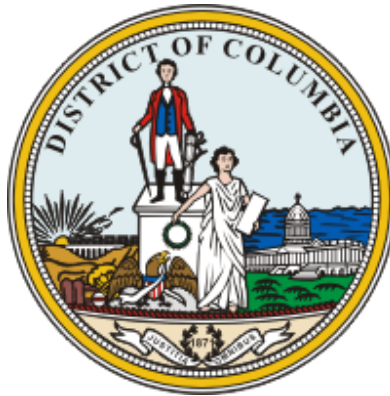




Recommendations for Chapter 2 of the Revised Criminal Code: Basic Requirements of Offense Liability



FIRST DRAFT OF REPORT NO. 2 SUBMITTED FOR ADVISORY GROUP REVIEW
December 21, 2016

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First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code—
Basic Requirements of Offense Liability

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

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

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

The deadline for Advisory Group written comments on this First Draft of Report No. 2, Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability, is February 15, 2017 (eight weeks from the date of issue). Oral comments and written comments received after February 15, 2017 will not be reflected in the Second Draft of Report No. 2. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-201 PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT

- (a) **PROOF OF OFFENSE ELEMENTS BEYOND A REASONABLE DOUBT.** No person may be convicted of an offense unless each offense element is proven beyond a reasonable doubt.
- (b) **OFFENSE ELEMENT DEFINED.** “Offense element” includes the objective elements and culpability requirement necessary to establish liability for an offense.
- (c) **OBJECTIVE ELEMENT DEFINED.** “Objective element” means any conduct element, result element, or circumstance element. For purposes of this Title:
- (1) “Conduct element” means any act or omission, as defined in § 22A-202, that is required to establish liability for an offense.
 - (2) “Result element” means any consequence that must have been caused by a person’s conduct in order to establish liability for an offense.
 - (3) “Circumstance element” means any characteristic or condition relating to either a conduct element or result element the existence of which is required to establish liability for an offense.
- (d) **CULPABILITY REQUIREMENT DEFINED.** “Culpability requirement” includes each of the following:
- (1) The voluntariness requirement, as provided in § 22A-203;
 - (2) The causation requirement, as provided in § 22A-204; and
 - (3) The culpable mental state requirement, as provided in § 22A-205.

COMMENTARY

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

Explanatory Note. Subsection (a) states the burden of proof governing offense elements. It establishes that proof of each offense element beyond a reasonable doubt is the foundation of liability for any offense in the Revised Criminal Code. This is intended to codify the well-established constitutional principle recognized by the U.S. Supreme Court in *In re Winship*: “[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”¹

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the burden of proof governing offense elements, it is well-established by the DCCA that every element of an offense must be proven beyond a reasonable doubt in order to support a criminal conviction.²

¹ 397 U.S. 358, 364 (1970).

² See, e.g., *Conley v. United States*, 79 A.3d 270, 278 (D.C. 2013); *Hatch v. United States*, 35 A.3d 1115, 1121 (D.C. 2011).

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.”³ In practical effect, this means that the defendant in a criminal case may not be required to “prove the critical fact in dispute,”⁴ which is to say any fact that serves to negate an element of the offense.⁵

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.⁶

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).⁷ 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.⁸ (Due to time constraints, the CCRC has no plans to develop recommendations on these matters before its statutory deadline of September 30, 2017).

³ *In re Winship*, 397 U.S. at 364.

⁴ *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975).

⁵ *See Patterson v. New York*, 432 U.S. 197, 207 (1977).

⁶ *In re Winship*, 397 U.S. at 364.

⁷ 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.

⁸ *See, e.g.*, Model Penal Code § 1.12; N.J. Stat. Ann. § 2C:1-13.

2. § 22A-201(b)—Offense Element Defined

Explanatory Note. Subsection (b) provides the definition of “offense element” applicable to § 22A-201(a) and throughout the Revised Criminal Code. It is an open-ended definition, which establishes that both the objective elements and culpability requirement necessary to establish liability for an offense are among the offense elements subject to the burden of proof set forth in § 22A-201(a). What is left unresolved by this non-exclusive list is whether other aspects of criminal liability that are not addressed by the Revised Criminal Code should also be treated as offense elements subject to the burden of proof set forth in § 22A-201(a). Under § 22A-201(b), these issues are left for judicial resolution.

Relation to Current District Law. Section 22A-201(b) codifies District law. While the D.C. Code does not contain a definition of “offense element,” it is clear under DCCA case law that both the objective elements and culpability requirement of an offense are among the facts subject to the proof beyond a reasonable doubt standard.⁹

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.”¹⁰ Both of these requirements, in turn, are among the “fact[s] necessary to constitute the crime with which [the accused] is charged.”¹¹

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.¹² 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.¹³ 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)

⁹ See, e.g., *Conley*, 79 A.3d at 278; *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

¹⁰ *United States v. Apfelbaum*, 445 U.S. 115, 131 (1980).

¹¹ *In re Winship*, 397 U.S. at 364.

¹² See sources cited *supra* note 7.

¹³ 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, see Kentucky Revision Project 501.202 and Illinois Reform Project § 202(1).

does not address such issues.¹⁴ (Due to time constraints the CCRC has no plans to develop general recommendations on these matters before its statutory deadline of September 30, 2017.)

3. § 22A-201(c)—Objective Element Defined

Explanatory Note. Subsection (c) provides the definition of “objective element” applicable to § 22A-201(b) and throughout the Revised Criminal Code. It establishes that the objective elements of an offense—or what in legal parlance is often referred to as an offense’s *actus reus*—are the conduct elements, result elements, and circumstance elements contained in an offense definition. Therefore, all of these elements are subject to the burden of proof set forth in § 22A-201(a).

Subsection (c) also provides precise definitions for each of these three kinds of objective elements. “Conduct element” is narrowly defined 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 a conduct element makes it easier to analytically separate what is usually inconsequential (i.e., the required bodily movement, or where relevant, the failure to make one), from other aspects of a criminal offense that are more central to determining culpability. One such aspect is a “result element,” which, as defined by § 22A-201(c)(2), is any consequence required to have been caused by the actor in order to establish liability. The other relevant aspect is a “circumstance element,” which, as defined by § 22A-201(c)(3), is any characteristic or condition relating to either a conduct element or result element the existence of which is necessary to establish liability.

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

Where, however, a verb employed in an offense definition refers to a particular characteristic of a person’s conduct, rather than a consequence caused by that conduct, the verb is instead likely to be comprised of a conduct element and a circumstance element. For example, in a joyriding offense that prohibits “knowingly using a motor vehicle without consent,” the verb “using” implies an act or omission—for example, stepping on the accelerator—on behalf of the defendant (a conduct element), which is of a specific character, namely, that it amounts to use in the particular context in which it occurs (a circumstance element). Likewise, in a theft offense that prohibits “knowingly obtaining property of another without consent,” the verb “obtaining” implies an act or omission—for example, reaching for a wallet—on behalf of the defendant (a conduct

¹⁴ 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.

element), which is of a specific character, namely, that it amounts to obtaining in the particular context in which it occurs (a circumstance element).

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

Relation to Current District Law. Subsection (c) broadly reflects District law. Although the D.C. Code lacks any explicit reference to the classification of objective elements, the DCCA has recently recognized the distinction between “conduct, resulting harm, [and] attendant circumstances”—as well as the importance of clearly making it—in some recent opinions.¹⁵

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 of different kinds of “objective elements,”¹⁶ which are “often distilled into three categories: the defendant’s conduct, the attendant circumstances, and the results or consequences.”¹⁷ 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.”¹⁸

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

¹⁵ *Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015); see also *Harris v. United States*, 125 A.3d 704, 708 n.3 (D.C. 2015).

¹⁶ 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).

¹⁷ *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)).

¹⁸ Model Penal Code § 2.02 cmt. at 123.

provisions.¹⁹ 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,”²⁰ 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.”²¹ 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.”²² 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.²³ 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*.”²⁴ If true, however, then this creates a “troublesome overlap between culpability as to conduct and culpability as to a circumstance and a result,”²⁵ a problem that has plagued courts attempting to consistently and objectively apply this kind of legislative scheme.²⁶

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 codes²⁷ and finds support in legal commentary.²⁸ The Revised Criminal Code does not use the phrase “nature of the actor’s conduct.”

¹⁹ 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).

²⁰ 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).

²¹ *State v. Crosby*, 154 P.3d 97, 102 (Or. 2007).

²² *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.

²³ *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.

²⁴ Robinson & Grall, *supra* note 20, at 707.

²⁵ 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.*

²⁶ *See, e.g.*, *Cook v. State*, 884 S.W.2d 485, 493 (Tex. Crim. App. 1994) (*en banc*) (Maloney, J., concurring).

²⁷ *See* sources cited *supra* note 22.

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 projects²⁹ and also find general support in legal commentary.³⁰

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.³¹ 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.”³² It will, therefore, no longer make sense to refer to “conduct crimes” under the Revised Criminal Code; every offense, under the prescribed framework, will be comprised of, at minimum, a conduct element and either a circumstance element or result element.³³

4. § 22A-201(d)—Culpability Requirement Defined

Explanatory Note. Subsection (d) provides the definition of “culpability requirement” applicable to § 22A-201(b) and throughout the Revised Criminal Code. It is an open-ended definition, which establishes that the voluntariness requirement, causation requirement, and culpable mental state requirement—to the extent applicable under the general provisions setting forth those requirements—are among the offense elements that comprise the culpability requirement, which is subject to the burden of proof set forth in § 22A-201(a). What is left unresolved by this non-exclusive list is whether other aspects of criminal liability that are not addressed by the Revised Criminal

²⁸ 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.

²⁹ 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.

³⁰ 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).

³¹ For a fuller discussion of this point, see commentary on the voluntariness requirement, § 22A-203, and the culpable mental state requirement, § 22A-205.

³² Robinson & Grall, *supra* note 20, at 712.

³³ 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).

Code should also be treated as part of an offense’s culpability requirement subject to the burden of proof set forth in § 22A-201(a). This question is left for judicial resolution.

Relation to Current District Law. See commentary on the voluntariness requirement, § 22A-203, causation requirement, § 22A-204, and the culpable mental state requirement, § 22A-205.

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.

§ 22A-202 CONDUCT REQUIREMENT

(a) CONDUCT REQUIREMENT. No person may be convicted of an offense unless the person’s liability is based on an act, omission, or possession.

(b) ACT DEFINED. “Act” means a bodily movement.

(c) OMISSION DEFINED. “Omission” means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when:

(1) The failure to act is expressly made sufficient by the law defining the offense; or

(2) A duty to perform the omitted act is otherwise imposed by law.

(d) POSSESSION DEFINED. “Possession” means knowingly exercising control over property, whether or not the property is on one’s person, for a period of time sufficient to allow the actor to terminate his or her control of the property.

COMMENTARY

1. § 22A-202(a)—Conduct Requirement

Explanatory Note. Subsection (a) states the conduct requirement governing all offenses in the Revised Criminal Code. It establishes that commission of an act or omission is a prerequisite to criminal liability. This provision is intended to codify the well-established prohibition against punishing a person for merely possessing undesirable thoughts or status. Subsection (a) also specifically notes that possession is a sufficient means of satisfying the conduct requirement.

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the conduct requirement, the DCCA has clearly recognized that the conduct requirement is a basic and necessary ingredient of criminal liability given that “bad thoughts alone cannot constitute a crime.”¹

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

¹ *Trice v. United States*, 525 A.2d 176, 187 n.5 (D.C. 1987) (Mack, J. dissenting) (internal quotations and alterations omitted); see, e.g., *Conley v. United States*, 79 A.3d 270, 278-79 (D.C. 2013); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

for three centuries.”² And it is no less established today: American courts all seem to accept the basic “principle that no one is punishable for his thoughts.”³ 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.”⁴

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.”⁵ 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 conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”⁶

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,⁷ and each serves different policy goals.⁸ 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.⁹

² Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 282 (2002).

³ *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)).

⁴ 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).

⁵ 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.

⁶ 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.”

⁷ 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).

⁸ 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.

⁹ See, e.g., DRESSLER, *supra* note 4, at § 9.02(a); Farrell & Marceau, *supra* note 7, at 1571-74.

2. § 22A-202(b)—Act Defined

Explanatory Note. Subsection (b) provides the definition of “act” applicable to both § 22A-202(a) and throughout the Revised Criminal Code. It establishes that the term “act” is to be understood narrowly, as a person’s bodily movement. This narrow definition should make it easier to distinguish between a person’s relevant conduct—for example, throwing an object in the direction of a child—and any results or circumstances tied to that conduct—for example, the serious bodily injury to the child that the projectile causes.

Relation to Current District Law. Subsection (b) fills a gap in District law. Neither the D.C. Code, nor District case law, provides a definition of the term “act.” However, the DCCA has recognized in passing that an “act” is, generally speaking, a “bodily movement.”¹⁰

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).¹¹

3. § 22A-202(c)—Omission Defined

Explanatory Note. Subsection (c) provides the definition of “omission” applicable to § 22A-202(a) and throughout the Revised Criminal Code. It establishes that omission is to be understood in light of the narrow definition of “act” in § 22A-202(b), such that it consists of a person’s failure to engage a bodily movement that he or she is obligated to perform. This definition should make it easier to distinguish between a person’s relevant conduct—for example, failing to turn off the bath water after having placed the person’s infant child in the tub—and any results or circumstances tied to that conduct—for example, the infant’s death from drowning that ensues after the person leaves the room for a significant period of time.

Subsection (c) also clarifies that only the failure to perform a *legal* duty constitutes an omission. Under § 22A-202(c)(1), a legal duty may be created by the criminal statute for which the accused is being prosecuted, by expressly defining the

¹⁰ *Trice*, 525 A.2d at 187 n.5 (Mack, J. dissenting).

¹¹ 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).

offense in terms of an omission. Under § 22A-202(c)(2), a legal duty may be created by a law—whether criminal or civil—distinct from the offense for which the defendant is being prosecuted.

One important aspect of § 22A-202(c) is that the person must have either been aware or culpably unaware of that legal duty. This requirement is intended to codify the D.C. Court of Appeals’ decision in *Conley v. United States*,¹² which interprets the U.S. Supreme Court’s decision in *Lambert v. California*¹³ 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.”¹⁴

Relation to Current District Law. Subsection (c) fills a gap in, but is consistent with, various aspects of District law concerning omission liability.

