



Recommendations for Chapter 2 of the
Revised Criminal Code:
Mistake, Deliberate Ignorance, and
Intoxication

FIRST DRAFT OF REPORT NO. 3 SUBMITTED FOR ADVISORY GROUP REVIEW
March 13, 2017

DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715

First Draft of Report No. 3, Recommendations for Chapter 2 of the Revised Criminal Code—
Mistake, Deliberate Ignorance, and Intoxication

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 the Advisory Group's written comments on this First Draft of Report No. 3, *Recommendations for Chapter 2 of the Revised Criminal Code—Mistake, Deliberate Ignorance, and Intoxication*, is April 24, 2017 (six weeks from the date of issue). Oral comments and written comments received after April 24, 2017 will not be reflected in the Second Draft of Report No. 3. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

**§ 22A-208 PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND
IGNORANCE**

(a) EFFECT OF ACCIDENT, MISTAKE, AND IGNORANCE ON LIABILITY. A person is not liable for an offense when that person's accident, mistake, or ignorance as to a matter of fact or law negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(b) CORRESPONDENCE BETWEEN MISTAKE AND CULPABLE MENTAL STATE REQUIREMENTS. For purposes of determining when a particular mistake as to a matter of fact or law negates the existence of a culpable mental state applicable to a circumstance:

(1) *Purpose*. Any reasonable or unreasonable mistake as to a circumstance negates the existence of the purpose applicable to that element.

(2) *Knowledge*. Any reasonable or unreasonable mistake as to a circumstance negates the existence of the knowledge applicable to that element.

(3) *Recklessness*. Any reasonable mistake as to a circumstance negates the recklessness applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the recklessness applicable to that element if the person did not recklessly make that mistake.

(4) *Negligence*. Any reasonable mistake as to a circumstance negates the existence of the negligence applicable to that element. An unreasonable mistake as to a circumstance only negates the existence of the negligence applicable to that element if the person did not recklessly or negligently make that mistake.

(c) IMPUTATION OF KNOWLEDGE FOR DELIBERATE IGNORANCE. When a culpable mental state of knowledge applies to a circumstance in an offense, the required culpable mental state is established if:

(1) The person was reckless as to whether the circumstance existed; and

(2) The person avoided confirming or failed to investigate whether the circumstance existed with the purpose of avoiding criminal liability.

COMMENTARY

1. §§ 22A-208(a) & (b)—Effect of Accident, Mistake and Ignorance on Liability & Correspondence Between Mistake and Culpable Mental State Requirements

Explanatory Note. Subsection (a) addresses the general effect of accidents, mistakes, and ignorance on offense liability. It broadly clarifies what is otherwise implicit in the requirement that a conviction rest upon proof of all offense elements

beyond a reasonable doubt: that a person’s accident, mistake, or ignorance as to a matter of fact or law will typically relieve that person of liability when (and only when) it precludes the person from acting with the culpable mental state applicable to a result or circumstance. This means that the relationship between accident, mistake, and ignorance, on the one hand, and culpable mental states, on the other hand, is typically one of logical relevance: any accident, mistake or ignorance is relevant when (but only when) it prevents the government from meeting its burden of proof with respect to any given culpable mental state required by an offense definition.¹

Subsection (b) clarifies the nature of the correspondence between mistake and culpable mental state requirements using the terminology most commonly associated with mistake claims. The courts, when presented with the claim that a given mistake as to a matter of fact or law negated the existence of a culpable mental state applicable to an offense, have historically found it helpful to evaluate the overarching reasonableness of that mistake. Consistent with this evaluation, §§ (b)(1) and (2) jointly clarify that any mistake, whether reasonable or unreasonable, has the capacity to negate the existence of the purpose or knowledge applicable to the circumstance element in an offense. Section (b)(3) thereafter states the rule applicable to an area of mistake law where the traditional reasonableness analysis breaks down—the nature of the mistake that will negate the existence of a culpable mental state of recklessness applicable to a circumstance element. In this particular context, an unreasonable mistake may negate the existence of the culpable mental state of recklessness only if the person was merely negligent, but not reckless, in making that mistake. Lastly, § (b)(4) clarifies the limited circumstance in which an unreasonable mistake may negate the existence of the culpable mental state of negligence applicable to a circumstance element: where the person was not negligent—i.e., grossly unreasonable—in making that mistake.

Relation to Current District Law. Subsections (a) and (b) are generally in accordance with current District law. While the D.C. Code does not address accident, mistake, or ignorance, the DCCA applies an approach to these issues that is substantively consistent with the standard reflected in these subsections. Consistent with DCCA case law, the Revised Code views the overarching relevance of an accident, mistake, or ignorance to liability to be a product of whether it precludes the government from proving an offense’s culpable mental state requirements beyond a reasonable doubt.

Importantly, however, the Revised Code’s approach to accident, mistake, and ignorance will fundamentally change District law in two significant ways. First, the Revised Code will, by clarifying the culpable mental state requirement applicable to each objective element of every offense, practically end use of the judicially developed concepts of general intent and specific intent crimes at the heart of the DCCA case law on accident, mistake, and ignorance. Second, this clarification of culpable mental state requirements, when viewed in light of §§ (a) and (b), will ensure that it is the legislature, not the judiciary, that makes all policy decisions concerning the relevance of an accident, mistake, or ignorance to liability. These departures are intended to improve the clarity, consistency, and completeness of District law.

¹ Note, however, that § 22A-208(c) addresses a particular situation where, although an actor’s ignorance negates the culpable mental state of knowledge as to a particular circumstance, that culpable mental state is nevertheless imputed on policy grounds.

Under current District law, “[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element.”² The same approach appears to be similarly applicable to ignorance as to a matter of fact (or non-penal law), which can rebut proof of a required mental element, though it should be noted that ignorance of this nature appears to be generally assimilated into the District’s law of mistake.³

To determine when this kind of rebuttal is possible for mistakes, the DCCA typically relies upon the distinction between specific intent crimes and general intent crimes. For specific intent crimes, the DCCA posits that any honestly held mistake as to a relevant matter of fact or law will constitute a defense to the crime charged, regardless of whether the mistake is reasonable or unreasonable.⁴ For general intent crimes, however, the DCCA has repeatedly held that only an honestly held and reasonable mistake as to a relevant matter of fact or law will constitute a defense to the crime charged.⁵ With respect to claims of accident, in contrast, DCCA case law seems to primarily focus on general intent crimes, to which accidents may constitute a defense.⁶ It seems clear, however, that accidents also constitute a defense to specific intent crimes, which entail a higher *mens rea*.

The outward clarity and simplicity of the foregoing framework obscures a range of issues, many of which the DCCA has itself recognized. At the heart of the problem is the “venerable common law classification” system it relies upon, offense analysis, which “has been the source of a good deal of confusion.”⁷ The reasons for this confusion are well known: the central culpability terms that comprise the system, “general intent” and “specific intent,” are little more than “rote incantations” of “dubious value,”⁸ which can “be too vague or misleading to be dispositive or even helpful.”⁹ Each term envisions a

² D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). As the DCCA recently observed: “The mistake of fact doctrine shields the accused from criminal liability if his or her mistake rebuts the mental state included in the offense.” *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).

