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article.

[24] These states are: Alaska, Alabama, Arkansas, Colorado, Indiana, Kansas, Maine, Montana, New Hampshire, New Jersey, South Dakota, Tennessee, Texas, Utah, and Washington.

The states that do have an analogous offense are: Arizona, Ariz. Rev. Stat. Ann. § 13-3409; Connecticut, Conn. Gen. Stat. Ann. § 21a-278a; Delaware, Del. Code Ann. tit. 16, § 4751A; Hawaii, Haw. Rev. Stat. Ann. § 712-1249.7; Illinois, 720 Ill. Comp. Stat. Ann. 570/407.1; Kentucky, Ky. Rev. Stat. Ann. § 530.064; Minnesota, Minn. Stat. Ann. § 152.022; Missouri, Mo. Ann. Stat. § 568.045; New York, N.Y. Penal Law § 220.28; North Dakota, N.D. Cent. Code Ann. § 19-03.1-23; Ohio , Ohio Rev. Code Ann. § 2925.02; Oregon, Or. Rev. Stat. Ann. § 167.262; Wisconsin, Wis. Stat. Ann. § 961.455.