While the D.C. Code does not contain a generally applicable definition of omission (or any other general statement on omission liability), a handful of District statutes expressly criminalize omissions to fulfill particular legal duties, such as the “duty to provide care [to] a vulnerable adult or elderly person”¹⁵ or the duty “to appear before any court or judicial officer as [legally] required.”¹⁶ And District case law generally establishes that the imposition of criminal liability under these circumstances is appropriate.¹⁷

District case law also establishes, however, that omission liability premised on the failure to perform a legal duty not otherwise specified in an offense definition may be appropriate. For example, the U.S. Court of Appeals for the District of Columbia Circuit (CADDC) in *Jones v. United States*¹⁸—a decision handed down before the creation of the local District judicial system¹⁹—recognized that “the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, [can] make the other chargeable.”²⁰ However, the *Jones* court also noted that “the omission of a duty owed by one individual to another” can only establish criminal liability when “the duty neglected [is] a legal duty”—i.e., “[i]t must be a duty imposed by law or by contract” rather than a “mere moral obligation.”²¹

Recently, the DCCA appears to have established that not just any legal duty will suffice for purposes of omission liability. Rather, it must be a legal duty that the actor “knew or should have known” about under the circumstances.²² In *Conley v. United States*, the DCCA struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm²³ on the basis that it “criminalize[d] entirely innocent

¹² 79 A.3d at 273.

¹³ 355 U.S. 225 (1957).

¹⁴ *Conley*, 79 A.3d at 273.

¹⁵ D.C. Code § 22-934.

¹⁶ D.C. Code § 23-1327.

¹⁷ See, e.g., *Fearwell v. United States*, 886 A.2d 95, 100 (D.C. 2005); *Jackson v. United States*, 996 A.2d 796 (D.C. 2010).

¹⁸ 308 F.2d 307 (D.C. Cir. 1962).

¹⁹ See *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

²⁰ *Jones*, 308 F.2d at 310 (citations and internal quotation marks omitted).

²¹ *Id.*

²² *Conley*, 79 A.3d at 281.

²³ D.C. Code § 22-2511 (Repealed).

behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise.”²⁴ Observing that “the average person [would not] know that he may be committing a felony offense merely by remaining in [a] vehicle, even if the gun belongs to someone else and he has nothing to do with it,” the DCCA concluded that the statute created a form of omission liability that violated the requirements of due process, and, therefore, was “facially unconstitutional.”²⁵

The *Conley* decision rested upon the court’s reading of the U.S. Supreme Court’s opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”²⁶

Subsection (c) is intended to collectively codify the foregoing District precedents concerning omission liability.

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.²⁷

The scope of omission liability, as developed by the common law, is relatively 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.”²⁸ 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.²⁹ 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.³⁰

²⁴ 79 A.3d at 273.

²⁵ *Id.* at 286.

²⁶ *Id.* at 273.

²⁷ *Id.*

²⁸ DRESSLER, *supra* note 4, at § 9.06(a).

²⁹ PAUL H. ROBINSON, CRIMINAL LAW DEFENSES, 1 CRIM. L. DEF. § 86 (Westlaw 2016).

³⁰ *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

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.³¹ Among these reform jurisdictions, most address the limits of omission liability through their definition of omission.³² 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,³³ 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.”³⁴

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, 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.”³⁵ 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

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).

³¹ 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.

³² 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.

³³ Model Penal Code § 1.13(4).

³⁴ Model Penal Code § 2.01(3).

³⁵ *United States v. Mancuso*, 420 F.2d 556, 559 (2d Cir. 1970).

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.³⁶

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.”³⁷ In this context, it is argued, “the strictest liability that makes any sense is a liability for culpable ignorance.”³⁸

Policy considerations aside, this position appears to have been adopted as a constitutional requirement by the DCCA in *Conley v. United States*.³⁹ In that case, the DCCA interpreted the U.S. Supreme Court’s decision in *Lambert v. California*⁴⁰ 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.”⁴¹

4. § 22A-202(d)—Possession Defined

Explanatory Note. Subsection (d) provides the definition of possession applicable to both the conduct requirement and throughout the Revised Criminal Code. It establishes that possession means—and only fulfills the conduct requirement when—a person has knowingly exercised control over property for a sufficient period of time to have been able to terminate his or her control over that property.

The latter temporal limitation dictates that a person who picks up a small plastic bag on the floor in a public space, notices that it contains drug residue, and then immediately disposes of it in a nearby trash can has not “possessed” the bag for purposes of the Revised Criminal Code. Just how much time is “sufficient” to enable a person to terminate control depends upon the facts of a given case. Generally speaking, though, the inquiry is intended to focus on two main factors: the dangerousness of the object and the ease with which the object could be safely disposed of under the circumstances.⁴²

Temporal limitations aside, § 22A-202(d) does not require proof that the person was aware of the particular characteristics of the property over which he or she exercises control in order to possess it under this definition (though a possession statute may require such proof by applying a culpable mental state to the requisite circumstance element of the offense). Nor must a person, in order to exercise control over property,

³⁶ *Id.* (citing H.L.A. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB., at 422-25).

³⁷ Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 602-03 (1958).

³⁸ *Id.*

³⁹ 79 A.3d at 273.

⁴⁰ 355 U.S. 225 (1957).

⁴¹ *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).

⁴² Possession that occurs for a longer period of time than is necessary to terminate control is, of course, a suitable basis for liability.

make actual physical contact with it under § 22A-202(d). The definition of possession provided in the Revised Criminal Code is broad enough to encompass situations where the property is not on one’s physical person so long as the person has the intent and ability to control the property—what is typically referred to as constructive possession.⁴³

Relation to Current District Law. Subsection (d) generally codifies the District’s law of possession as it has been developed by the DCCA. However, the definition of possession contained in § 22A-202(d) does slightly modify District law by requiring proof that the person knowingly exercised control over the property *for a sufficient period of time* to have been able to terminate his or her control over that property. This departure, which is supported by the law of other jurisdictions, is recommended to limit the risk of convicting blameless individuals.

The DCCA has developed a robust body of case law on the contours of possession liability in the District, which recognizes two forms of possession: actual possession and constructive possession.⁴⁴ To establish actual possession, the government must prove that the defendant had “the ability . . . to knowingly exercise direct physical custody or control over the [object].”⁴⁵ “To prove constructive possession,” in contrast, the government must prove that the defendant “had knowledge of [the object’s] presence,” had “the ability . . . to exercise dominion and control over [the property],” and had “the intent to exercise dominion and control over [the property].”⁴⁶

Synthesizing the relevant case law on both forms of possession, the D.C. Criminal Jury Instructions offer the following description:

Possession means to have physical possession or to otherwise exercise control over tangible property. A person may possess property in either of two ways. First, the person may have physical possession of it by holding it in his or her hand or by carrying it in or on his or her body or person. This is called “actual possession.” Second, a person may exercise control over property not in his or her physical possession if that person has both the power and the intent at a given time to control the property. This is called “constructive possession.” Mere presence near something or mere knowledge of its location, however, is not enough to show possession. To prove possession of [describe item] against [name of defendant] in this

⁴³ For this reason, the phrase “knowingly exercising control over property . . . [not] on one’s person” employed in § 22A-202(d) should be construed in a manner that is consistent with the requirements governing constructive possession under current District law, namely, the “intent” to control property and the “ability” to control property. (As explained in the commentary to § 22A-206(b), the term “knowingly”—as utilized in the phrase “knowingly exercises control”—is the equivalent of the term “intent” as utilized by the DCCA.)

⁴⁴ See, e.g., *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001) (en banc); *Smith v. United States*, 55 A.3d 884, 887 (D.C. 2012); *Moore v. United States*, 927 A.2d 1040, 1050 (D.C. 2007); *Earle v. United States*, 612 A.2d 1258, 1265 (D.C. 1992); *Burnette v. United States*, 600 A.2d 1082, 1083 (D.C. 1991); *Brown v. United States*, 546 A.2d 390, 394 n.2 (D.C. 1988); *Taylor v. United States*, 662 A.2d 1368, 1372 (D.C. 1995).

⁴⁵ *White v. United States*, 763 A.2d 715, 724 (D.C. 2000) (quoting *Hack v. United States*, 445 A.2d 634, 639 (D.C. 1982)).

⁴⁶ *Smith*, 55 A.3d at 887.

case, the government must prove beyond a reasonable doubt that s/he had either actual or constructive possession of it.⁴⁷

The definition of possession provided in § 22A-202(d) is intended to be capacious enough to accommodate this description of possession liability, as well as the robust body of case law that supports it.⁴⁸ There is, however, one point of departure between § 22A-202(d) and the current state of District law governing possession liability.

Under DCCA case law, there does not appear to be any temporal limitation placed on possession liability with respect to the government’s affirmative burden of proof; rather, evidence of mere “momentary possession” of an object seems to suffice to support a conviction for a possession crime.⁴⁹ The DCCA does recognize an affirmative defense for “innocent or momentary possession”⁵⁰; however, this affirmative defense is only available “in certain narrowly defined circumstances.”⁵¹ More specifically, the “accused [must be able to] show not only an absence of criminal purpose but also that his possession was excused and justified as stemming from an affirmative effort to aid and enhance social policy underlying law enforcement.”⁵²

Under § 22A-202(d), in contrast, possession liability would require proof that the defendant exercised control over property for a period of time sufficient to provide an opportunity to terminate his or her control over that property. This excises a small sliver of the District’s current affirmative defense of “innocent or momentary possession”—namely, the “momentary” part of it—and transforms it into an element of possession offenses. The “innocent” part of the affirmative defense, however, remains untouched, such that if the government can prove that the requisite control occurred for a sufficient amount of time to enable the person to safely abandon control, then the defendant would still have to prove that he or she intended to abandon control to avoid liability.

The basis for this departure is rooted in the principle against convicting blameless individuals, generally recognized in *Conley* and other DCCA cases⁵³; where fleeting possession is at issue the risk that innocent actors will become ensnared within the scope of criminal liability is arguably too great.

Relation to National Legal Trends. Subsection (d) is generally in accordance with well-established common law principles and nationwide legislative practice.

Prohibitions on the possession of contraband or other criminal instrumentalities pervade American criminal law.⁵⁴ Prohibitions of this nature, like criminal statutes that prohibit attempts or solicitation, are typically understood to constitute a form of “inchoate” liability in that their primary “purpose is to provide the police with a basis for

⁴⁷ D.C. Crim. Jur. Instr. § 3.104.

⁴⁸ See *supra* note 43.

⁴⁹ *United States v. Felder*, 548 A.2d 57, 68 (D.C. 1988); *Jones v. United States*, 401 A.2d 473, 476 (D.C. 1979); see also *Brown*, 546 A.2d at 396.

⁵⁰ *Hines v. United States*, 326 A.2d 247, 248 (D.C. 1974).

⁵¹ *Jackson v. United States*, 498 A.2d 185, 186 n.2 (D.C. 1985).

⁵² *Hines*, 326 A.2d at 248; see *Worthy v. United States*, 420 A.2d 1216, 1218 (D.C. 1980); *Stewart v. United States*, 439 A.2d 461, 463 (D.C. 1981); *Logan v. United States*, 402 A.2d 822, 824-27 (D.C. 1979); *Carey v. United States*, 377 A.2d 40, 43-44 (D.C. 1977).

⁵³ See, e.g., *Conley*, 79 A.3d at 280; *McIntosh v. Washington*, 395 A.2d 744, 757 (D.C. 1978).

⁵⁴ WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 19.1 (Westlaw 2016).

arresting those whom they suspect will later commit a socially injurious act (e.g., sell narcotics, or use the tools to commit a crime).⁵⁵ Unlike other forms of inchoate liability, however, possession offenses do not necessarily require the defendant to engage in a physical movement at all. It is generally accepted, for example, that proof that an actor “failed to dispossess herself of [a prohibited] object after she became aware of its presence” will suffice for possession liability.⁵⁶ “In the latter case, ‘possession’ is equivalent to an omission, in which the defendant has a statutory duty to dispossess herself of the property.”⁵⁷ And it is also well established at common law that proof of actual possession is not necessary for criminal liability; rather proof that the person constructively possessed prohibited contraband not otherwise on his or her person will suffice.⁵⁸

Codification of the foregoing principles governing possession liability is a standard part of modern code reform efforts. The basis for nearly all such general provisions is Model Penal Code § 2.01(4), which establishes that “[p]ossession is an act, within the meaning of [the voluntary act doctrine], 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.” Many reform jurisdictions have a definition of possession substantively identical to § 2.01(4).⁵⁹ Another sizable group of reform jurisdictions, in contrast, define possession solely by reference to whether the actor “was aware of his control thereof for a sufficient period to have been able to terminate his possession.”⁶⁰

Subsection (d) defines possession in a manner that is broadly consistent with the foregoing general provisions as well as those contained in other code reform projects.⁶¹ However, it has been modified to more clearly allow for constructive possession as a sufficient basis for liability—as reflected in the phrase “whether or not the property is on one’s person.” And it also strives to make clear that, regardless of whether actual or constructive possession is at issue, “the issue of passing control [should be viewed as] intrinsically related to the definition of possession rather than as a matter of affirmative defense.”⁶²

The latter aspect of § 22A-202(d) reflects the most intuitive understanding of possession—as various federal courts have observed: “To ‘possess’ means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its

⁵⁵ DRESSLER, *supra* note 4, at § 9.03(c).

⁵⁶ DRESSLER, *supra* note 4, at § 9.03(c)

⁵⁷ *Id.* That being said, such a defendant “is not guilty if the contraband was ‘planted’ on her, and she did not have sufficient time to terminate her possession after she learned of its presence.” *Id.*

⁵⁸ See, e.g., *United States v. McCane*, 573 F.3d 1037 (10th Cir. 2009); *Wallace v. State*, 932 S.W.2d 519 (Tex. App. 1995); *State v. Al-Khayyal*, 744 S.E.2d 885 (Ga. App. 2013); *People v. Josephitis*, 914 N.E.2d 607 (Ill. App. 2009); *State v. Miller*, 678 S.E.2d 592 (N.C. 2009); *State v. Demarais*, 770 N.W.2d 246 (N.D. 2009).

⁵⁹ See Del. Code Ann. tit. 11, § 243; Haw. Rev. Stat. Ann. § 702-202; 720 Ill. Comp. Stat. Ann. 5/4-2; Me. Rev. Stat. tit. 17-A, § 103-B; Mo. Ann. Stat. § 562.011; Mont. Code Ann. § 45-2-202; N.H. Rev. Stat. Ann. § 626:1; N.J. Stat. Ann. § 2C:2-1; Ohio Rev. Code Ann. § 2901.21; 18 Pa. Stat. and Cons. Stat. Ann. § 301; Tex. Penal Code Ann. § 6.01.

⁶⁰ See Ala. Code § 13A-2-1; Colo. Rev. Stat. Ann. § 18-1-501; Ind. Code Ann. § 35-41-2-1; Ky. Rev. Stat. Ann. § 501.010; N.Y. Penal Law § 15.00.