³ See, e.g., *Simms v. District of Columbia*, 612 A.2d 215, 219 (D.C. 1992). Neither ignorance nor mistake as to a matter of *penal* law is a defense, however, except with respect to the rare offense that incorporates a culpability requirement with respect to illegality. See, e.g., *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013); *Bsharah v. United States*, 646 A.2d 993, 999-1000 (D.C. 1994); *Abney v. United States*, 616 A.2d 856, 857-58, 863 (D.C. 1992).

⁴ See, e.g., *Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014); *In re Mitrano*, 952 A.2d 901, 905 (D.C. 2008).

⁵ See, e.g., *Simms v. District of Columbia*, 612 A.2d 215, 218 (D.C. 1992); *Goddard v. United States*, 557 A.2d 1315, 1316 (D.C. 1989); *Williams v. United States*, 337 A.2d 772, 774-75 (D.C. 1975).

⁶ For example, the commentary to the District’s criminal jury instructions states that:

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

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

⁷ *Ortberg*, 81 A.3d at 307 (quoting *United States v. Bailey*, 444 U.S. 394, 403 (1980)).

⁸ *Buchanan v. United States*, 32 A.3d 990, 1001 (D.C. 2011) (Ruiz, J. concurring).

⁹ *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011).

singular “umbrella culpability requirement that applie[s] in a general way to the offense as a whole.”¹⁰ Both, therefore, “fail[] to distinguish between elements of the crime, to which different mental states may apply.”¹¹

The District’s reliance on these ambiguous distinctions to address mistake and accident claims has brought with it the standard litany of consequences associated with offense analysis (and which are more fully discussed *infra*, Relation to National Legal Trends).

The first three problems are primarily relevant to the District’s law of mistake. First, reliance on the distinctions between general intent and specific intent crimes in this context allows for judicial policymaking, given that there is no reliable mechanism, legislative or judicial, for consistently communicating this classification.¹²

Second, absent a reliable mechanism for consistently distinguishing between general intent and specific intent crimes, it can be difficult to predict, *ex ante*, how a District court will exercise its policy discretion over a mistake issue of first impression.¹³

Third, judicial reliance on binary, categorical rules concerning whether a mistake is reasonable or unreasonable precludes District judges from accounting for the different kinds of mistakes that might arise—for example, reckless versus negligent mistakes.¹⁴

The fourth problem has less to do with the classifications of general intent and specific intent themselves than it does with the offense-level analysis of culpability that

¹⁰ PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW 155 (2d ed. 2012).

¹¹ *Ortberg*, 81 A.3d at 307.

¹² To take just one example, D.C. Code § 22–3302(a)(1) provides, in relevant part:

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

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

¹³ To that end, the commentary on the District’s criminal jury instructions states that: “[N]o general pattern instruction on these defenses could adequately provide for the range of contexts in which they arise, without resorting to a confusing array of alternative selections.” D.C. Crim. Jur. Instr. § 9.600: Defenses of Accident and Mistake—Note.

¹⁴ As one commentator observes:

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

undergirds them. It is therefore similarly applicable to the District’s law of accident. Viewing claims of mistake or accident through the lens of offense analysis has, on occasion, led Superior Court judges to treat issues of mistake and accident as true defenses, when, in fact, they are simply conditions that preclude the government from meeting its burden of proof with respect to an offense’s culpability requirement.¹⁵ In practical effect, this risks improperly shifting the burden of proof concerning an element of an offense onto the accused—something the DCCA has cautioned against in the context of both accident and mistake claims.¹⁶

All of the foregoing problems should be remedied by §§ (a) and (b) when viewed in light of the element analysis more broadly incorporated into the Revised Code. Instead of relying on the ambiguous and unpredictable distinctions of general intent and specific intent crimes to address issues of mistake or accident as “defenses,” District courts will only need to consider whether—consistent with §§ (a) and (b)—the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense. If the accident or mistake precludes the government from meeting its burden then it is, by virtue of an offense definition, an appropriate basis for exoneration. But if, in contrast, it does not preclude the government from meeting its burden, then—again, by virtue of an offense definition—that accident or mistake is appropriately ignored. In either case, however, the ultimate policy decision will reside with the legislature, contingent upon the legislature’s decision concerning which culpable mental state, if any, to apply to each objective element of an offense.

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

Claims that a defendant did not satisfy the *mens rea* of the charged offense by virtue of some accident,¹⁷ mistake¹⁸ or ignorance¹⁹ as to a matter of fact or law have long

¹⁵ The DCCA has recently observed this much, noting in the context of trespass that “the existence of a reasonable, good faith belief is a valid defense precisely because it precludes the government from proving what it must—that a defendant knew or should have known that his entry was against the will of the lawful occupant.” *Ortberg*, 81 A.3d at 308–09.

¹⁶ See, e.g., *Clark v. United States*, 593 A.2d 186, 194 (D.C. 1991); *Simms*, 612 A.2d at 219; *Carter*, 531 at 964.

¹⁷ Generally speaking, “[a]n accident occurs when one brings about a result without desiring or foreseeing it.” Kenneth W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 J. CRIM. L. & CRIMINOLOGY 447, 504-07 (1990) [hereinafter, *Mistake and Impossibility*].

¹⁸ In contrast to accidents, “[m]istakes occur in the realm of perception; they involve false beliefs.” Douglas N. Husak, *Transferred Intent*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 65, 73 (1996).

¹⁹ “‘Ignorance’ implies a total want of knowledge—a blank mind—regarding the matter under consideration.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 12.01 n.2 (6th ed. 2012). This is in contrast to mistakes, which “suggests a wrong belief about the matter.” *Id.* As a result, the terms “[i]gnorance” and “mistake” are “not synonyms.” *Id.* Nevertheless, “this distinction typically is not drawn” in the relevant cases. *Id.* What is important is that both terms “describe the absence of a particular

been recognized by the common law as a viable defense theory.²⁰ At the same time, however, courts have historically struggled to deal with these claims in a clear, consistent, and principled manner—indeed, “[n]o area of the substantive criminal law has traditionally been surrounded by more confusion.”²¹

The most frequently referenced form of this type of claim is based on an erroneous factual belief—or generalized ignorance—concerning the ownership status of a particular piece of property.²² In a paradigm mistake of fact scenario, a person takes a piece of property owned by someone else motivated by the mistaken belief that it was abandoned.²³ If later prosecuted for a theft offense, that person will argue that because of this mistaken belief as to the property’s ownership statute, he or she lacked the *mens rea* necessary for a conviction.²⁴

At common law, courts relied upon a three-part offense categorization scheme to address claims of this nature.²⁵ For specific intent crimes, the general rule was that an honestly held mistake could serve as a defense to the crime charged, regardless of whether the mistake was reasonable or unreasonable.²⁶ For general intent crimes, in contrast, courts applied a reasonable mistake doctrine, under which an honestly held mistake could serve as a defense to the crime charged only if it was reasonable.²⁷ And for strict liability crimes, courts simply held that no mistake, no matter its reasonableness, could serve as a defense.²⁸

Categorical rules of this nature were understood to address the level of culpability required by the class of offense at issue. The problem, however, is that there was little principled basis upon which to pin the distinction between “general intent” and “specific intent” in the first place.²⁹ After all, “[n]either common experience nor psychology

state of mind as to a circumstance element, but not as to a conduct or result element.” Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 732 (1983). For purposes of this commentary, ignorance can be assimilated within mistake.

²⁰ WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.6 (Westlaw 2017); DRESSLER, *supra* note 19, at § 12.01. Note that mistakes or ignorance as to a matter of *penal* law typically was not, nor is currently, recognized as a viable defense since such issues rarely negate the *mens rea* of an offense. *Id.* This commentary does not discuss such issues except to the extent that proof of a culpable mental state as to a matter of penal law is an element of an offense. For discussion of offenses that incorporate proof of a culpable mental state as to a matter of penal law as an element of an offense, see Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1579-80 (2006).

²¹ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

²² LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

²³ See, e.g., *Simms*, 612 A.2d at 219. For an example of an accident claim, in contrast, imagine that the person later realizes the property was not, in fact, abandoned and thereafter attempts to return it to its lawful owner. If, in the course of trying to return that property, he or she unintentionally drops it on the floor, thereby destroying it, the person could raise the accidental nature of the dropping as a defense in the context of a destruction of property prosecution.

²⁴ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

²⁵ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

²⁶ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

²⁷ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

²⁸ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; DRESSLER, *supra* note 19, at § 12.03.

²⁹ The main, and perhaps only, exception to this phenomenon were those offenses that expressly required proof of “an intent or purpose to do some future act, or to achieve some further consequence (i.e., a special motive for the conduct), beyond the conduct or result that constitutes the *actus reus* of the offense.” DRESSLER, *supra* note 19, at § 10.06. These so-called partially inchoate offenses were quite consistently treated as specific intent offenses at common law. See Model Penal Code § 2.08 cmt. at 356.

knows of any such phenomenon as ‘general intent’ distinguishable from ‘specific intent.’”³⁰ In the absence of legislative guidance on whether an offense was one of specific intent or general intent, that classification decision—as well as the ultimate policy judgment concerning whether any particular kind of mistake ought to provide the basis for exoneration—was left to the courts.

In making that policy determination, moreover, this binary categorization scheme failed to provide courts with a basis for accounting for the different kinds of mistakes that could potentially arise. For example, the distinction between reasonable and unreasonable mistakes at the heart of the common law approach overlooked the potential relevance of a reckless mistake—which “occurs when an actor is aware of a substantial risk that the circumstance exists”—to liability.³¹

Perhaps more problematic, however, was the fact that courts themselves often failed to accurately perceive the nature of what they were doing. Whether in the context of considering claims of mistake or accident, judicial reliance on the distinctions between general intent and specific intent crimes had a tendency to lead courts to view the relevant issues as distinct from the government’s burden of proof, and, therefore, to treat them as “affirmative defenses”³²—for which the defendant may ultimately bear the burden of proof—rather than “absent element defenses”³³—for which the defendant may not.³⁴

The source of most of the foregoing problems, as many jurisdictions have come to recognize, was the flawed method of analyzing culpability, offense analysis, upon which the common law approach to mistake and accident was premised. By “failing to distinguish between elements of the crime, to which different mental states may apply,”³⁵ offense analysis lacked the conceptual toolkit necessary to appreciate what the modern conception of culpability, element analysis, clarified: resolving claims of mistake,

³⁰ *People v. Kelley*, 176 N.W.2d 435, 443 (Mich. 1970).

³¹ ROBINSON & CAHILL, *supra* note 10, at 195.

³² An affirmative defense is contingent upon conditions or circumstances unrelated to the elements contained in the charged offense. When an affirmative defense—typically either a justification or excuse—is successfully raised it exonerates the accused *notwithstanding the fact that the government proved all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

³³ An absent element defense is contingent upon conditions or circumstances directly related to the elements of the charged offense. When an absent element defense is successfully raised it exonerates the accused *because the government cannot, by virtue of the defense’s existence, prove all of the elements of an offense beyond a reasonable doubt*. ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65(c).

³⁴ The United States Supreme Court has held that the states and the federal government must be allocated the burden of persuasion with regard to the requisite culpable mental state for each objective element of the crime(s) charged. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510 (1979). For compilations of case law addressing mistake and accident claims which may conflict with this principle, see, for example, Robinson & Grall, *supra* note 19, at 758; Dannye Holley, *The Influence of the Model Penal Code’s Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 255 nos. 100 & 101 (1997); see also Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 356-57 (1986).

³⁵ *Ortberg*, 81 A.3d at 307.

ignorance, and accident amount to little more than a “negative statement” of the culpable mental state governing the particular objective element to which it applies.³⁶

To appreciate the reciprocal nature of this relationship consider the role that a mistaken belief as to abandonment, such as that discussed *supra*, plays in the context of a theft offense with the following *actus reus*: “No person shall unlawfully use the property of another.” In this context, the nature of the mistaken belief as to abandonment that will exonerate is part and parcel with the culpable mental state requirement (if any) applicable to the circumstance “of another.”³⁷

For example, application of a knowledge mental state requirement to that circumstance means that any honest mistake as to the property’s ownership status shall exonerate, since someone who wholeheartedly believed—whether reasonably or unreasonably—that property X was abandoned cannot, by definition, have been practically certain (i.e., knew) that property X was owned by someone else. But if, in contrast, the government need only prove the accused was negligent as to whether the property was “of another” to secure a conviction, only a reasonable mistake (or at least a mistake that is not grossly unreasonable) as to the property’s ownership status can negate the existence of the culpable mental state requirement. Negligence, after all, does not require proof that the accused was aware of the substantial risk he or she disregarded, only that the reasonable person in the accused’s situation *would have been aware of that risk*.³⁸

This kind of element analysis offers similar insights for the adjudication of accident claims, which can primarily be distinguished from mistake claims by the objective element to which they relate: whereas mistakes implicate the culpable mental state governing circumstance elements, accidents typically involve the culpable mental state governing result elements.³⁹ For example, “[o]ne makes a ‘mistake’ as to another’s age or property, the obscene nature of a publication, or other circumstance elements, but one ‘accidentally’ injures another, pollutes a stream, or interferes with a law enforcement officer.”⁴⁰ “To say,” therefore, “that a non-negligent accident that causes a prohibited result provides a defense is simply to say that all offenses containing result elements require at least negligence as to causing the prohibited result.”⁴¹

³⁶ Robinson & Grall, *supra* note 19, at 726–27. As Dressler similarly observes: “[B]ecause of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense.” DRESSLER, *supra* note 19, at § 12.02.

³⁷ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6.

³⁸ Likewise, if a culpable mental state of recklessness governed the circumstance “of another,” then an unreasonable mistake as to whether property X was abandoned can negate the existence of the requisite culpable mental state requirement, so long as the defendant was merely negligent, but not reckless, in making that mistake. See Robinson & Grall, *supra* note 19, at 726–27.