⁶¹ See Kentucky Revision Project § 501.204; Illinois Reform Project § 204.

⁶² *Jordan v. State*, 819 P.2d 39, 41 (Alaska Ct. App. 1991).

nature.”⁶³ Perhaps more importantly, this understanding of possession is best situated to limit the risk that “superficial possession”⁶⁴—such as when one picks up a prohibited object to merely examine it—will lead to “convictions under guiltless circumstances.”⁶⁵ By providing a “grace period [] designed to separate illegal possession from temporary control incidental to the lawful purpose of terminating possession,”⁶⁶ § 22A-202(d) is intended to avoid causing “manifest injustice to admittedly innocent individuals.”⁶⁷

⁶³ *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958) (quoting *United States v. Wainer*, 170 F.2d 603, 606 (7th Cir. 1948)).

⁶⁴ *Tingley v. Brown*, 380 So.2d 1289, 1291 (Fla.1980).

⁶⁵ *People v. Mijares*, 491 P.2d 1115, 1119–20 (1971).

⁶⁶ *State v. Flaherty*, 400 A.2d 363, 367 (Me. 1979).

⁶⁷ *Mijares*, 491 P.2d at 1120 (1971).

§ 22A-203 VOLUNTARINESS REQUIREMENT

(a) VOLUNTARINESS REQUIREMENT. No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense.

(b) SCOPE OF VOLUNTARINESS REQUIREMENT.

(1) *Voluntariness of Act.* Where a person’s act provides the basis for liability, a person voluntarily commits the conduct element of an offense when that act was the product of conscious effort or determination, or was otherwise subject to the person’s control.

(2) *Voluntariness of Omission.* Where a person’s omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when the person had the physical capacity to perform the required legal duty, or the failure to act was otherwise subject to the person’s control.

COMMENTARY

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

Explanatory Note. Subsection (a) states the voluntariness requirement governing all offenses in the Revised Criminal Code. It establishes that voluntary commission of an offense’s conduct element is a prerequisite to liability for any crime. This is intended to codify a fundamental principle of criminal law: punishment is only appropriate for those individuals who had a reasonable opportunity to avoid engaging in the prohibited conduct. Where an actor’s conduct is involuntary, it cannot be said that this fundamental principle is satisfied—or that criminal liability is appropriate.

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

For example, in *Conley v. United States*, the DCCA recognized that the requirement of a voluntary act is a “basic jurisprudential point” supported by a wide range of authorities.¹ The court also recognized that the same basic principle applies to omissions as well: “[n]o one, of course, can be held criminally liable for failing to do an act that he is physically incapable of performing.”² And in *Easter v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit (in an oft-cited pre-1971 decision) observed the basic principle underlying the voluntariness requirement: “An essential element of criminal responsibility is the ability to avoid the conduct specified in

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

² *Conley*, 79 A.3d at 279.

the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action.”³

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.⁴ “At all events it is clear,” as LaFave observes, “that criminal liability requires that the activity in question be voluntary.”⁵ Indeed, it has been argued that “a voluntary act is the most fundamental requirement of criminal liability.”⁶ 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.”⁷ 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.⁸

Given the centrality of the voluntariness requirement to American criminal law, “[a]t least forty-two jurisdictions” recognize it in some way.⁹ 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.”¹⁰ 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

³ 361 F.2d 50, 52 (1966).

⁴ See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881); 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).

⁵ 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).

⁶ Paul H. Robinson et. al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 92 (2015).

⁷ 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).

⁸ LAFAVE, *supra* note 5, at § 6.1; see MPC § 2.01 cmt. at 214-15.

⁹ Robinson et. al., *supra* note 6, at 92.

¹⁰ 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.

his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”¹¹ Among reform jurisdictions, the requirement of a voluntary act is “almost universally treated as a required element of every offense.”¹²

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,¹³ and each serves different policy goals.¹⁴ 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.¹⁵

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

Explanatory Note. Subsection (b) clarifies the scope of the voluntariness requirement under § 22A-203(a). Subsection (b)(1) establishes that the conduct element of an offense is voluntarily committed when the required act was the product of conscious effort or determination, or, if it was not the product of conscious effort or determination, when it was otherwise subject to the control of the actor. Likewise, § 22A-203(b)(2) establishes that, where omission liability is concerned, the conduct element of an offense is voluntarily committed when the person was physically capable of performing the required legal duty, or, if the person lacked that physical capacity, then when the failure to act was otherwise subject to the control of the actor.

The conscious effort and determination prong of § 22A-203(b)(1) calls upon the factfinder to consider whether the requisite act was an external manifestation of the defendant’s will. This is the crux of the voluntariness requirement, and in all but the most rare cases involving physical abnormalities—such as those where the requisite act was a reflex, part of an epileptic seizure, or occurred while the actor was sleeping—it is likely to be satisfied. The physical capacity prong of § 22A-203(b)(2) is the logical corollary to the conscious effort and determination prong under § 22A-203(b)(1). It establishes that just as one typically cannot be criminally liable on account of a bodily movement that is not the product of volition, so one cannot be criminally liable for failing to do an act which he or she is physically incapable of performing.

Both §§ 22A-203(b)(1) and (b)(2) also contain catch-all prongs, which establish that the voluntariness requirement is established if the person’s conduct was “otherwise subject to the person’s control.” 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

¹¹ Model Penal Code § 2.01(2) later clarifies the conditions that render an act involuntary.

¹² PAUL H. ROBINSON, 2 CRIM. L. DEF. § 171 (Westlaw 2016).

¹³ 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).

¹⁴ 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.

¹⁵ See, e.g., DRESSLER, *supra* note 7, at § 9.02(a); Farrell & Marceau, *supra* note 13, at 1571-74.

physical 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.

An example is a blackout-prone alcoholic's decision to drink to excess prior to driving to a social engagement. If the drinker becomes unconscious while at home and thereafter gets behind the wheel of the car and crashes into a group of pedestrians, the fact that the actor was not acting consciously at the time of the accident should not preclude a determination that the person's conduct was nevertheless subject to her control, and therefore voluntary, under the circumstances.

The analysis would be no different in the case of an omission. For example, if the same blackout prone drinker has been ordered to appear in court for a hearing on a Monday morning, but decides to drink herself into a state of unconsciousness on the Sunday evening before, the fact that she is physically incapable of attending the hearing should not preclude a determination that the defendant's conduct was nevertheless subject to her control, and therefore voluntary, under the circumstances.

Because the existence of a reasonable opportunity to avoid committing the conduct element of an offense is the animating principle underlying all voluntariness evaluations, § 22A-203(b) should be interpreted to exclude exceptional situations involving physical interference by a third party. Consider the situation of a person who becomes intoxicated at a friend's home and is thereafter carried against his will into a public space by someone at the party. If the drunk person is then arrested for public intoxication, there would be an insufficient basis for deeming the person's conduct voluntary under § 22A-203(b). The same can also be said about the situation of a person who places a controlled substance in her pocket while at home, is immediately thereafter arrested, and then transported to jail without ever being searched or asked about the contraband. If, once the person has entered the facility, she is arrested for introducing a controlled substance into a government facility, there would likely be an insufficient basis for deeming the person's conduct voluntary under § 22A-203(b). In both situations, the physical interference of a third party is sufficient to deny the actors a reasonable opportunity to avoid engaging in the proscribed conduct.

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

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.¹⁶ 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

¹⁶ See *supra* notes 4-9 and accompanying text.

follows our volition,”¹⁷ while Justice Oliver Wendell Holmes described it as a “willed” contraction of a muscle.¹⁸ 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.”¹⁹

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*.²⁰

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.²¹ However, the specifics of the Model Penal Code approach have been widely criticized for failing to “specifically define the term ‘voluntary.’”²² Consistent with this criticism, reform jurisdictions have typically rejected the Model Penal Code’s negative approach to defining voluntariness.²³ 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.”²⁴ 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

¹⁷ 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 426 (3d ed. 1869).

¹⁸ OLIVER WENDELL HOLMES, THE COMMON LAW 54 (1881).

¹⁹ LAFAVE, *supra* note 5, at § 6.1.

²⁰ The relevant provision reads as follows:

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).

²¹ Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 277 (2002).

²² *Id.*

²³ See Mont. Code Ann. § 45-2-101; Ohio Rev. Code Ann. § 2901.21.

²⁴ 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.

voluntary act.²⁵

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 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,²⁶ 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.”²⁷ 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.”²⁸

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 physical 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:

²⁵ 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.

²⁶ Haw. Rev. Stat. Ann. § 702-200.

²⁷ Model Penal Code § 2.01 cmt. at 216.

²⁸ 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).

[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.²⁹

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,”³⁰ 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.”³¹ 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,”³² 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.”³³

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

²⁹ 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); 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).

³⁰ Model Penal Code § 2.01 cmt. at 215.

³¹ 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.

³² Marceau & Farrell, *supra* note 13, at 1579.

³³ H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 168, 174 (1968).

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.³⁴ For his actions—and in light of Decina’s knowledge that he was subject to epileptic seizures—Decina was prosecuted for negligent homicide.³⁵

On appeal, the New York Court of Appeals was presented with a difficult question of “time-framing.”³⁶ 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.”³⁷ 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.”³⁸ The New York Court of Appeals ultimately chose the latter view, relying on the voluntary conduct of the defendant prior to the seizure as the basis for potential liability.³⁹

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.”⁴⁰ 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.”⁴¹ 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*⁴² (though it may also capture other situations where liability would be inappropriate.⁴³)

³⁴ *People v. Decina*, 138 N.E.2d 799, 803, 807 (N.Y. 1956).

³⁵ *Id.*

³⁶ DRESSLER, *supra* note 7, at § 9.02.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *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).

⁴⁰ Model Penal Code § 2.01(1).

⁴¹ Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2441 (2007).

⁴² 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.

⁴³ 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

Rather than utilize the “notoriously cryptic”⁴⁴ 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.”⁴⁵ 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.”⁴⁶ In accordance with the foregoing analysis, § 22A-203(b) employs a distinctive yet accessible approach to addressing issues of voluntariness.

(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.

⁴⁴ Husak, *supra* note 41, at 2441.

⁴⁵ Denno, *supra* note 21, at 358.

⁴⁶ *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 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.

§ 22A-204 CAUSATION REQUIREMENT

(a) CAUSATION REQUIREMENT. No person may be convicted of an offense that contains a result element unless the person’s conduct was the factual cause and legal cause of the result.

(b) FACTUAL CAUSE DEFINED. “Factual cause” means:

- (1) The result would not have occurred but for the person’s conduct; or
- (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.

(c) LEGAL CAUSE DEFINED. “Legal cause” means the result was a reasonably foreseeable consequence of the person’s conduct. A consequence is reasonably foreseeable if its occurrence is not too remote, accidental, or otherwise dependent upon an intervening force or act to have a just bearing on the person’s liability.

COMMENTARY

1. § 22A-204(a)—Causation Requirement

Explanatory Note. Subsection (a) establishes that causation is a basic requirement of criminal liability for any offense that requires proof of a result element. It provides that the minimum causal nexus between a person’s conduct and its attendant results is comprised of two different components: factual causation and legal causation. Because both of these components are part of an offense’s culpability requirement under § 22A-201(d), each must be proven beyond a reasonable doubt.

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a general statement on causation, the DCCA has addressed the requirement of causation on many occasions. It is well-established in case law that causation is a basic element of criminal responsibility, which requires the government to prove—for all crimes involving result elements—that the defendant was the factual and legal cause of the harm for which he or she is charged.¹

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.²

¹ See, e.g., *McKinnon v. United States*, 550 A.2d 915, 917 (D.C. 1988); *Matter of J.N.*, 406 A.2d 1275, 1287 (Newman, C.J., dissenting); D.C. Crim. Jur. Instr. § 4.230.

² 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).

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.³ Both components are typically treated as offense elements, the existence of which must be proven beyond a reasonable doubt.⁴

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.⁵ 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-204(a), which is both clearer and better fits existing case law than the approach to codification applied in reform jurisdictions.

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

Explanatory Note. Subsection (b) provides a comprehensive definition of “factual cause.” In the vast majority of cases, factual causation will be proven under § 22A-204(b)(1) by showing that the defendant was the logical, but-for cause of a result. The inquiry required by subsection 22A-204(b)(1) is essentially empirical, though also hypothetical: it asks what the world would have been like if the accused had not performed his or her conduct. In rare cases, however, where the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under § 22A-204(b)(2) by showing that the defendant’s conduct was sufficient—even if not necessary—to produce the prohibited result. Although in this situation it cannot be said that but for the defendant’s conduct the result in question would not have occurred, the fact that the defendant’s conduct was by itself

³ 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. LaFare, *Substantive Criminal Law* § 6.4(a), pp. 464–466 (2d ed. 2003) . . .

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

⁴ 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).

⁵ 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.

sufficient to cause the result provides a sufficient basis for treating the defendant’s conduct as a factual cause.

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

To address the issue of factual causation, the DCCA has adopted the “substantial factor” test drawn from the Restatement of Torts.⁶ Under this test, “[a] defendant’s actions are considered the cause-in-fact . . . if those actions ‘contribute substantially to or are a substantial factor in a[n] injury.’”⁷ “[S]ubstantial cause,” in turn, has been defined by the DCCA as “conduct which a reasonable person would regard as having produced the [relevant result].”⁸

Application of the substantial factor test to deal with all issues of factual causation is problematic. The test was originally developed in the context of tort law to address those “highly unusual cases” where it is “logically impossible for the government to prove but-for causation because two causes, each alone sufficient to bring about the harmful result, operate[d] together to cause it.”⁹ By employing the open-textured language of “substantial factor,” proponents of the test thought it would provide fact finders with sufficient leeway to ensure that defendants, each of whose conduct constitute independent sufficient causes, would not escape liability.¹⁰ However, the “substantial factor” test has been the source of significant criticism, and, ultimately, has not withstood the test of time.¹¹

Insofar as the DCCA’s reliance on the test is concerned, two main critiques can be made. First, application of the substantial factor test to deal with *all* issues of factual causation unnecessarily complicates the fact finder’s analysis in many cases.¹² In the run-of-the-mill case, the substantial factor test produces the same results as a but-for test, but requires the factfinder to engage in an unnecessarily complex analysis. Why, one might ask, should a factfinder be required to employ a complex test that incorporates “noncausal policy considerations” to deal with standard factual causation issues when a

⁶ See, e.g., *District of Columbia v. Carlson*, 793 A.2d 1285, 1288 (D.C. 2002); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980); *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003).

⁷ *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011); D.C. Crim. Jur. Instr. § 4.230.