³⁹ See, e.g., Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1080 (1997); Simons, *Mistake and Impossibility*, *supra* note 17, at 504-07; Husak, *supra* note 18, at 65.

⁴⁰ Robinson & Grall, *supra* note 19, at 732.

⁴¹ *Id.* As the DCCA observed in *Carter v. United States*: “It is only where there is a reasonable theory of the evidence under which the parties involved may be held to have exercised due care notwithstanding that the accident occurred, that an unavoidable accident instruction is proper.” 531 A.2d at 964 (quoting *Bickley v. Farmer*, 215 Va. 484, 488 (1975)).

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

Aided by the insights of element analysis, the drafters accurately perceived that “ignorance or mistake has only evidential import; it is significant whenever it is logically relevant, and it may be logically relevant to negate the required mode of culpability.”⁴² These principles were understood by the drafters to be implicit in the requirement that the government prove every element of an offense—including culpable mental states—beyond a reasonable doubt.⁴³ Nevertheless, the drafters nevertheless chose to explicitly codify them for purposes of clarity.

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

(1) Ignorance or mistake as to a matter of fact or law is a defense if:

(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense;
or

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

The explanatory note accompanying this provision communicates the drafters' stated intent of clarifying that “ignorance or mistake is a defense to the extent that it negatives a required level of culpability or establishes a state of mind that the law provides is a defense,” which in turn depends “upon the culpability level for each element of the offense, established according to its definition and the general principles set forth in Section 2.02.”⁴⁴

Generally speaking, Model Penal Code § 2.04(1) has been quite influential. It is now commonly accepted, for example, that “ignorance or mistake of fact or law is a defense when it negatives the existence of a mental state essential to the crime charged.”⁴⁵ And codification of a general provision modeled on § 2.04(1) is a well-established part of modern code reform efforts: a strong majority of reform jurisdictions—as well as all of the major model codes and recent comprehensive code reform projects—codify a comparable provision.⁴⁶ Likewise, courts in jurisdictions

⁴² Model Penal Code § 2.04 cmt. at 269.

⁴³ Robinson & Grall, *supra* note 19, at 727.

⁴⁴ Model Penal Code § 2.04—Explanatory Note.

⁴⁵ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6; *see, e.g., People v. Andrews*, 632 P.2d 1012, 1016 (Colo. 1981) *People v. Mayberry*, 542 P.2d 1337, 1346 (Cal. 1975). There is, however, one exception: “if the defendant would be guilty of another crime had the situation been as he believed, then he may be convicted of the offense of which he would be guilty had the situation been as he believed it to be.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. For further discussion of this issue, *see infra* note 69.

⁴⁶ For reform jurisdictions, *see* Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Ark. Code Ann. § 5-2-206; Colo. Rev. Stat. Ann. § 18-1-504; Haw. Rev. Stat. Ann. § 702-218; 720

that never modernized their codes have endorsed Model Penal Code § 2.04(1) through case law.⁴⁷

Notwithstanding the broad popularity of the Model Penal Code approach, however, many reform jurisdictions have opted to modify § 2.04(1) in one or more ways.⁴⁸ For example, a plurality of jurisdictions link the significance of mistakes to disproving the requisite culpable mental state without reference to “defenses” at all—as is the case in Model Penal Code § 2.04(1)(a)—and instead focus solely on when a given mistake “negatives” an element of the offense.⁴⁹ Another common variance is reflected in the plurality of jurisdictions that omit the second prong of Model Penal Code § 2.04(1)(b) altogether, opting against inclusion of an explicit statement that “[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense.”⁵⁰

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

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

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

⁴⁷ See, e.g. *United States v. Aitken*, 755 F.2d 188, 193 (1st Cir. 1985); *Com. v. Lopez*, 745 N.E.2d 961, 964 (Mass. 2001).

⁴⁸ Holley, *supra* note 34, at 247-49 (collecting citations).

⁴⁹ For reform jurisdictions, see Ala. Code § 13A-2-6; Alaska Stat. Ann. § 11.81.620; Ariz. Rev. Stat. Ann. § 13-204; Colo. Rev. Stat. Ann. § 18-1-504; Conn. Gen. Stat. Ann. § 53a-6; Ky. Rev. Stat. Ann. § 501.070; Mo. Ann. Stat. § 562.031; N.H. Rev. Stat. Ann. § 626:3; N.Y. Penal Law § 15.20. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

⁵⁰ For reform jurisdictions, see Ariz. Rev. Stat. Ann. § 13-204(a); Ill. Comp. Stat. 720 § 5/4-8; Ind. Code Ann. § 35-41-3-7; Kan. Stat. Ann. § 21-5207; Mo. Ann. Stat. § 562.031; Tenn. Code Ann. § 39-11-502; Tex. Penal Code Ann. § 8.02; Utah Code Ann. § 76-2-304. For recent code reform projects, see Kentucky Revision Project § 501.207 and Illinois Reform Project § 207.

Both of these modifications—each of which is consistent with the plurality legislative trends noted above—are intended to avoid the significant judicial and legislative confusion that “characterizing the mistake of fact doctrine as a ‘defense’” has produced in many jurisdictions.⁵¹ In an attempt to avoid this kind of confusion, § (a) more clearly communicates that mistake “does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution’s ability to prove the requisite culpable mental state beyond a reasonable doubt.”⁵²

A related area of confusion, addressed by § (b), is the nature of the correspondence between mistake and culpable mental state requirements. Although courts in reform jurisdictions generally seem to have recognized that “determining whether a reasonable or an unreasonable mistake as to a particular [] circumstance element will provide a defense requires nothing more than determining what culpable state of mind is required as to that element,”⁵³ judges have struggled to accurately translate this principle into specific rules that accurately translate the traditional distinctions between reasonable and unreasonable mistakes into rules that track the relevant culpable mental states.⁵⁴ This is particularly true, moreover, in the area where the translation is most difficult, determining the kind of mistake that negates the existence of recklessness.⁵⁵ With that in mind, and consistent with case law,⁵⁶ commentary,⁵⁷ and

⁵¹ Holley, *supra* note 34, at 254; see Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 205 (2003).

⁵² Holley, *supra* note 34, at 247. As LaFave phrases it: “Instead of speaking of ignorance or mistake of fact or law as a defense, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense. LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Consistent with that analysis, Model Penal Code § 2.04(1)(b), by providing that “[i]gnorance or mistake as to a matter of fact or law [serves as] a defense [when] the law provides that the state of mind established by such ignorance or mistake constitutes a defense,” is “doubly superfluous.” ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62. For an application of this provision, see Model Penal Code § 223.1(3)(a), which provides a defense for an actor who took property when he “was unaware that the property or service was that of another” For recognition by the Model Penal Code drafters that this defense is redundant and that such an actor would be exculpated by the normal operation of the culpability requirements, see Model Penal Code § 223.1 cmt. at 153

⁵³ Robinson & Grall, *supra* note 19, at 729. As the New Jersey Supreme Court frames the inquiry: “[W]e relate the type of mistake involved to the essential elements of the offense, the conduct proscribed, and the state of mind required to establish liability for the offense.” *State v. Sexton*, 733 A.2d 1125, 1130 (N.J. 1999).