⁸ *Blaize*, 21 A.3d at 82; see also *Roy v. United States*, 871 A.2d 507, 5087 (D.C. 2005) (citing *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003)).

⁹ *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1359, 1364-65 (N.D. Ill. 1997) *aff’d*, 168 F.3d 976 (7th Cir. 1999).

¹⁰ See, e.g., David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1264-66 (1978); LAFAVE, *supra* note 2, at § 6.4; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 267-68 (5th ed. 1984).

¹¹ RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002).

¹² See, e.g., Eric Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 87-88 (2005); Model Penal Code § 2.03 cmt. at 259; *United States v. Needle*, 72 F.3d 1104, 1120 (3d Cir. 1995) *amended*, 79 F.3d 14 (3d Cir. 1996) (Becker, J. dissenting).

more concrete, intuitive, and straightforward but-for framing of factual causation—such as that provided in § 22A-204(b)(1)—can easily resolve most issues?¹³ “In the absence of such special causation problems, there is [simply] no need to employ the substantial factor test, because the ‘but-for cause’ of a harm is always a substantial factor in bringing about the harm.”¹⁴

Second, for those few cases where application of a more expansive approach is arguably necessary—namely, where the defendant is one of multiple concurrent causes—the substantial factor test offers a highly discretionary standard to support an outcome that a bright line rule would more effectively facilitate. A simple, straightforward statement deeming independently sufficient causes to be factual causes—such as that provided in § 22A-204(b)(2)—is clearer than the “spectacular vagueness”¹⁵ of the substantial factor test. Indeed, even proponents of the substantial factor test are “uncertain about [its] precise application,” and have had a difficult time specify[ing] how important or how substantial a cause must be to qualify.”¹⁶

Given the uncertain scope of the substantial factor test, it’s possible—though by no means clear—that replacing it with the approach reflected in § 22A-204(b) could modestly circumscribe the scope of criminal liability under District law in extreme cases. However, “[g]iven the need for clarity and certainty in the criminal law,” this circumscription—to the extent it would occur—better reflects sound policy.¹⁷

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.”¹⁸ 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.”¹⁹ 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]

¹³ Robert Strassfeld, *Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992); see Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2201-02 (1994).

¹⁴ *Pitt-Des Moines, Inc.*, 970 F. Supp. at 1364-65.

¹⁵ Johnson, *supra* note 12, at 89 n.190.

¹⁶ *Burrage*, 134 S. Ct. at 892.

¹⁷ *Id.* at 891.

¹⁸ *Velazquez v. State*, 561 So. 2d 347, 350 (Fla. Dist. Ct. App. 1990).

¹⁹ 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)).

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).²⁰

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).²¹

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).²² That being said, only five state criminal 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).²³

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.²⁴ 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.²⁵

²⁰ *Burrage*, 134 S. Ct. at 892.

²¹ 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)).

²² 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. § 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.

²³ 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.

²⁴ 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.

²⁵ For example, § 203(2) of the Illinois Reform Project reads:

(1) Conduct is the cause of a result if:

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.

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

Explanatory Note. Subsection (c) provides a comprehensive definition of “legal cause.” Under the proscribed definition, legal causation exists where it can be proven that the result was a reasonably foreseeable consequence of the person’s conduct. Whether a consequence is reasonably foreseeable, in turn, asks the factfinder to consider whether the causal connection between the defendant’s conduct and the occurrence of the resulting harm was so remote, accidental, or dependent on an intervening force or act that it would be unfair to hold the defendant responsible. Viewed as a whole, then, § 22A-204(c) entails a normative evaluation by the factfinder that appropriately encompasses a wide array of factors.

Although this evaluation entails a significant amount of discretion, it can be made more concrete and uniform if the factfinder focuses on (among other potential factors): (1) the length of time and distance between the actor’s conduct and the result; (2) the likelihood that the actor’s conduct would cause the result; (3) the degree to which the result’s manner of occurrence was unexpected; (4) the independence of any intervening forces or acts; and (5) the comparative causal responsibility of any intervening forces or acts.²⁶

Relation to Current District Law. Subsection (c) broadly accords with District law. While the D.C. Code does not address legal causation, the DCCA has adopted a standard to address issues of legal causation that is substantively similar to the standard reflected in § 22A-204(c). The Revised Criminal Code’s definition of legal cause in §

(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.

²⁶ See Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 441-43 (1988).

22A-204(c) is intended to codify District case law in a manner that makes it more accessible and coherent.

It is well-established in the District that “a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions.”²⁷ Reasonable foreseeability is thus at the heart of legal causation under District law—a point reflected in the D.C. Criminal Jury Instructions on homicide which state that “A person causes the death of another person if . . . it was reasonably foreseeable that death or serious bodily injury could result from such conduct.”²⁸ Notwithstanding the centrality of the phrase “reasonably foreseeable” in the District’s law of causation, however, it is far from clear what it actually means.

District courts have made a wide range of statements on the nature of reasonable foreseeability. Relying on the requirement of reasonable foreseeability, for example, the DCCA has held that a defendant “may not be held liable for harm actually caused where the chain of events leading to the injury appears ‘highly extraordinary in retrospect.’”²⁹ Reasonable foreseeability is also the basis of the DCCA’s observation that “[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor’s . . . conduct, though still a substantial causative factor, should not result in the actor’s liability.”³⁰ And reasonable foreseeability is also the foundation for the DCCA’s determination that notwithstanding an “intervening act of another,” which “makes the causal connection between the defendant’s [conduct] and the plaintiff’s injury more attenuated,” a defendant will “be [deemed] responsible for the [resulting harm] if the danger of an intervening negligent or criminal act should have been reasonably anticipated.”³¹

The diversity and complexity of statements regarding the nature of reasonable foreseeability perhaps explains why at least some District judges have refrained from providing jurors with any further elaboration of the concept in their instructions— notwithstanding specific requests from jurors for further clarification.³² This is unfortunate, however, given that these statements all revolve around a basic and intuitive moral question (which is reflected in the case law): can the defendant, given all of the “intervening occurrences [that] may have contributed to” producing the result for which he or she is being prosecuted, “in all fairness[] be held criminally responsible” for that result?³³

Subsection (c) is intended to give voice to this principle by first codifying the requirement of reasonable foreseeability, and thereafter explaining that reasonable foreseeability entails an evaluation of whether the manner in which a result occurred is not too remote, accidental, or otherwise dependent on an intervening force or act to have

²⁷ *Blaize*, 21 A.3d at 81 (quoting *McKinnon v. United States*, 550 A.2d 915, 918 (D.C. 1988)).

²⁸ D.C. Crim. Jur. Instr. § 4.230.

²⁹ *Blaize*, 21 A.3d at 83; *Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C.2002) (citing *Morgan v. District of Columbia*, 468 A.2d 1306, 1318 (D.C.1983) (en banc)).

³⁰ *Butts*, 822 A.2d at 418 (citing Restatement (Second) of Torts § 440 (1965)).

³¹ *Id.* (quoting *Lacy v. District of Columbia*, 424 A.2d 317, 323 (D.C. 1980)). The D.C. Criminal Jury Instructions state that: “As a matter of law, negligent medical treatment is reasonably foreseeable However, as a matter of law, grossly negligent medical treatment is not reasonably foreseeable if it is the sole cause of death” D.C. Crim. Jur. Instr. § 4.230.

³² *Blaize*, 21 A.3d at 84.

³³ *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting); *see, e.g., McKinnon*, 550 A.2d at 917.

a just bearing on the person’s liability. This definition of legal cause, when viewed in light of the factors relevant to this inquiry highlighted in the explanatory note, is intended to both preserve District law, while, at the same time, rendering it more transparent and accessible.

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.³⁴ It generally “refers to the basic requirement that there must be some direct relation between the injury asserted and the injurious conduct alleged.”³⁵ 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.³⁶ What, precisely, “reasonably foreseeability” means, however, is less than clear and often muddled 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.³⁷ 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.”³⁸

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.”³⁹ 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.⁴⁰ 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.⁴¹ 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.”⁴²

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

³⁴ See, e.g., LAFAVE, *supra* note 2, at § 6.4.

³⁵ *Paroline*, 134 S. Ct. at 1719.

³⁶ *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).

³⁷ See DRESSLER, *supra* note 2, at § 14.03.

³⁸ *State v. Malone*, 819 P.2d 34, 37 (Alaska Ct. App. 1991).

³⁹ *Blue Shield of Va. v. McCready*, 457 U.S. 465, 478 n.13 (1982).

⁴⁰ 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.

⁴¹ Compare Model Penal Code § 2.03 with Proposed Federal Criminal Code § 305.

⁴² 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)).

“fresh approach”⁴³ 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 legal causation.⁴⁴ 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.⁴⁵

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

⁴³ Model Penal Code § 2.03 cmt. at 254.

⁴⁴ 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).

⁴⁵ Robinson, *supra* note 44, at 1.

causation analysis.⁴⁶ 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 Model Penal Code's general standard through case law to give voice to it.⁴⁷ 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).⁴⁸

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."⁴⁹ 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."⁵⁰ 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.⁵¹ There are simply limits on how precise any formulation of a normative judgment, such as that entailed by legal causation, can be made.⁵² 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.⁵³ Accordingly, that is the approach to legal causation taken in § 22A-204(c).

⁴⁶ 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.

⁴⁷ 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).

⁴⁸ 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 . . ."

⁴⁹ 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."

⁵⁰ WEINREB, *supra* note 42, at 145; see Larry Alexander, *Crime and Culpability*, 1994 J. CONTEMP. LEGAL ISSUES 1, 14 (1994).

⁵¹ 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.

⁵² 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).

⁵³ 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." LAFAYE, *supra* note 2, at § 6.4 (collecting cases).

§ 22A-205 CULPABLE MENTAL STATE REQUIREMENT

(a) CULPABLE MENTAL STATE REQUIREMENT. No person may be convicted of an offense unless the person acts with a culpable mental state with respect to every result and circumstance required by the offense, with the exception of any result or circumstance for which that person is strictly liable under § 22A-207(b).

(b) CULPABLE MENTAL STATE DEFINED. “Culpable mental state” means purpose, knowledge, recklessness, negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

(c) STRICTLY LIABILITY DEFINED. “Strictly liable” or “strict liability” means liability in the absence of purpose, knowledge, recklessness, or negligence, as defined in § 22A-206, or any comparable mental state specified in this Title.

COMMENTARY

Explanatory Notes. Subsection (a) states the culpable mental state requirement governing all criminal offenses in the Revised Criminal Code. It establishes that a culpable mental state is applicable to every result and circumstance in an offense definition, with the exception of those results and circumstances that are subject to strict liability under the rule of interpretation established in § 22A-207(b). This communicates the Revised Criminal Code’s basic commitment to viewing culpable mental states on an element-by-element basis—a practice known as element analysis—while also recognizing that in certain instances the legislature may decide to refrain from applying a culpable mental state to a given result or circumstance, thereby holding an actor strictly liable for it. In that case, however, the legislature must specify its intent to impose strict liability through one of the means specified in § 22A-207(b). Subsection (a) also clarifies that culpable mental states only apply to results and circumstances; conduct is excluded from the requisite culpable mental state analysis. Insofar as culpability is concerned, the conduct element of an offense need only be considered with respect to the voluntariness requirement under § 22A-203.

Subsection (b) provides the definition of “culpable mental state” applicable to § 22A-205(a) and throughout the Revised Criminal Code. This definition primarily establishes that proof of purpose, knowledge, recklessness, and negligence, as defined in § 22A-206, with respect to each result and circumstance in an offense definition will satisfy the culpable mental state requirement. It also establishes, however, that proof of a comparable mental state specified in this Title with respect to a result or circumstance in an offense definition may suffice to satisfy § 22A-205(a). Although the Revised Criminal Code envisions purpose, knowledge, recklessness, and negligence serving as the sole mental states creating criminal liability, it is possible that a subsequent legislature may enact a criminal statute that utilizes a different mental state. In that case, the legislature’s new mental state would satisfy the culpable mental state requirement so long as it is comparable to purpose, knowledge, recklessness, or negligence, as defined in § 22A-206.

Subsection (c) provides the definition of “strict liability” applicable to § 22A-205(a) and throughout the Revised Criminal Code. It establishes that strict liability means liability in the absence of a culpable mental state—either purpose, knowledge, recklessness, or negligence, as defined in § 206, or a comparable mental state specified in this Title—with respect to a given result or circumstance. Implicit in this understanding of strict liability is the view that the voluntary commission of an offense, while a necessary prerequisite for criminal liability under § 22A-203, does not constitute a culpable mental state, as defined in § 22A-205(b). Nevertheless, strict liability offenses, which require proof of voluntariness and nothing more, are possible in the Revised Criminal Code, if so specified by the legislature.

Relation to Current District Law. Section 22A-205 fills a gap in District law, which at present does not typically enumerate all the culpable mental states that must be proven for a given offense. By requiring element analysis, § 22A-205 provides the basis for clearly drafting and consistently applying criminal statutes in a manner sensitive to key distinctions in culpability between objective elements. Although the District’s criminal statutes generally do not reflect the element analysis that § 22A-205 requires, the manner in which the DCCA has interpreted many criminal statutes, particularly in the past few years, accords with the most important aspects of § 22A-205. District case law also recognizes the benefits of clarity and consistency to be gained from legislative adoption of element analysis.

Generally speaking, the District’s criminal statutes do not reflect element analysis. Which is to say, they are not drafted in a manner that envisions criminal offenses as comprised of different objective elements to which culpable mental states of purpose, knowledge, recklessness, or negligence might apply. Rather, the criminal offenses in the D.C. Code most often state some culpable mental state requirement—whether comprised of one,¹ two,² three,³ or even four⁴ culpable mental states—at the beginning of an offense definition, without clarifying how these culpable mental states are intended to be distributed amongst the offense’s objective elements. Additionally, while many of the District’s more recent criminal statutes employ the statutory terms of purpose, knowledge, recklessness, and negligence,⁵ older statutes often employ other terms, such as “maliciously,”⁶ “willfully,”⁷ “wanton[ly],”⁸ “reckless indifference,”⁹ and “having reason to believe.”¹⁰

It’s also worth noting that some of the District’s most important criminal statutes merely codify the penalty applicable to the offense, and, therefore, enumerate no culpable

¹ *E.g.*, D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.

² *E.g.*, D.C. Code § 22-404.01; D.C. Code § 22-3312.01.

³ *E.g.*, D.C. Code § 22-404; D.C. Code § 22-1101.

⁴ D.C. Code § 5-1307.

⁵ *E.g.*, D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.

⁶ *E.g.*, D.C. Code § 22-303; D.C. Code § 22-3318.

⁷ *E.g.*, D.C. Code § 22-934; D.C. Code § 22-3312.01.

⁸ *E.g.*, D.C. Code § 22-934; D.C. Code § 22-3312.01.

⁹ *E.g.*, D.C. Code § 22-934; D.C. Code § 22-404.01.

¹⁰ *E.g.*, D.C. Code § 22-723; D.C. Code § 22-3214.

mental state at all.¹¹ In the absence of any legislatively specified offense elements, the common law definition of these offenses—typically comprised of an ambiguous culpable mental state requirement framed in terms very different from element analysis—is read in by the courts.¹² (These statutes are to be contrasted with various strict liability offenses in the D.C. Code, where it is clear that no culpable mental state was intended to govern some or all of the offense’s objective elements.¹³)

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

Historically, District courts have similarly refrained from using element analysis in their interpretation of criminal statutes. For a long time, the DCCA, when faced with clarifying a criminal statute’s ambiguous culpability requirement, employed an approach known as “offense analysis,” analyzing the appropriate culpable mental state for an offense as a whole (rather than each of its parts). Rather than ask whether any particular objective element in an offense was subject to a culpable mental state—and if so, whether it is akin to purpose, knowledge, recklessness, or negligence—the court typically sought to determine the *mens rea* governing the crime as a whole which it characterized as one of “general intent” or “specific intent.”¹⁴ More recently, however, the DCCA has recognized how problematic this practice is for the administration of justice, and has thus sought to shift its focus away from this common law approach.

For example, in a pair of 2011 decisions, *Perry v. United States* and *Buchanan v. United States*, the DCCA observed that the terms “general intent” or “specific intent” are little more than “rote incantations” of “dubious value,”¹⁵ which “can be too vague or misleading to be dispositive or even helpful”¹⁶ and can lead to “outright confusion . . . when they are included in jury instructions.”¹⁷ (For this reason, the District’s criminal jury instructions “avoid[s]” using the terms “general intent” and “specific intent” as the terms are “more confusing than helpful to juries.”¹⁸)

Thereafter, in the DCCA’s 2013 decision in *Ortberg v. United States*, the court recognized that the problem with “these terms [is that they] fail to distinguish between elements of the crime, to which different mental states may apply.”¹⁹ The better alternative, as the court goes on to explain, is a “clear analysis” which faces the “question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime.”²⁰ With the foregoing insights in mind, the DCCA observed in the 2015 decision of *Jones v. United States* that “courts and legislatures” should, wherever possible, “simply make clear what mental state (for

¹¹ These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.

¹² See generally *Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011) (Ruiz, J. concurring).

¹³ As the DCCA observed in *McNeely v. United States*, “[s]trict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past. 874 A.2d 371, 385–86 n.20 (D.C. 2005) (collecting statutes); see also D.C. Code Ann. § 22-3011(a).

¹⁴ *Buchanan*, 32 A.3d at 1002.

¹⁵ *Id.* at 1001.

¹⁶ *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011)

¹⁷ *Id.* at 809.

¹⁸ D.C. Crim. Jur. Instr. § 3.100 *Defendant’s State of Mind—Note*.

¹⁹ 81 A.3d 303, 307 (D.C. 2013).

²⁰ *Id.* (citations, quotations, and alterations omitted).

example, strict liability, negligence, recklessness, knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance).”²¹

Section 22A-205 establishes a legislative framework that broadly accords with all of the foregoing insights. Consistent with the DCCA’s recent case law, § 22A-205(a) “requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”²² Consistent with the District’s varied criminal statutes, § 22A-205(b) establishes that the kind of culpable mental state at issue will be one of purpose, knowledge, recklessness, negligence, or any other comparable mental state specified by the legislature. And consistent with both District case law and criminal statutes, § 22A-205(c) acknowledges the possibility that no culpable mental state may apply to a given objective element at all.²³

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

Although the DCCA appears, at times, to envision that conduct, no less than results or circumstances, is subject to culpable mental states, the court’s more recent case law demonstrates the problems and confusion to which this view can lead. For example, the DCCA has frequently defined a “general intent” crime as one requiring proof of “the intent to do the act that constitutes the crime.”²⁴ Applying this definition to simple assault, a so-called general intent crime, suggests that the government need only prove the intent to perform the acts constituting the assault.²⁵ But two recent cases, *Williams v. United States* and *Buchanan v. United States*, appear to reject this view of the culpable mental state requirement governing the offense, holding that the government must prove that the accused intended for that harm to occur.²⁶ The reason? The “intent to act” interpretation of simple assault, if taken literally, would—as one DCCA judge phrases it—“allow the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability,” and, therefore, is actually consistent with strict liability.²⁷

Whether or not a strict liability interpretation of simple assault was ever intended by the DCCA is not entirely clear.²⁸ What is clear, though, is that other courts have

²¹ 124 A.3d 127, 130 n.3 (D.C. 2015)

²² For a discussion of how many of the non-conforming culpable mental states in current District statutes are comparable to purpose, knowledge, recklessness, or negligence, see the commentary on § 22A-206.

²³ See *McNeely*, 874 A.2d at 385.

²⁴ E.g., *Dauphine v. United States*, 73 A.3d 1029, 1032 (D.C. 2013).

²⁵ *Anthony v. United States*, 361 A.2d 202, 206 n.5; *Ray v. United States*, 575 A.2d 1196, 1198 (D.C. 1990).

²⁶ *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011); *Williams v. United States*, 887 A.2d 1000 (D.C. 2005).

²⁷ *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring).

²⁸ For example, neither the DCCA nor any other common law authority has explicitly taken the position that simple assault is a strict liability crime. And the DCCA has even interpreted so-called strict liability crimes to require proof of some *mens rea* beyond just voluntary conduct. See, e.g., *McNeely*, 874 A.2d at 387. Moreover, in other contexts, the DCCA has defined a “general intent” crime as requiring the government to prove that the accused was “aware of all those facts which make [one’s] conduct criminal,” *Campos v. United States*, 617 A.2d 185, 188 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d

unwittingly created strict liability crimes by misconstruing an “intent to act” as amounting to something more than the voluntariness requirement, and that, more generally, the failure to distinguish between voluntary conduct and *mens rea* as to results and circumstances has produced a significant amount of confusion in the law, both inside and outside of the District.²⁹ Subsection (a) is intended to avoid confusion of this nature by excluding conduct—narrowly defined elsewhere in the Revised Criminal Code as an act or failure to act—from the requisite culpable mental state analysis.

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 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.”³⁰ 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.”³¹ And this umbrella culpability requirement was often quite simplistic, indicating “little more than immorality of motive,”³² a “vicious will,”³³ or an “evil mind.”³⁴ 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.”³⁵

434, 437 (D.C. 1962))—a definition that seems to imply that a knowledge-like *mens rea* is applicable to at least some of the objective elements in an offense such as simple assault.

²⁹ See sources cited *infra* note 51 and 52.

³⁰ *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 492 (E.D.N.Y. 1993)

³¹ PAUL H. ROBINSON & MICHAEL T. CAHILL, *CRIMINAL LAW* 155 (2d ed. 2012).

³² Francis B. Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in *HARVARD LEGAL ESSAYS* 399, 411-12 (1934).

³³ 4 WILLIAM BLACKSTONE, *COMMENTARIES* at 21.

³⁴ 1 JOEL P. BISHOP, *CRIMINAL LAW* § 287 (9th ed. 1923).

³⁵ 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*

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 element.”³⁶ 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.³⁷ 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.”³⁸ 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.”³⁹ 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.”⁴⁰

Codification of comparable provisions is a well-established part of modern code reform efforts.⁴¹ Through such provisions, reform codes recognize that “[t]he mental

American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code, 6 BUFF. CRIM. L. REV. 691 (2003).

³⁶ *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).

³⁷ PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 198-99 (2d ed. 1986).

³⁸ E.g., *United States v. Bailey*, 444 U.S. 394, 406 (1980) (quoting Model Penal Code § 2.02 cmt. at 123).

³⁹ Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 Colum. L. Rev. 1425, 1426 (1968).

⁴⁰ *Id.*

⁴¹ 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

ingredients of a particular crime may differ with regard to the different elements of the crime,”⁴² 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.”⁴³

The Model Penal Code’s two central analytical insights regarding *mens rea* have thus been transformed into the “representative modern American culpability scheme.”⁴⁴ 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.”⁴⁵

The principle of correspondence dictates that proof of some culpable mental state must be required with respect to every objective element of an offense.⁴⁶ 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.”⁴⁷

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.⁴⁸ 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.⁴⁹ 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

recent reform projects, *see* Kentucky Penal Code Revision Project, § 501.201; Proposed Illinois Criminal Code, § 205.

⁴² WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.1 (Westlaw 2016).

⁴³ 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).

⁴⁴ Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692 (1983).

⁴⁵ *E.g.*, ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 76 (6th ed. 2007); VICTOR TADROS, CRIMINAL RESPONSIBILITY 93-97 (2005).

⁴⁶ Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285 (2012).

⁴⁷ Herbert L. Packer, *The Model Penal Code and Beyond*, 63 COLUM. L. REV. 594, 595 (1963).

⁴⁸ For a comprehensive overview of the relevant legal trends, *see* Brown, *supra* note 46.

⁴⁹ Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 772 (2012).

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.

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.⁵⁰ 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.⁵¹ 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.⁵²

⁵⁰ 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.

⁵¹ 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).

⁵² 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).

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.”⁵³) 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.⁵⁴ 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.”⁵⁵ That “[c]onduct culpability does nothing more than encompass the voluntariness requirement,”⁵⁶ however, means it is “unduly confusing, and not analytically helpful, to retain this category.”⁵⁷

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.⁵⁸ 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.⁵⁹ Given this potential for confusion, the clearer definition is that “[l]iability is strict if it

⁵³ Robinson & Grall, *supra* note 44, at 712.

⁵⁴ See Me. Rev. Stat. tit. 17-A, § 35.

⁵⁵ Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).

⁵⁶ Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983).

⁵⁷ 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.

⁵⁸ 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).

⁵⁹ Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

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.”⁶⁰

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 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.)

⁶⁰ 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).

§ 22A-206 HIERARCHY OF CULPABLE MENTAL STATES

(a) **PURPOSE DEFINED.** “Purposely” or “purpose” means:

- (1) With respect to a result, consciously desiring that one’s conduct cause the result.
- (2) With respect to a circumstance, consciously desiring that the circumstance exists.

(b) **KNOWLEDGE DEFINED.** “Knowingly” or “knowledge” means:

- (1) With respect to a result, being aware that one’s conduct is practically certain to cause the result.
- (2) With respect to a circumstance, being aware that it is practically certain that the circumstance exists.

(c) **RECKLESSNESS DEFINED.** “Recklessly” or “recklessness” means:

- (1) With respect to a result, being aware of a substantial risk that one’s conduct will cause the result.
- (2) With respect to a circumstance, being aware of a substantial risk that the circumstance exists.
- (3) In order to act recklessly as to a result or circumstance, the person’s conduct must grossly deviate from the standard of care that a reasonable person would observe in the person’s situation.
- (4) In order to act recklessly as to a result or circumstance “under circumstances manifesting extreme indifference” to the interests protected by an offense, the person’s conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person’s situation.

(d) **NEGLIGENCE DEFINED.** “Negligently” or “negligence” means:

- (1) With respect to a result, failing to perceive a substantial risk that one’s conduct will cause the result.
- (2) With respect to a circumstance, failing to perceive a substantial risk that the circumstance exists.
- (3) In order to act negligently as to a result or circumstance, the person’s conduct must grossly deviate from the standard of care that a reasonable person would observe in the person’s situation.

(e) PROOF OF GREATER CULPABLE MENTAL STATE SATISFIES REQUIREMENT FOR LOWER.

(1) *Proof of Negligence.* When the law requires negligence as to a result or circumstance, the requirement is also satisfied by proof of recklessness, knowledge, or purpose.

(2) *Proof of Recklessness.* When the law requires recklessness as to a result or circumstance, the requirement is also satisfied by proof of knowledge or purpose.

(3) *Proof of Knowledge.* When the law requires knowledge as to a result or circumstance, the requirement is also satisfied by proof of purpose.

COMMENTARY

1. §§ 22A-206(a) & (b)—Purpose Defined & Knowledge Defined

Explanatory Notes. Subsection (a) provides a comprehensive definition of purpose, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts purposely with respect to a result when that person consciously desires a prohibited result to occur (e.g., as when a person pulls the trigger of a loaded gun with the goal of killing the victim). Likewise, a person acts purposely with respect to a circumstance when that person consciously desires that the prohibited circumstance exist (e.g., as when a person assaults a uniformed police officer because of the victim’s status as a police officer). Under this definition, the fact that a person has some ulterior motive, above and beyond the person’s conscious desire to cause a prohibited result or act under specified circumstances, should not preclude a finding of purpose. However, the conscious desire required by § 22A-206(a) must be accompanied by an awareness on behalf of the actor that it is at least possible the requisite result will occur or that the circumstance exists.

Subsection (b) provides a comprehensive definition of knowledge, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts knowingly with respect to a result when that person is aware that it is practically certain that the prohibited result will result from that person’s conduct (e.g., as when a child rights advocate blows up a manufacturing facility that relies upon child labor and kills the on-duty night guard, practically certain that the guard, who the advocate would prefer not to injure, will be killed). Likewise, a person acts knowingly with respect to a circumstance when that person is aware that it is practically certain that the prohibited circumstance exists (e.g., as when a person is practically certain that the gun-shaped object she is buying is, in fact, a prohibited firearm).

The essence of the distinction between purpose and knowledge is the presence or absence of a positive desire. Whereas the knowing actor is aware that it is practically certain that a result will occur or that a circumstance exists, the purposeful actor consciously desires that the result occur or that a circumstance exists. To differentiate between these two kinds of actors in practice, the factfinder might find it useful to consider the following counterfactual test: “Would the defendant regard himself as

having failed if a particular result does not occur, or circumstance does not exist?”¹ An affirmative answer to this question is indicative of a purposeful actor.

Relation to Current District Law. Subsections (a) and (b) fill a gap in District law. The culpable mental states of “purpose” and “knowledge” appear in a variety of District statutes; however, none of these statutes explicitly define either term.² Nor, for that matter, has the DCCA clearly defined them. What the DCCA has done is clarify that it views the culpable mental states of purpose and knowledge as the substantive equivalent of “intent” or “specific intent,” which is sufficient to establish liability for even the most serious offenses under District law.