⁵⁴ ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62 (collecting citations).

⁵⁵ As Robinson and Grall observe:

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

the general provisions incorporated into two recent comprehensive criminal code reform projects,⁵⁸ § (b) provides District courts with the basic rules of translation. Such guidance is intended to avoid the confusion which silence on such issues can create, and, therefore, increase the clarity and consistency of District law.

The third noteworthy aspect of the Revised Code is its application of the logical relevance principle incorporated into § (a) to accidents, alongside mistakes and ignorance. This dual application of the logical relevance principle constitutes a departure from modern legislative trends: few reform codes address the import of accidents and, to the extent they do, accidents are viewed through the lens of legal causation.⁵⁹

More specifically, these few reform code provisions incorporate the “fresh approach”⁶⁰ to legal causation developed by the drafters of the Model Penal Code and implemented through Model Penal Code § 2.03(2).⁶¹ For the reasons discussed in the

Robinson & Grall, *supra* note 19, at 729; *see, e.g.*, ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 62; Holley, *supra* note 34, at 233 n.12.

⁵⁶ For example, in *Laseter v. State*, an Alaska appellate court determined because the offense of sexual assault in the first degree requires recklessness as to lack of consent in Alaska, it was reversible error to instruct the jury to acquit if the jury found that defendant had a “reasonable belief” that the victim consented—the “reasonable belief” instruction permitted the jury to convict on the basis of negligence as to lack of consent. 684 P.2d 139, 142 (Alaska Ct. App. 1984). For a similar recognition in the context of negligence and unreasonable mistakes, *see Doe v. Breedlove*, 906 So. 2d 565, 573 (La. Ct. App. 2005).

⁵⁷ *See, e.g.*, sources cited *supra* note 55.

⁵⁸ For example, § 207(2)-(3) of the Illinois Reform Project reads:

(2) *Correspondence Between Mistake Defenses and Culpability Requirements.* Any mistake as to an element of an offense, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A negligent mistake as to an element of an offense will negate the existence of intention, knowledge, or recklessness as to that element. A reasonable mistake as to an element of an offense will negate intention, knowledge, recklessness, or negligence as to that element.

(3) *Definitions.*

(a) A “reckless mistake” is an erroneous belief that the actor is reckless in forming or holding.

(b) A “negligent mistake” is an erroneous belief that the actor is negligent in forming or holding.

(c) A “reasonable mistake” is an erroneous belief that the actor is non-negligent in forming or holding.

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

⁵⁹ *See* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303. For reform jurisdictions with similar provisions, *see* Ariz. Rev. Stat. Ann. § 13-203; Del. Code Ann. tit. 11, § 261 et seq.; Haw. Rev. Stat. Ann. § 702-214; Ky. Rev. Stat. Ann. § 501.060; Mont. Code Ann. § 45-2-201; N.J. Stat. Ann. § 2C:2-3; 18 Pa. Stat. and Cons. Stat. Ann. § 303.

⁶⁰ Model Penal Code § 2.03 cmt. at 254.

⁶¹ The relevant provisions addressing accidents in Model Penal Code § 2.03(2) read:

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

commentary to Revised Code § 22A-204(c), however, this approach generally constitutes a problematic departure from the common law.⁶² With respect to treatment of accidents in particular, though, what the Model Penal Code (and relevant state-based provisions) miss is that whether a claim of accident or mistake is raised, both effectively raise a culpable mental state issue, namely, whether the government can meet its affirmative burden of proof concerning the culpable mental state requirement governing an offense.⁶³

This insight is reflected in District case law, which recognizes that “[d]efenses of accident and mistake of fact (or non-penal law) have potential application to any case in which they could rebut proof of a required mental element.”⁶⁴ And it is also reflected in case law from outside of the District, which similarly views accidents through the lens of *mens rea*.⁶⁵ In accordance with these authorities, and in furtherance of the interests of clarity and consistency, § (a) explicitly articulates that accidents are subject to the same general rule of logical relevance as mistakes.

Viewed collectively, the broadly applicable logical relevance principle set forth by §§ (a) and (b) should secure for the District one of the primary benefits of element analysis: “eliminating the need for separate bodies of law such as mistake and accident by demonstrating that these apparently independent doctrines are actually concerned with culpability as to particular objective elements.”⁶⁶ There is, however, one additional benefit of codifying this logical relevance principle that bears notice: it should provide the basis for more clearly and consistently dealing with those exceptional situations where the distinctively culpable nature of a particular kind of mistake, ignorance, or accident justifies imputing the relevant culpable mental state—considerations of logical relevance aside.

An illustrative example is presented by an actor who suspects a prohibited circumstance exists but deliberately avoids the acquisition of guilty knowledge in order to

(a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

(a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused

⁶² See Commentary to Revised Criminal Code § 204(c), Nationwide Legal Trends.

⁶³ See, e.g., Paul H. Robinson, *The Model Penal Code’s Conceptual Error on the Nature of Proximate Cause, and How to Fix it*, 51 No. 6 CRIM. LAW BULLETIN Art. 3 (Winter 2015).

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

⁶⁵ ROBINSON, *supra* note 14, 1 CRIM. L. DEF. § 63 n.4; see, e.g., *People v. Eveland*, 81 Ill. App. 3d 97 (1980); *People v. Schwartz*, 64 Ill. App. 3d 989 (1978); *People v. Morrin*, 31 Mich. App. 301 (1971); *City of Columbus v. Bee*, 425 N.E.2d 409 (Ohio Ct. App. 1979); *Hall v. State*, 431 A.2d 1258 (Del. 1981).

⁶⁶ Robinson & Grall, *supra* note 19, at 704.

preserve a defense.⁶⁷ Under these circumstances, it is clear that—pursuant to § (a)—the actor’s ignorance would negate the existence of the culpable mental state of knowledge applicable to that circumstance. At the same time, however, it is also generally recognized that deliberate ignorance of this nature should not preclude a conviction for a crime that imposes a requirement of knowledge as to a prohibited circumstance given the comparable blameworthiness of the actor’s conduct. Consistent with this recognition, Revised D.C. Code § 208(c) clearly delineates deliberate ignorance as an exception to the logical relevance principle stated in § (a) by authorizing courts to impute knowledge in the relevant circumstances. (Additional imputation provisions have not been incorporated into § 208 to deal with situations involving accident-based⁶⁸ or mistake-based⁶⁹ divergences.⁷⁰)

⁶⁷ See *infra*, Commentary to Revised D.C. Code § 208(c), National Legal Trends, for a more detailed discussion of the topic of deliberate ignorance.