For example, in *Perry v. United States*, the DCCA stated that the statutory terms of “purpose” or “knowledge” utilized in the District’s aggravated assault statute are the equivalent of “intent.”³ The *Perry* court also observed that “[t]he heightened *mens rea* for [the most] serious assault crimes”—such as assault with intent to kill—can be established through proof of “a specific intent.”⁴ How, if at all, is “specific intent” different from “intent”? DCCA case law lacks a precise answer to this question—indeed, as one DCCA judge has observed, the language of “specific intent” is little more than a “rote incantation[.]” of “dubious value” which obscures “the different *mens rea* elements of a wide array of criminal offenses.”⁵ What is clear from the relevant case law, however, is that proof of purpose or knowledge should satisfy it.

For example, the DCCA in *Logan v. United States* observed that “[a] specific intent to kill exists when a person acts with the *purpose* . . . of causing the death of another.”⁶ And this seems to entail a desire—as the DCCA later observed in *Arthur v. United States*:

The government did have to prove that Arthur had a specific intent to kill . . . There was, however, ample evidence of that intent, both in his behavior and in the comment, “I hope she’s dead,” which he made (twice) when he first started to leave the room before discovering that his victim was still alive.⁷

The conscious desire at issue in purpose will also suffice to establish the specific intent requirement governing general inchoate offenses under District law. In *Browner v. United States*, for example, the DCCA observed that “[i]n certain narrow classes of crimes [such as criminal attempts the] heightened culpability [of purpose] has been thought to merit special attention,”⁸ while in *Wilson-Bey v. United States*, the DCCA

¹ R.A. DUFF, CRIMINAL ATTEMPTS 17 (1996).

² E.g., D.C. Code § 22-404.01; D.C. Code § 22-1101; D.C. Code § 5-1307. It should be noted that some of these statutes use the terms “intent” and “knowledge,” which, when viewed in context, suggest that “intent” is the equivalent to “purpose.”

³ 36 A.3d 799 (D.C. 2011).

⁴ *Perry v. United States*, 36 A.3d 799, 811 (D.C. 2011) (citations and quotations omitted).

⁵ *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).

⁶ 483 A.2d 664, 671 (D.C. 1984).

⁷ 602 A.2d 174, 179 n.7 (D.C. 1992).

⁸ 979 A.2d 1191, 1194 (D.C. 2009) (quoting *United States v. Bailey*, 444 U.S. 394, 405 (1980)).

recognized that a “purpose-based standard” is the most demanding of *mens rea* requirements and will suffice even for accomplice liability.⁹

It’s important to note, however, that District law describing specific intent seems to include more than just purposeful conduct. In *Logan*, for example, the DCCA notes that where the accused possesses the “conscious intention of causing the death of another,” he or she also possesses the “specific intent” to kill.¹⁰ Although the court never clarifies what this “conscious intention” entails, the court later equivocates, in the context of homicide, the *mens rea* of “a specific intent to kill” with “actually . . . fores[eeing] that death [will] result from [one’s] act.”¹¹

Other DCCA case law surrounding “specific intent” also supports a knowledge reading. For example, in *Peoples v. United States*, the DCCA sustained various convictions for malicious disfigurement in a case where “the evidence disclosed that appellant deliberately set fire to [a home], using a flammable liquid accelerant, in the early morning hours while those inside were sleeping.”¹² The court deemed it “reasonable to infer that appellant *knew* that the people inside the house *would sustain grievous burn injuries* if they escaped alive,” circumstances which “evidence[d] appellant’s *intent* sufficiently to permit the jury to find that appellant had the requisite *specific intent* to support his convictions of malicious disfigurement.”¹³

Similarly, in *Curtis v. United States*, the court upheld a malicious disfigurement conviction where the accused had “brandish[ed] a bottle of draining fluid, and hurled its contents down in his direction, dousing him on the neck and soaking his shirt.”¹⁴ Both the court and counsel for the accused deemed it obvious that *if* “appellant was *aware* that the particular fluid would cause harmful burns to human skin, proof of specific intent to disfigure the person at whom it was thrown [would exist]”—the only question was *whether* the accused indeed possessed this awareness.¹⁵

The definitions of purpose and knowledge contained in §§ 22A-206(a) and (b) should provide the basis for preserving the foregoing authorities, while also affording greater clarity and specificity to District law.

Relation to National Legal Trends. Subsections (a) and (b) 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 these provisions have been clarified, simplified, and rendered more consistent.

“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.”¹⁶ 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

⁹ 903 A.2d 818, 833-34 (D.C. 2006) (en banc).

¹⁰ 483 A.2d at 671.

¹¹ *Id.* (quoting *United States v. Wharton*, 433 F.2d 451, 456 (D.C. Cir. 1970)).

¹² 640 A.2d 1047, 1055-56 (D.C. 1994).

¹³ *Id.*

¹⁴ *Curtis v. United States*, 568 A.2d 1074, 1075 (D.C. 1990).

¹⁵ *Id.*

¹⁶ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978).

result is *practically certain* to follow from his conduct, whatever his desire may be as to that result.”¹⁷

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.¹⁸ 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.

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.”¹⁹ 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.²⁰ 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

¹⁷ WAYNE R. LAFAYE, 1 SUBSTANTIVE CRIMINAL LAW § 5.2 (2d ed.); see also *Tison v. Arizona*, 481 U.S. 137, 150 (1987).

¹⁸ 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.

¹⁹ PAUL ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 43 (1997).

²⁰ 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 § 22A-206(b)(1).

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.²¹ The intuition is also one with a strong legal basis—as the U.S. Supreme Court in *U.S. 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.²²

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 and knowledge modeled on those proposed by the Model Penal Code.²³ Likewise, in those jurisdictions that never modernized their codes, many courts have adopted similar definitions of purpose and knowledge through the common law.²⁴

Subsections (a) and (b) of § 22A-206 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

²¹ 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).

²² *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.

²³ 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.

²⁴ 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).

codified separately in § 22A-206(a) from the *desire* sense of the term—labeled “purposely”—under § 22A-206(b). 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 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.²⁵ 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 Staff Commentary on § 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 result in § 22A-206(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.²⁶ The language of “conscious desire” seems to more intuitively capture that which is at the heart of purpose than that of “conscious object.”²⁷ In contrast, use of the phrase “conscious desire” in the Revised Criminal Code’s definition of purpose as to a circumstance in § 22A-206(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

²⁵ See Model Penal Code § 2.02(2)(b)-(c).

²⁶ As specified in the explanatory note, the conscious desire necessary to constitute purpose must be accompanied by awareness 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 be aware 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.

²⁷ For cases and commentary utilizing the phrase “conscious desire,” see LAFAVE, *supra* note 17, at § 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.

the person *believes* or *hopes* that they exist.”²⁸ 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? It’s unclear: “[n]owhere in the Comments to the Model Penal Code is this anomaly . . . explained.”²⁹

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/awareness distinction in the context of results similarly apply to circumstances.³⁰ 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.”³¹

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 § 22A-206(a)(2). When viewed in light of the definition of purpose as to a result in § 22A-206(a)(1), this produces a simpler culpable mental state hierarchy that allows legislators to draft more proportionate offenses.³²

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

²⁸ Model Penal Code § 2.02(a)(ii).

²⁹ 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.

³⁰ 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 29, at 174.

³¹ Wesson, *supra* note 29, at 174.

³² See sources cited *supra* note 30.

Code’s definition of knowledge as to a result in § 22A-206(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 § 22A-206(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.”³³ 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.³⁴

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.”³⁵ 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 Penal Code § 2.02(2)(c)(ii) “since it is a weaker requirement.”³⁶ 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.³⁷

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, § 22A-206(b)(1)—namely, awareness as to a practical certainty—to the definition of knowledge as to a circumstance, § 22A-206(b)(2). When viewed collectively, these two definitions of knowledge produce a culpable mental state hierarchy that is less complex, more consistent, and easier to apply.

2. §§ 22A-206(c) & (d)—Recklessness Defined & Negligence Defined

Explanatory Notes. Subsection (c) provides a comprehensive definition of recklessness, sensitive to the type of objective element to which the term applies. Under this definition, a person acts recklessly with respect to a result when that person is aware of a substantial risk that the prohibited result will be caused by that person’s conduct (e.g., as when a person speeds through a red light, aware of a meaningful likelihood that the person’s vehicle will hit a pedestrian stepping into the crosswalk). Likewise, a person acts recklessly with respect to a circumstance when that person is aware of a substantial risk that the prohibited circumstance exists (e.g., as when a person purchases a stolen

³³ Model Penal Code § 2.02(2) cmt. 13 at 236.

³⁴ *Id.*

³⁵ Model Penal Code § 2.02(7).

³⁶ 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).

³⁷ *Id.* at 182-83. The issue of willful blindness will be addressed through a separate general provision, released by the CCRC in the future.

luxury car for a fraction of its market value, aware of a meaningful likelihood that the vehicle was stolen).

Subsection (c)(3) establishes that the person’s conduct must, in order to rise to the level of recklessness, grossly deviate from the standard of care that a reasonable person would observe in the person’s situation. This additional culpability requirement reflects the fact that conscious risk creation and risk taking is a routine aspect of life—present in, for example, any construction project, medical procedure, or the operation of an emergency response vehicle. In order for such conscious risk creation or risk taking to rise to the level of recklessness, therefore, the conduct must be both unjustifiable and manifest a level of blameworthiness that departs from community norms.

In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person’s conduct constituted a “gross deviation” from a reasonable standard of care under § (c)(3). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in § 22A-206(c)(3) is intended to be guided by the following framework.

Whether and to what extent a person’s conduct deviates from a reasonable standard of care in the context of recklessness depends upon an assessment of three main factors viewed in light of the circumstances known to the actor. The first factor concerns the risk of harm, including: its severity, the likelihood it would be realized, and the extent to which the person was aware of it. The second factor concerns the person’s conduct, including: the extent to which it was intended to further legitimate social interests, the likelihood those interests would be furthered, and any other morally relevant reasons for which the person consciously disregarded the risk. The third factor is whether any situational factors for which the person is not responsible reasonably hindered the person’s ability to exercise an appropriate level of concern for the interests of others. The more clearly these factors, when viewed collectively, indicate the unjustifiability of the conduct and the blameworthiness of the accused, the more likely it is that the gross deviation standard has been satisfied.

Subsection (c)(4) provides for an enhanced form of recklessness, which is indicated by the phrase “recklessly, under circumstances manifesting extreme indifference” in an offense definition. This form of enhanced recklessness requires proof that the person’s conduct—above and beyond implicating the requisite awareness of a substantial risk at issue in recklessness—constituted an extreme deviation from the standard of care that a reasonable person would observe in the person’s situation. The requirement of an extreme deviation is to be contrasted with that of a gross deviation, which is required for recklessness under § 22A-206(c)(3). The difference between enhanced recklessness and normal recklessness is, therefore, one of degree. It should be assessed by applying, where necessary, the same framework applicable to recklessness.

Subsection (d) provides a comprehensive definition of negligence, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts negligently with respect to a result when that person fails to perceive a substantial risk that a prohibited result will be caused by that person’s conduct (e.g., as when a person speeds through a red light unaware that there is a meaningful likelihood that the person’s vehicle will hit a pedestrian stepping into the crosswalk). Likewise, a person acts negligently with respect to a circumstance when that person fails to perceive a substantial

risk that the prohibited circumstance exists (e.g., as when a person purchases a stolen luxury car for a fraction of the market price, unaware of a meaningful likelihood that the vehicle was stolen). Under both §§ 22A-206(d)(1) and (d)(2), therefore, negligence—unlike purpose, knowledge, or recklessness—constitutes a purely objective form of culpability; it is concerned with the substantial risks of which the person should have been aware, and for which the person can appropriately be held criminally liable.

To aid in the latter task, § 22A-206(d)(3) establishes that the person’s conduct must, in order to rise to the level of negligence, grossly deviate from the standard of care that a reasonable person would observe in the person’s situation. As with recklessness, the discretionary determination reflected in § 22A-206(d)(3) is intended to be guided by a basic framework for assessing the unjustifiability of a person’s conduct and the blameworthiness of an actor for having engaged in it.

Whether and to what extent a person’s conduct deviates from a reasonable standard of care in the context of negligence depends upon an assessment of three main factors viewed in light of the circumstances known to the actor. The first factor concerns the risk of harm, including: its severity, the likelihood it would be realized, and the extent to which the person should have been aware of it. The second factor concerns the person’s conduct, including: the extent to which it was intended to further legitimate social interests, the likelihood those interests would be furthered, and any other morally relevant reasons for which the person failed to perceive the risk. The third factor is whether any situational factors for which the person is not responsible reasonably hindered the person’s ability to exercise an appropriate level of concern for the interests of others. The more clearly these factors, when viewed collectively, indicate the blameworthiness of the accused, the more likely it is that the gross deviation standard has been satisfied.

Relation to Current District Law. Subsections (c) and (d) fill a gap in, but generally accord with, District law. The culpable mental states of “recklessness” and “negligence” appear in a variety of District statutes, though no statute defines either term.³⁸ In the absence of a statutory definition, other District authorities—namely, DCCA case law and the D.C. Criminal Jury Instructions—have provided interpretations of identical or comparable terms in a manner that is broadly consistent with §§ 22A-206(c) and (d). That being said, §§ 22A-206(c) and (d), when viewed in light of the accompanying explanatory note, provide substantially more detail than does existing District authority. This additional detail improves the clarity and consistency of the Revised Criminal Code.

The modern genesis of District law on recklessness is the District’s cruelty to children statute, D.C. Code § 22-1101, which prohibits, *inter alia*, “recklessly . . . [m]altreat[ing] a child.”³⁹ Notably, the statute does not define this key culpable mental state. The D.C. Criminal Jury Instructions originally recommended that the term “recklessly” be interpreted in accordance with the Model Penal Code’s definition of recklessness.⁴⁰ Thereafter, in *Jones v. United States*, the DCCA had the opportunity to

³⁸ See, e.g., D.C. Code § 22-1101; D.C. Code § 22-404; D.C. Code § 5-1307.

³⁹ D.C. Code § 22-1101(b)(1). For earlier District authority on recklessness, see, e.g., *Thompson v. United States*, 690 A.2d 479, 483 (D.C. 1997).