⁶⁸ Accident-based divergences most frequently arise where the victim or property actually harmed or affected by an actor’s conduct is different than the particular victim or property the person intended or risked harming or affecting, as the case may be. Divergence of this nature is most commonly associated with bad-aim cases: “[W]hen one person (A) acts (or omits to act) with intent to harm another person (B), but because of a bad aim he instead harms a third person (C) whom he did not intend to harm.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4. Typically, these situations are dealt with by the judicially created doctrine of “transferred intent,” which treats an actor such as A “just as guilty as if he had actually harmed the intended victim.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 6.4; see *Ruffin v. United States*, 642 A.2d 1288 (D.C. 1994). Likewise, under a corollary doctrine of “transferred recklessness” courts allow for a “defendant’s conscious awareness of the danger to one person [to suffice for liability] when another person is harmed *and* the defendant was negligent as to that person.” *Id.*; see also *Flores v. United States*, 37 A.3d 866 (D.C. 2011). Under the Model Penal Code, in contrast, this kind of divergence is viewed through the lens of legal causation; Model Penal Code § 2.03(2) provides that the variance between the actual result and the result designed, contemplated, or risked is immaterial if the only difference is whether a “different person or different property” is injured.

⁶⁹ Mistake-based divergences arise where the character of the circumstance actually harmed or affected by the actor’s conduct is distinct from the character of the circumstance the person intended or risked harming or affecting. Divergence of this nature is most commonly associated with the commission of property crimes that grade based upon the nature of the property violated: consider, for example, the prosecution of defendant who, “in a jurisdiction which by statute makes burglary of a dwelling a more serious offense than burglary of a store, reasonably believes that the building he has entered is a store when it is in fact a dwelling.” LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.6. Historically, these issues were disposed of by the judicially-created “lesser legal wrong” or “moral wrong” doctrines, which dictated that “the mistake by the defendant may be disregarded because of the fact that he actually intended to do some legal or moral wrong.” *Id.* The Model Penal Code, in contrast, denies a mistake defense under these circumstances if the “defendant would be guilty of another offense had the situation been as he supposed,” but thereafter “reduce[s] the grade and degree of the offense of which [defendant] may be convicted to those of the offense of which he would be guilty had the situation been as he supposed.” Model Penal Code § 2.04(2).

⁷⁰ Reform codes do not typically codify general provisions addressing accident-based or mistake-based divergences, see LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. §§ 5.6, 6.4, while both of the relevant Model Penal Code provisions addressing these issues, Model Penal Code §§ 2.03(2) and 2.04(2), have been the subject of significant criticism. See, e.g., Richard Singer, *The Model Penal Code and Three Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139 (2000); Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321 (2013); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984). It is also an open question whether a special doctrine is even necessary to deal with accident-based divergences, see *Brooks v. United States*, 655 A.2d 844, 848 (D.C. 1995) (citing *Moore v. United States*, 508 A.2d 924 (D.C. 1986)), or whether the offenses in the Revised D.C. Code will be structured in a manner to necessitate a statement on mistake-based divergences, see *Carter v. United States*, 591 A.2d 233, 234 (D.C. 1991) (discussing D.C. Code § 48-904.01).

3. § 22A-208(c)—Imputation of Knowledge for Deliberate Ignorance

Explanatory Note. Section (c) states a generally applicable principle of imputation to address the situation of an actor who deliberately ignores a prohibited circumstance, otherwise suspected to exist, in order to avoid criminal liability. If this actor is later prosecuted for a crime that requires proof of knowledge as to that circumstance, the actor may be able to point to a level of ignorance that precludes the government from proving the level of awareness—awareness as to a practical certainty—necessary to establish knowledge under § 22A-206(b). Nevertheless, that actor is, given his or her initial suspicions and later purposeful avoidance, just as blameworthy as a person who acted with the statutorily requirement culpable mental state of knowledge. Consistent with this moral equivalency, § (c) authorizes courts to impute the culpable mental state of knowledge based upon proof that the actor was at least reckless as to whether the prohibited circumstance existed and that he or she avoided confirming or failed to investigate the existence of the circumstance for the purpose of avoiding criminal liability.

Relation to Current District Law. Subsection (a) is generally in accordance with, but fills a gap in, District law. The D.C. Code is silent on the issue of deliberate ignorance; however, the DCCA has generally recognized the applicability of the willful blindness doctrine through case law. That being said, reported decisions addressing this doctrine are scant, and those which do exist provide limited direction on the approach to deliberate ignorance envisioned by the DCCA. Subsection (a) fills this gap in the law by providing a clear and comprehensive approach to the issue.

The DCCA has only issued one opinion directly addressing the issue of deliberate ignorance, *Owens v. United States*, and it is a case that is primarily concerned with the culpability requirement governing the District’s RSP statute.⁷¹ That statute penalizes a person who “buys, receives, possesses, or obtains control of stolen property, knowing or *having reason to believe* that the property was stolen.”⁷²

At issue in *Owens* was whether the italicized “having reason to believe” language embodies an objective, negligence-like standard, or, alternatively, a subjective standard akin to knowledge. The DCCA ultimately concluded that “the mental state for RSP is a subjective one” akin to knowledge⁷³; however, the *Owens* court also recognized—quoting from the U.S. Court of Appeals for the D.C. Circuit’s (CADC) decision in *United States v. Gallo*⁷⁴—that although “[g]uilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant,” it may nevertheless “be satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.”⁷⁵

“Following these principles,” the DCCA went on to explain that when the government proceeds, not “on a theory of actual knowledge,” but rather on the basis that

⁷¹ 90 A.3d 1118, 1122-23 (D.C. 2014).

⁷² D.C. Code § 22-3232(a).

⁷³ *Owens*, 90 A.3d at 1121.

⁷⁴ 543 F.2d 361, 369 n.6 (D.C. Cir. 1976).

⁷⁵ *Owens*, 90 A.3d at 1122.

“the defendant had ‘reason to believe’ the property was stolen,” Superior Court judges should provide an instruction that incorporates the above-quoted language on willful blindness from *Gallo*.⁷⁶

No other DCCA case expressly applies the doctrine of willful blindness; however, the Court of Appeals has, over the years, made a variety of passing observations—in both the criminal⁷⁷ and civil⁷⁸ contexts—which generally suggest that willful blindness doctrine is indeed a generally applicable principle in the District.

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

Relation to National Legal Trends. Subsection (c) codifies a universally recognized common law principle, which is only addressed by a few modern criminal codes. Express codification of this principle is intended to enhance the clarity, consistency, and proportionality of District law.

The doctrine of willful blindness is a well-established part of Anglo-American criminal law,⁷⁹ which has been developed to deal with situations involving what is most aptly referred to as deliberate ignorance⁸⁰—that is, where an actor who suspects a prohibited circumstance exists “deliberately omits to make further inquiries, because he wishes to remain in ignorance.”⁸¹

Deliberate ignorance poses a problem for the legal system because many criminal offenses, particularly those involving illegal contraband, require proof of knowledge as to the existence of a prohibited circumstance. So, for example, the run-of-the-mill drug

⁷⁶ *Id.* More specifically, Superior Court judges are supposed to provide an instruction that reads, in relevant part:

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

Id.

⁷⁷ See *Santos v. District of Columbia*, 940 A.2d 113, 117 n.21 (D.C. 2007).

⁷⁸ See *In re Cater*, 887 A.2d 1, 26 (D.C. 2005); *In re Owusu*, 886 A.2d 536, 542 (D.C. 2005).