⁴⁰ D.C. Crim. Jur. Instr. § 4.120 cmt. (quoting Model Penal Code § 2.02(2)(c)).

address the issue, determining that the required recklessness could be satisfied by proof that the accused “was aware of and disregarded the grave risk of bodily harm created by his conduct”⁴¹— a definition the *Jones* court deemed consistent with the Model Penal Code definition of “recklessly.”⁴²

Building on the *Jones* decision, the DCCA, in *Tarpeh v. United States*, applied a similar understanding of recklessness to interpret the requirement of “reckless indifference” in the context of the District’s Criminal Neglect of a Vulnerable Adult statute, D.C. Code § 22–934.⁴³ Observing that “Model Penal Code § 2.02(2)(c) [] states that a ‘person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct,’” the *Tarpeh* court opted to “[a]pply th[e]se concepts to ‘reckless indifference’” in a manner consistent with *Jones*.⁴⁴ More specifically, the DCCA held that “the trier of fact,” to prove reckless indifference, “must show not only that the actor did not care about the consequences of his or her action, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action.”⁴⁵

The definition of recklessness reflected in §§ 22A-206(c)(1)-(3) is intended to generally capture the foregoing District authorities on recklessness and reckless indifference. At the same time, however, it is also intended to allow future factfinders to proceed in a clearer and more consistent fashion. For example, the extent to which a risk is grave, an actor’s disregard of the risk is culpable, or whether it can be said that an actor did not care about the consequences of his or her action, necessarily hinge upon a variety of fact-specific considerations pertaining to the justifiability of a person’s conduct and the person’s blameworthiness for engaging in it. These include, among other factors, the circumstances known to the actor, the reasons why the actor consciously disregarded the risk, and the extent to which any aspects of the actor’s situation reasonably hindered the actor’s ability to exercise an appropriate level of concern for the interests of others. The gross deviation standard stated in § 22A-206(c)(3), when viewed in light of the evaluative framework specified in this explanatory note, appropriately accounts for these considerations.

District law also recognizes an enhanced form of recklessness involving extreme indifference that is distinct from normal recklessness. Consider § (b) of the District’s aggravated assault statute, D.C. Code § 22–404.01, which requires proof of the following mental state:

Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person . . .⁴⁶

Although the meaning of the foregoing language is less than clear from the statute, the DCCA has expounded upon it through case law.

⁴¹ 813 A.2d 220, 225 (D.C. 2002).

⁴² *Id.* (quoting Model Penal Code § 2.02(2)(c)).

⁴³ 62 A.3d 1266, 1270 (D.C. 2013).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ D.C. Code § 22-404.01.

For example, in *Johnson v. United States*, the court explained that this provision of the District’s aggravated assault statute incorporates the mental state of “[g]ross recklessness’ . . . coupled with ‘extreme indifference to human life.’”⁴⁷ This elevated culpable mental state requirement, as the court went on to explain, not only entails proof that the accused was “aware that his conduct created an extreme risk of serious bodily injury,” but also that this conduct have “take[n] place ‘under circumstances manifesting extreme indifference to human life.’”⁴⁸

The DCCA has likewise determined that the foregoing *mens rea* applicable to aggravated assault is substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,⁴⁹ which also requires proof of “‘extreme recklessness’ regarding risk of [harm].”⁵⁰ This is a product of the DCCA’s interpretation of the phrase “malice aforethought” employed in the District’s second-degree murder statute, D.C. Code § 22-2103.⁵¹ One of the “distinct mental states” that comprise this common law phrase is that of a “depraved heart” which has been said to exist where the “perpetrator was subjectively aware that his or her conduct created an extreme risk of death,” but nevertheless disregarded that risk.⁵² Notably, however, the DCCA has made a variety of additional statements regarding the culpable mental state governing depraved heart murder, such as, for example, that the actor’s conduct must “manifest a wanton disregard of human life.”⁵³

Whatever the precise meaning of extreme recklessness is in theory, it is relatively clear what it looks like in practice. Illustrative is the depraved heart murder case of *Powell v. United States*,⁵⁴ which the DCCA’s *en banc* decision in *Comber v. United States* identifies as a classic example of extreme recklessness.⁵⁵ The defendant in *Powell* “disregarded a police officer’s signal to stop his car and pull over” and “led police on a harrowing high speed chase” that included speeding through a tunnel at speeds in excess of ninety miles per hour and turning onto a congested exit ramp blocked by vehicles.⁵⁶ The chase concluded with the defendant’s killing of an innocent victim, for which the defendant was convicted of depraved heart murder.⁵⁷

On appeal, the defendant’s conviction was upheld on the theory, reaffirmed by the *Comber* court, that the defendant’s conduct “showed a wanton, reckless disregard for life.”⁵⁸ In accordance with the foregoing reasoning, the *Comber* court highlights the following additional fact patterns as paradigmatic examples of depraved heart murder: (1) “firing a bullet into a room occupied, as the defendant knows, by several people”; (2) starting a fire at the front door of an occupied dwelling”; (3) “shooting into . . . a moving

⁴⁷ 118 A.3d 199, 206 (D.C. 2015).

⁴⁸ *Id.* at 205.

⁴⁹ *Perry*, 36 A.3d at 823 (Farrell, J. concurring).

⁵⁰ *Id.* at n.3 (quoting *Comber v. United States*, 584 A.2d 26, 39 n.11 (D.C.1990) (en banc)).

⁵¹ *Comber*, 584 A.2d at 38.

⁵² *Id.* at 39. See, e.g., *Jennings v. United States*, 993 A.2d 1077, 1080 (D.C. 2010); *Williams v. United States*, 858 A.2d 984, 998 (D.C. 2004).

⁵³ *Id.* (quoting *United States v. Dixon*, 419 F.2d 288, 293 n.8 (D.C. Cir. 1969)); *Powell v. United States*, 485 A.2d 596, 603 (D.C. 1984).

⁵⁴ 485 A.2d at 603.

⁵⁵ *Comber*, 584 A.2d at 39 n.13.

⁵⁶ *Powell*, 485 A.2d at 603.

⁵⁷ *Id.*

⁵⁸ *Id.* See *Comber*, 584 A.2d at 39 n.13 (quoting *Powell*, 485 A.2d at 603).

automobile, necessarily occupied by human beings”; and (4) “playing a game of ‘Russian roulette’ with another person.”⁵⁹

The definition of enhanced recklessness reflected in § 22A-206(c)(4) is intended to generally capture the foregoing District authorities on aggravated assault and depraved heart murder. At the same time, however, it is also intended to provide future factfinders with a basis for identifying enhanced recklessness—and distinguishing between normal recklessness and enhanced recklessness—in a clearer and more consistent fashion.

For example, although District authorities tend to focus on the conscious disregard of an “extreme risk” as the core of enhanced recklessness, it is unclear what extreme means in this context—or how it is different than the grave or substantial risk required for other normal recklessness offenses. The most obvious reading of the term is that it is probabilistic, that is, that the result of death or serious bodily injury must be extremely likely to occur. If true, however, then this definition “fails to account for cases where a conviction for unintended murder [or aggravated assault] is clearly in order regardless of the probability that death [or serious bodily injury] will occur.”⁶⁰ Indeed, the illustrative examples cited to in *Comber* reflect “a wanton, reckless disregard for life” not (only) because of how probable the risk of death was, but because they were “imposed for insufficient or misanthropic reasons.”⁶¹ The gross deviation standard stated in § 22A-206(c)(4), when viewed in light of the evaluative framework specified in the explanatory note, appropriately accounts for these implicit considerations.

The DCCA’s approach to negligence appears to be similar to that of its approach to recklessness, with one exception: awareness of the risk is not necessary. Few District statutes require this particular culpable mental state; however, the DCCA has interpreted the District’s broadly worded manslaughter statute to incorporate the offense of involuntary manslaughter, which is governed by the mental state of “culpable (criminal) negligence.”⁶² Case law establishes that this culpable mental state, in turn, entails proof that the actor’s conduct created “extreme danger to life or of serious bodily injury,” which amounts to “a gross deviation from a reasonable standard of care.”⁶³ Such requirements are to be distinguished, as the DCCA has further explained, from “simple or civil negligence,” which is merely “a failure to exercise that degree of care rendered appropriate by the particular circumstances in which a man or woman of ordinary prudence in the same situation and with equal experience would not have omitted.”⁶⁴ (Note, however, that the District’s vehicular homicide statute, § 50-2203.01, appears to incorporate this civil negligence standard.⁶⁵)

⁵⁹ *Comber*, 584 A.2d at 39 n.13 (quotations and citation omitted).

⁶⁰ Alan C. Michaels, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 798 (1985). It also questionable, given recent empirical work on *mens rea*, that jurors would be able to differentiate between the substantial or grave risk at issue in normal recklessness and the extreme risk at issue in enhanced recklessness. See Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1353 (2011).

⁶¹ Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 934-35 (2000).

⁶² *Faunteroy v. United States*, 413 A.2d 1294, 1298-99 (D.C. 1980).

⁶³ *Comber*, 584 A.2d at 48.

⁶⁴ *Faunteroy*, 413 A.2d at 1298-99.

⁶⁵ The relevant statutory provision reads:

Any person who, by the operation of any vehicle in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, including a

The definition of negligence reflected in § 22A-206(d) is broadly consistent with the foregoing District authority on involuntary manslaughter.⁶⁶ Consistent with the analysis of recklessness and enhanced recklessness *supra*, however, this definition—when viewed in light of the factors specified in the explanatory note—is also intended to provide future factfinders with the basis for identifying it in a clearer and more consistent fashion.

Relation to National Legal Trends. Subsections (c) and (d) 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.⁶⁷ However, while courts agreed “that something more was required for criminal liability than the ordinary negligence which is sufficient for tort liability,”⁶⁸ 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.⁶⁹

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

pedestrian in a marked crosswalk, or unmarked crosswalk at an intersection, shall be guilty of a felony, and shall be punished by imprisonment for not more than 5 years or by a fine of not more than the amount set forth in § 22-3571.01 or both.

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

⁶⁶ Note, however, that the reference to “*extreme danger to life or of serious bodily injury*” in the DCCA’s definition of the negligence governing involuntary manslaughter is likely distinct from the mere “substantial risk” referenced in the Revised Criminal Code’s definition of negligence under §§ 22A-206(d)(1)-(2).

⁶⁷ LAFAVE, *supra* note 17, at § 5.4.

⁶⁸ *Id.*

⁶⁹ *Id.*

the standard of conduct that a law-abiding person would observe in the actor's situation.

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

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.”⁷⁰ 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.”⁷¹ 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.”⁷²

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.⁷³ 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.⁷⁴

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.⁷⁵ The specific standard provided is that of a “gross deviation” from a reasonable standard of care, which, under both definitions,

⁷⁰ Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1438-39 (1968)

⁷¹ *Id.*

⁷² *Id.*

⁷³ Model Penal Code § 2.02 cmt. at 237, 241.

⁷⁴ *Id.*

⁷⁵ *Id.*

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.”⁷⁶ 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.”⁷⁷

The Model Penal Code definitions of recklessness and negligence, like those of purpose and knowledge, have been quite influential. Insofar as legislative practice is concerned, for example, “[a]t least 24 state statutes follow the Model Penal Code’s definitions of recklessness and negligence.”⁷⁸ 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.⁷⁹ (The U.S. Sentencing Commission also opted to incorporate the Model Penal Code definitions of recklessness and negligence into the U.S. Sentencing Guidelines.⁸⁰)

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 negligence⁸¹; (2) some reform jurisdictions omit reference to the magnitude of the risk in their definitions of recklessness and/or negligence⁸²; 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.⁸³

⁷⁶ *See id.*

⁷⁷ *Id.*

⁷⁸ *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.

⁷⁹ *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).

⁸⁰ *See, e.g.,* U.S.S.G. §2A1.4.

⁸¹ *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.

⁸² 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.

⁸³ 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;

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.⁸⁴ 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 §§ 22A-206(c)(1)-(2) and §§ 22A-206(d)(1)-(2), 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 § 22A-206(c)(3) and § 22A-206(d)(3), employ a situation-specific gross deviation standard. There are, however, a few important ways in which the definitions of 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.”⁸⁵ 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 § 22A-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)

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.

⁸⁴ See *Brown*, 520 U.S. at 422.

⁸⁵ See Model Penal Code § 2.02(2)(c)-(d).

that a *substantial and unjustifiable* risk existed.⁸⁶ 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.⁸⁷ Nor does it appear to have been intended by the Model Penal Code drafters.⁸⁸ 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.⁸⁹

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 §§ 22A-206(c)(1)-(2) reads: “being 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 “failing to perceive a substantial risk” in §§ 22A-206(d)(1)-(2)—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 “[un]justifiable” 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.”⁹⁰ 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.⁹¹ 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.⁹²

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

⁸⁶ See Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1379 n.130 (1992).

⁸⁷ See LAFAVE, *supra* note 17, at § 5.4.

⁸⁸ See Model Penal Code § 2.02 cmt. at 238.

⁸⁹ 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).

⁹⁰ Stephen P. Garvey, *What’s Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 341-42 (2006).

⁹¹ Model Penal Code § 2.02 cmt. at 237, 241.

⁹² 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 70, 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).

culpable enough to be criminalized under the Revised Criminal Code.⁹³ 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.⁹⁴ 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 the factfinder is less than clear, however.⁹⁵ 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,”⁹⁶ 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.”⁹⁷ 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 §§ 22A-206(c)(3) and (d)(3) 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

⁹³ 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).

⁹⁴ 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).

⁹⁵ See, e.g., Treiman, *supra* note 89, at 358; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).

⁹⁶ Model Penal Code § 2.02 cmt. at 243.

⁹⁷ *Id.*

considerations that should be brought to bear on whether the actor’s conduct constitutes a gross deviation.⁹⁸

It’s worth noting that this formula also provides the basis—as reflected in § 22A-206(c)(4)—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.⁹⁹ In reform jurisdictions, this enhanced recklessness is most frequently articulated through the requirement of acting “recklessly under circumstances manifesting extreme indifference to the value of human life.”¹⁰⁰ The foregoing language is directly drawn from the Model Penal Code definitions of murder and aggravated assault.¹⁰¹ 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 is as culpable as knowing or purposeful conduct.¹⁰²

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.¹⁰³

⁹⁸ 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 foreseeable 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 17, at § 5.4; Kimberly Kessler Ferzan, *Plotting Premeditation’s Demise*, 2012 LAW & CONTEMP. PROBS. 83, 86.

⁹⁹ See, e.g., Michaels, *supra* note 60; LAFAVE, *supra* note 17, at § 14.4.

¹⁰⁰ 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 17, 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).

¹⁰¹ See Model Penal Code §§ 210.2(b), 211.1(2)(a).

¹⁰² See Model Penal Code § 210.2 cmt. at 21-22.

¹⁰³ See *id.*

There are two problems with this “I know it when I see it approach” to *mens rea*.¹⁰⁴ 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.”¹⁰⁵ Second, case law and scholarly commentary indicate that the contours of enhanced recklessness can be fleshed out in a more coherent fashion.¹⁰⁶ 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.¹⁰⁷ (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.¹⁰⁸)

Consistent with the foregoing authorities, the Revised Criminal Code addresses the culpable mental state of enhanced recklessness as follows. Subsection (c)(4) establishes that “[i]n order to act recklessly as to a result or circumstance ‘under circumstances manifesting extreme indifference’ to the interests protected by an offense, the person’s conduct must constitute 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.¹⁰⁹ 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.¹¹⁰

3. § 22A-206(e)—Proof of Greater Culpable Mental State Satisfies Requirement for Lower

Explanatory Note. Subsection (e) states that proof of a higher culpable mental state will always establish a lesser culpable mental state. This establishes that negligence can be satisfied by proof of recklessness, knowledge, or purpose; recklessness can be satisfied by proof of knowledge or purpose, and knowledge can be satisfied by proof of

¹⁰⁴ John C. Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 444 (2007).