⁷⁹ See generally Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191, 196-97 (1990). The doctrine has its roots in the 19th-century English legal system, see *Regina v. Sleep*, 169 Eng. Rep. 1296 (Cr. Cas. Res. 1861); however, almost as soon as British courts recognized the concept their American counterparts across the Atlantic followed suit, see *People v. Brown*, 16 P. 1 (Cal. 1887).

⁸⁰ Many different labels are applied to describe this problem, including connivance, willful ignorance, conscious avoidance, and deliberate ignorance. See, e.g., ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 867 (3d ed. 1982); Rollin M. Perkins, “Knowledge” as a Mens Rea Requirement, 29 HASTINGS L.J. 953, 956-57 (1978). This commentary uses the phrase “deliberate ignorance” throughout to describe the problem, and “willful blindness” to describe the doctrinal solution.

⁸¹ GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 157, 159 (2d ed. 1961).

offense requires proof that the defendant was aware that he was possessing, transferring, or selling an illegal substance. In order to avoid the reach of these kinds of statutes, then, sophisticated criminal actors—often a participant in a drug trafficking scheme—may take steps to ensure that such knowledge is never actualized.

Courts and legislatures have sought to avoid this potential legal loophole through creation of willful blindness doctrine, which provides a mechanism for holding certain kinds of deliberately ignorant actors responsible when they are charged with crimes that impose fact-based knowledge requirements, notwithstanding the absence of knowledge. Generally speaking, the operative mechanism at work is a rule of imputation: willful blindness doctrine effectively establishes an alternative means of establishing knowledge, contingent upon proof of certain inculcating conditions that adequately capture the conduct of the deliberately ignorant actor.⁸²

The creation of willful blindness doctrine has been deemed a “practical necessity given the ease with which a defendant could otherwise escape justice by deliberately refusing to confirm the existence of one or more facts that he believes to be true.”⁸³ However, willful blindness doctrine is most frequently justified not by reference to pragmatic considerations, but rather, in moral terms: courts and commentators alike frequently reference the fact that “deliberate ignorance and positive knowledge are equally culpable.”⁸⁴ This so-called “equal culpability thesis” posits that “[deliberate] ignorance is the ‘moral equivalent’ of knowledge; it involves a degree of culpability that is equal to genuine knowledge.”⁸⁵

There are two basic versions of the willful blindness doctrine applied by American courts and legislatures. The first is the traditional common law approach, which has two components: (1) a subjective belief requirement, which requires proof that the defendant possessed some modicum of suspicion regarding the existence of a prohibited circumstance; and (2) a purposeful avoidance requirement, which requires proof that the defendant engaged in conduct—whether an act or omission—in some way calculated towards avoiding guilty knowledge.

The primary marker of the traditional common law approach is the use of “[p]urposefulness-type language” to describe the relationship between the actor and the guilty knowledge that he or she avoided acquiring.⁸⁶ Illustrative are the following phrases drawn from the case law: “purposely refrains from obtaining . . . knowledge”;⁸⁷

⁸² See ROBINSON, *supra* note 14, at 1 CRIM. L. DEF. § 65. In practical effect, then, the “law allows ignorance to substitute for knowledge provided that the defendant is at fault for being ignorant and positively sought to avoid criminal liability thanks to such ignorance.” Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 551 (2012).

⁸³ *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002).

⁸⁴ LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2 (quoting *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976)).

⁸⁵ Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 69 (1994); see Richard Singer & Douglas Husak, *Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer*, 2 BUFF. CRIM. L. REV. 859 (1999).

⁸⁶ Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1371 (1992). Note that Charlow categorizes approaches to willful blindness doctrine in a different, and more fine-grained, manner.

⁸⁷ *Rumely v. United States*, 293 F. 532, 553 n.2 (2d Cir. 1923).

“deliberately chose not to learn”;⁸⁸ “with a conscious purpose to avoid learning the truth”;⁸⁹ and “deliberately closed his eyes to what would otherwise have been obvious to him.”⁹⁰

These so-called “willfulness-based constructions of the doctrine”⁹¹ primarily look for a “calculated effort to avoid the sanctions of the statute while violating its substance.”⁹² Implicit in these willfulness-based constructions, however, is a requirement that a defendant’s calculated effort have been accompanied by at least some level of suspicion regarding the existence of a prohibited circumstance. This subjective belief requirement reflects the fact that without some awareness as to the “probability of unlawfulness, the need to investigate may be overlooked,” while, perhaps more fundamentally, “there is no conscious purpose to avoid learning the truth when the risk of unlawfulness has not been realized.”⁹³

Collectively, the dual requirements of subjective belief and purposeful avoidance that comprise the common law approach constitute the majority view on willful blindness doctrine in America.⁹⁴ This traditional framing of the issue is reflected in most judicial formulations of the doctrine⁹⁵ and in at least one criminal code.⁹⁶

The second approach to willful blindness doctrine is rooted in the general culpability provisions of the Model Penal Code. More specifically, Model Penal Code § 2.02(2) generally defines knowingly with respect to a circumstance element to require proof of an awareness that a particular circumstance exists.⁹⁷ This definition of knowingly is thereafter modified by Model Penal Code § 2.02(7), which establishes that: “When 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

⁸⁸ *United States v. Olivares-Vega*, 495 F.2d 827, 830 n.10 (2d Cir. 1974).

⁸⁹ *United States v. Gurary*, 860 F.2d 521, 526 n.5 (2d Cir. 1989).

⁹⁰ *United States v. Callahan*, 588 F.2d 1078, 1082 (5th Cir. 1979).

⁹¹ Charlow, *supra* note 86, at 1370.

⁹² *Jewell*, 532 f.2d at 704.

⁹³ Perkins, *supra* note 80, at 964.

⁹⁴ See Charlow, *supra* note 86, at 1368-70.

⁹⁵ For example, as the U.S. Supreme Court observed in *Global-Tech Appliances, v. SEB S.A.*:

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.

563 U.S. 754, 769 (2011). For additional judicial authorities, see *infra* notes 108, 110, 114, and 116.

⁹⁶ For example, the Ohio criminal code contains a provision which reads:

When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Ohio Rev. Code Ann. § 2901.22(B).

⁹⁷ More specifically, Model Penal Code § 2.02(2)(b)(i) reads: “A person acts knowingly with respect to a material element of an offense when . . . if the element involves . . . attendant circumstances, he is aware that . . . such circumstances exist.”

he actually believes that it does not exist.”⁹⁸ The relevant explanatory note describes this provision as an “elaboration on the definition of ‘knowledge’ when the issue is whether the defendant knew of the existence of a particular fact,”⁹⁹ while the accompanying commentary explains that this provision is designed to deal with the situation where a defendant “is aware of the probable existence of a material fact but does not determine whether it exists or does not exist.”¹⁰⁰

Viewed as a whole, the Model Penal Code appears to deal with the problem of deliberate ignorance by redefining knowledge with respect to circumstances to apply to actors who satisfy two criteria: (1) awareness of a high probability of the existence of a fact; and (2) the absence of a belief that the fact at issue does not exist.¹⁰¹

Notwithstanding the impact of the Model Penal Code on many other areas of culpability, the Code’s approach to willful blindness has not been widely adopted or followed. For example, “[v]ery few of the modern recodifications contain a provision of this type.”¹⁰² Likewise, “courts rarely, if ever, use these elements alone to describe the notion of willful ignorance.”¹⁰³

The Model Penal Code approach to willful blindness has also been the subject of academic criticism, which highlights two main problems. First, willful blindness is not, as the Code seems to assume, a form of knowledge: “[B]eing aware that something is highly probable simply isn’t the same as actually knowing it.”¹⁰⁴ Whereas knowledge requires belief, “awareness that something is highly probable may stop short of the inferential leap into belief.”¹⁰⁵ Second, and perhaps more problematically, the Model Penal Code places all of the focus on how certain the actor is about a fact, i.e., “[t]he inquiry is about the actor’s subjective state at the moment of the misdeed.”¹⁰⁶ However,

⁹⁸ Model Penal Code § 2.02(7).