¹⁰⁵ 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 60, 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).

¹⁰⁶ See sources cited *supra* note 98.

¹⁰⁷ See sources cited *supra* note 98.

¹⁰⁸ See *Jeffries*, 169 P.3d at 916; *Neitzel v. State*, 655 P.2d at 336.

¹⁰⁹ Robinson, *supra* note 95, at 451-52.

¹¹⁰ *Id.*

purpose. These rules are a product of the view that, all else being equal, purpose is more culpable than knowledge, which is more culpable than recklessness, which is more culpable than negligence. In practical effect, these rules dictate that the legislature need not state alternative mental states in the definition of an offense; rather, a statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

Relation to Current District Law. Subsection (e) generally accords with District law. Although no District authority has squarely addressed the principle reflected in § 22A-206(e), many of the District’s more recent statutes suggest what this provision explicitly states: where knowledge will suffice to establish an objective element, so will purpose; where recklessness will suffice, so will knowledge or purpose; and where negligence will suffice, so will recklessness, knowledge, or purpose. This is reflected in the legislature’s practice of noting hierarchically superior mental states alongside the lowest mental state.¹¹¹ Under the Revised Criminal Code, in contrast, the legislature need not state alternative mental states in the definition of an offense; rather, a statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

Relation to National Legal Trends. Subsection (e) 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”¹¹² specified by legislatures ultimately amount to little more than “fine gradations along but a single spectrum of culpability.”¹¹³ 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,¹¹⁴ such that “it is impossible to commit a crime intentionally without concomitantly committing that crime recklessly.”¹¹⁵

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.¹¹⁶

¹¹¹ D.C. Code § 22-404.01 (knowledge or purpose as to causing serious bodily injury); D.C. Code § 22-404 (intent, knowledge, or recklessness as to causing serious bodily injury); D.C. Code § 22-1101 (intent, knowledge, or recklessness as to causing mistreatment); D.C. Code § 5-1307 (intent, knowledge, recklessness, or negligence as to causing interference).

¹¹² *People v. Green*, 56 N.Y.2d 427, 432 (1982).

¹¹³ *People v. Cameron*, 506 N.Y.S.2d 217, 218 (1986) (citing *Green*, 56 N.Y.2d at 433).

¹¹⁴ *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)).

¹¹⁵ *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 17, at § 5.4 (citing *State v. Stewart*, 122 P.3d 1269 (N.M. 2005); *Simmons v. State*, 72 P.3d 803 (Wyo. 2003)).

¹¹⁶ 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.

Substantively speaking, it clarifies that purpose is more culpable than knowledge, which is more culpable than the recklessness, which is more culpable than negligence.¹¹⁷ So, for example, “if [a] crime can be committed recklessly, it is no less committed if the actor acted purposely.”¹¹⁸ 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.”¹¹⁹

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).¹²⁰ Several courts in jurisdictions that have not modernized their criminal codes have also recognized the virtues of this “common legal notion”¹²¹ and similarly apply it through case law.¹²² Consistent with the foregoing trends, § 22A-206(e) incorporates a substantively identical provision into the Revised Criminal Code.

Model Penal Code § 2.02(5).

¹¹⁷ *See id.*

¹¹⁸ Explanatory note on Model Penal Code § 2.02(5).

¹¹⁹ *Id.*

¹²⁰ 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.

¹²¹ *Kolstad v. Am. Dental Ass’n*, 139 F.3d 958, 970 (D.C. Cir. 1998) (Randolph, J., concurring).

¹²² *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).

**§ 22A-207 RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATE
REQUIREMENT**

(a) DISTRIBUTION OF ENUMERATED CULPABLE MENTAL STATES. Any culpable mental state specified in an offense applies to all subsequent results and circumstances until another culpable mental state is specified, with the exception of any result or circumstance for which the person is strictly liable under § 22A-207(b).

(b) IDENTIFICATION OF ELEMENTS SUBJECT TO STRICT LIABILITY. A person is strictly liable for any result or circumstance in an offense:

(1) That is modified by the phrase “in fact,” or

(2) To which legislative intent explicitly indicates strict liability applies.

(c) DETERMINATION OF WHEN RECKLESSNESS IS IMPLIED. A culpable mental state of “recklessly” applies to any result or circumstance not otherwise subject to a culpable mental state under § 22A-207(a), or subject to strict liability under § 22A-207(b).

COMMENTARY

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

Explanatory Note. Subsection (a) states the rule of interpretation governing the distribution of enumerated culpable mental states. It establishes that any enumerated culpable mental state should be interpreted as applying to all ensuing results and circumstances (with the exception of those subject to strict liability under § 22A-207(b)), until another culpable mental state is enumerated, in which case the subsequently specified culpable mental state should be interpreted in a similar fashion.

This rule of distribution clarifies the objective elements to which the legislature intended for a specified culpable mental state to apply. For example, in an offense that prohibits “knowingly causing bodily injury to a child” the enumerated culpable mental state might be interpreted as applying to the result of bodily injury alone, or, alternatively, to both that result and the requisite circumstance, namely, that the person to whom bodily injury was caused have been a child. Under § 22A-207(a), the latter interpretation would be the correct one since it mandates that the culpable mental state of knowledge be distributed to the ensuing results and circumstances.¹

The rule of interpretation reflected in § 22A-207(a) is intended to facilitate consistency in the law by providing a precise rule for distributing all culpable mental states among the result and circumstances of an offense. However, it is also intended to provide the legislature with an important drafting shortcut. Whenever the legislature wishes to apply the same culpable mental state to consecutive results and circumstances,

¹ If, however, the offense definition prohibited “knowingly causing injury to a person, negligent as to whether the person is a child,” then, pursuant to § 22A-207(a), the culpable mental state of knowledge would apply only to the result, while the culpable mental state of negligence—which is subsequently specified—would govern the requisite circumstance.

under § 22A-207(a) it need only state that term once with the expectation that it will be distributed appropriately. There is no need for the legislature to repeat the same culpable mental state in an offense, as might otherwise be required to clarify the culpable mental states to which various objective elements are subject in the absence of § 22A-207(a).

Relation to Current District Law. Subsection (a) fills a gap in District law. The D.C. Code lacks a fixed rule of interpretation for distributing culpable mental state terms, or for interpreting criminal statutes more generally. In the absence of a rule of this nature, the DCCA tends to employ a highly discretionary and context sensitive approach to interpreting criminal statutes.² On at least one occasion, however, the court has deemed a rule of distribution such as that reflected in § 22A-207(a) to reflect the “most straightforward reading of the [mental state] language” employed in a criminal statute.³

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.”⁴ 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.”⁵ 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 word ‘knowingly’ as applying that word to each element”⁶—what is considered the “normal, commonsense reading of a subsection of a criminal statute.”⁷

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).⁸ 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

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

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

⁴ *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009).

⁵ *Id.* at 652.

⁶ *Id.*; see, e.g., *Liparota v. United States*, 471 U.S. 419 (1985).

⁷ *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring).

⁸ 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.

embody the most likely legislative intent—the “normal probability” is that an articulated culpability requirement “was designed to apply to all material elements.”⁹

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).¹⁰ 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.¹¹

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).

These modest variances are necessary to facilitate the clear and consistent interpretation of the District’s criminal statutes.¹² 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. § 22A-207(b)—Identification of Elements Subject to Strict Liability

Explanatory Note. Subsection (b) states the rule of interpretation governing the identification of strict liability. It establishes that a result or circumstance is subject to strict liability if one of two conditions is met. First, under § 22A-207(b)(1) a result or circumstance is subject to strict liability if it is modified by the phrase “in fact.” Second, under § 22A-207(b)(2) a result or circumstance is subject to strict liability if—

⁹ Model Penal Code § 2.02 cmt. at 129.

¹⁰ 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.

¹¹ See, e.g., *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1239 (D.C. Cir. 2008); sources cited *supra* notes 4-7.

¹² 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).

notwithstanding the absence of the “in fact” modifier—legislative intent otherwise explicitly indicates that strict liability is applicable.

Here is an illustrative example of how each provision is intended to operate. An offense definition that prohibits “knowingly causing bodily injury to a person who is, in fact, a child” should, pursuant to § 22A-207(b)(1), be understood to apply strict liability to the requisite circumstance, namely, that the person to whom bodily injury was caused was a child. In contrast, an offense definition that prohibits “knowingly causing bodily injury to a child” and thereafter explicitly states that “a defendant shall be held strictly liable with respect to whether the victim harmed was a child,” should, pursuant to § 22A-207(b)(2), be given its intended effect. That is, although the rule of distribution reflected in § 22A-207(a) indicates that the culpable mental state of “knowingly” travels to all subsequent results and circumstances, the explicit expression of legislative intent reflected in the latter portion of the offense definition is sufficiently clear to overcome this rule.

The rule of interpretation reflected in § 22A-207(b) is intended to facilitate consistency in the law by providing a fixed methodology for appropriately recognizing strict liability elements. However, it is also intended to provide the legislature with important drafting shortcuts. Whenever the legislature intends to apply strict liability to a single result or circumstance, use of the phrase “in fact” is a simple and efficient means of communicating this point. When, however, the legislature intends to apply strict liability to more than one (or even all) of the results and circumstances in an offense, an explicit statement to that effect may be more efficient than continually repeating the phrase “in fact” throughout an offense definition.¹³

Relation to Current District Law. Subsection (b) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a standard way to specify offense elements that are subject to strict liability, even though elements and offenses subject to strict liability offenses exist.¹⁴ However, the DCCA does not lightly infer the absence of a culpable mental state; it must be “clear the legislature intended to create a strict liability offense.”¹⁵ In the absence of an “obvious [legislative] purpose” to impose strict liability, “the common law presumption in favor of imposing a *mens rea* requirement where a statute is otherwise silent” operates.¹⁶

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

¹³ So, for example, when the legislature intends to create a pure strict liability offense it might state something to the effect of “no culpable mental state applies to any objective element in this offense.”

¹⁴ As the DCCA observed in *McNeely v. United States*, “Strict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past.” 874 A.2d 371, 385–86 (D.C. 2005) (collecting statutes); see also *In re E.F.*, 740 A.2d 547, 550-51 (D.C. 1999) (discussing D.C. Code § 22-3011(a)).

¹⁵ *Conley v. United States*, 79 A.3d 270, 289 n.91 (D.C. 2013) (quoting *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

¹⁶ *McNeely*, 874 A.2d at 379–80. “[W]here the legislature is acting in its capacity to regulate public welfare,” however, mere “silence can be construed as a legislative choice to dispense with the *mens rea* requirement.” *Id.* at 388.

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.¹⁷

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.”¹⁸ 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.¹⁹

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 more precise term “explicitly.” This should help to limit litigation and inconsistent outcomes the former language has engendered.²⁰

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

Explanatory Note. Subsection (c) states a default rule, which addresses any interpretive ambiguities concerning culpable mental states that remain after consideration of the previous rules set forth in § 22A-207. It establishes that an offense definition which fails to clarify the culpable mental state (or strict liability) applicable to a given result or circumstance under §§ 22A-207(a) and (b) should be interpreted as applying a default of recklessness to that element.

Here are two illustrative examples of the kinds of situations where this default rule might apply. First, an offense definition might not specify any culpable mental state at all, such that the rule of distribution stated in § 22A-207(a) is inapplicable, while, at the same time, failing to clarify that strict liability is applicable under § 22A-207(b).

¹⁷ 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).

¹⁸ See, e.g., Me. Rev. Stat. tit. 17-A, § 34; N.D. Cent. Code Ann. § 12.1-02-02.

¹⁹ 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.

²⁰ See Brown, *supra* note 17.

Consider, for example, a hypothetical theft of government property offense that reads: “No person shall take government property without consent.”

Second, an offense definition might specify a culpable mental state but do so after some results and circumstances, which are neither governed by an explicitly specified culpable mental state nor clearly subject to strict liability. Consider, for example, a hypothetical aggravated theft of government property offense that reads: “No person shall take government property without consent and knowingly sell it to another.”

In each of these situations, § 22A-207(c) establishes that the relevant objective elements are subject to a culpable mental state of recklessness. In both theft of property offenses, for example, this would include the requirement of a “taking,” the requirement that the object taken be “government property,” and the requirement that the taking occur in the absence of “consent.”

The default rule reflected in § 22A-207(b) is intended to facilitate consistency in the law by providing a precise rule for determining how to resolve situations of interpretive ambiguity. It may also provide, however, what amounts to a drafting shortcut for the legislature in those situations where the legislature intends to apply recklessness to multiple objective elements (as reflected in the two examples noted above).

Relation to Current District Law. Subsection (c) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a fixed rule of interpretation for implying culpable mental state terms. In the absence of a rule of this nature, the DCCA employs “an interpretive presumption that *mens rea* is required,” notwithstanding statutory silence to the contrary, so long as the implication of a culpable mental state would not be contrary to legislative intent.²¹ As the DCCA has recognized, “[t]he presumption is based on the common understanding of *malum in se* offenses, which traditionally are ‘generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.’”²²

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.’”²³ This “rule of construction reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’”²⁴ 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.”²⁵ As a result, courts have for a long time opted to “interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even

²¹ *Conley*, 79 A.3d at 289 (citing *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

²² *McNeely*, 874 A.2d at 388 (quoting *Morrisette v. United States*, 342 U.S. 246, 251 (1952)).

²³ *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (quoting *Morrisette*, 342 U.S. at 250).

²⁴ *Id.* at 2009 (quoting *Morrisette*, 342 U.S. at 252).

²⁵ *Morrisette*, 342 U.S. at 250, 252.

where the statute by its terms does not contain them.”²⁶ 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.²⁷ 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.”²⁸ Whether or not this is 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,²⁹ and—as articulated in one recent Supreme Court concurrence—likely constitutes the contemporary basis for the common law presumption of *mens rea*.³⁰

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

²⁶ *X-Citement Video*, 513 U.S. at 70.

²⁷ 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).

²⁸ Model Penal Code § 2.02(3) cmt. at 127.

²⁹ Robinson & Grall, *supra* note 12, at 701.

³⁰ 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 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).

general provision providing a comparable default rule.³¹ 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.³² 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.

³¹ 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.

³² 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).