⁹⁹ Model Penal Code § 2.02(7).

¹⁰⁰ Model Penal Code § 2.02 cmt. at 248.

¹⁰¹ In practical effect, this means that under the Model Penal Code “a defendant who has a belief that would otherwise subject him to liability is excused if he also has a mistaken belief to the contrary.” Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091, 1104 (1985). Here’s an example of how this might operate:

[A] defendant who is aware of a high probability that his car is full of marijuana is excused from liability for transporting marijuana across the U.S. border if he also believes (mistakenly) that there was no marijuana in his car. The Model Penal Code does not require that the mistaken belief cause the defendant to drive the car (and the marijuana) across the border. His mistaken belief excuses him even though, had he known the marijuana was in the car, he still would have crossed the border.

Id.

¹⁰² LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2 (citing the following statutes as being based on the Model Penal Code approach: Alaska Stat. § 11.81.900(a)(2); Del. Code Ann. tit. 11, § 255; Ill. Comp. Stat. Ann. ch. 720 § 5/4-5; Mont. Code Ann. § 45-2-101; and N.J. Stat. Ann. § 2C:2-2).

¹⁰³ Charlow, *supra* note 86, at 1368. Note, however, that aspects of Model Penal Code § 2.02(7) have been quite influential in judicial formulations of willful blindness doctrine. See, e.g., *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070; *United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir. 1973).

¹⁰⁴ David Luban, *Contrived Ignorance*, 87 GEO. L.J. 957, 961 (1999).

¹⁰⁵ Luban, *supra* note 104, at 960.

¹⁰⁶ Luban, *supra* note 104, at 962. Or, as another commentator phrases it: Rather than focus on how deliberate the individual was in avoiding knowledge, the Model Penal Code simply demotes the requisite

the focus in a run-of-the-mill deliberate ignorance case is on whether the actor purposefully avoided guilty knowledge, i.e., “[t]he inquiry is about whatever steps the actor took to ward off knowledge prior to the misdeed.”¹⁰⁷

Consistent with the foregoing legal trends, § (c) codifies a rule of knowledge imputation that is modeled on the widely followed common law approach: § (c)(1) codifies a subjective belief requirement, alongside a purposeful avoidance requirement in § (c)(2). It’s important to note, however, that the precise manner in which these requirements are codified addresses two issues that have been the subject of disagreement among those jurisdictions that subscribe to the common law view.

The first issue is the threshold level of awareness necessary to ground a finding of deliberate ignorance. Among those jurisdictions that subscribe to the common law approach, one group utilizes the “high probability” language of Model Penal Code § 2.02(7) to express the level of subjective belief required for application of willful blindness doctrine.¹⁰⁸ Under this approach, mere suspicion that some prohibited circumstance exists is insufficient; instead, the government must prove that the accused believed the existence of the relevant fact to be highly probable. Other jurisdictions, in contrast, apply a lower threshold, such as criminal recklessness—the “standard definition” of which is the “conscious disregard [of] a substantial [] risk”¹⁰⁹—to establish the level of subjective belief necessary to activate willful blindness doctrine.¹¹⁰

The subjective belief requirement incorporated into § (c)(1) reflects the latter, less demanding approach. It establishes that insofar as an actor’s level of awareness is concerned, proof of recklessness—as defined under § 206(c)(2)—will suffice. This is consistent with the view of the numerous state and federal courts that apply this lower threshold,¹¹¹ and it better communicates the limited importance of an “agent’s estimation of the probability of the truth of a proposition” with respect to “judgments about whether he is wilfully ignorant.”¹¹² After all, “an actor can screen herself from knowledge of facts regardless of whether their probability is high or low,” but in either case, the actor is appropriately treated as though he or she possessed guilty knowledge so long as the prior purposeful avoidance is sufficiently culpable.¹¹³

mens rea requirement to something short of actual knowledge.” Rebecca Roiphe, *The Ethics of Willful Ignorance*, 24 GEO. J. LEGAL ETHICS 187, 194-95 (2011); see Robbins, *supra* note 79, at 231.

¹⁰⁷ Luban, *supra* note 104, at 962; see Roiphe, *supra* note 106, at 194-95.

¹⁰⁸ See, e.g., *United States v. Fernandez*, 553 F. App’x 927, 936-37 (11th Cir. 2014); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1237 (11th Cir. 2009); *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008); *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070 (collecting cases).

¹⁰⁹ Model Penal Code § 2.02 (c); see *Bd. of Cnty. Comm’rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 422 (1997).

¹¹⁰ See, e.g., *Gallo*, 543 F.2d at 368 n.6.; *United States v. Jacobs*, 475 F.2d at 287-88; *United States v. Cook*, 586 F.2d 572, 579-80 (5th Cir. 1978); *United States v. Thomas*, 484 F.2d 909, 913 (6th Cir. 1973); *United States v. Egenberg*, 441 F.2d 441, 444 (2d Cir. 1971); Charlow, *supra* note 86, at 1368-70 nn.74-86 (collecting cases).

¹¹¹ See *supra* note 110.

¹¹² Husak & Callender, *supra* note 85, at 39.

¹¹³ Luban, *supra* note 104, at 960. A person is deliberately ignorant, as one commentator phrases it, when he “has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance.” WILLIAMS, *supra* note 81, at 157. However, “to have a suspicion that *P*, it does not seem one must think *P* highly likely—the mere belief that it is somewhat likely seems to suffice.” Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN’S L. REV. 1023, 1101 (2014); see Husak & Callender, *supra* note 85, at 39.

The second issue addressed by § (c)—and over which jurisdictions that otherwise subscribe to the common law approach disagree—is the appropriate scope of this purposeful avoidance condition. Some jurisdictions endorse a formulation of willful blindness doctrine that would seemingly allow for proof of any form of “deliberate action” calculated to avoid confirming the relevant prohibited circumstance at issue to suffice.¹¹⁴ Under this unmitigated form of purposeful avoidance, the *reason for the conduct* appears to be immaterial.¹¹⁵ Another group of jurisdictions, in contrast, appear to formulate the purposeful avoidance requirement in a more narrowly-tailored manner, limiting the reach of willful blindness doctrine to those situations where “one’s specific reason for remaining in ignorance [was] that one wanted to preserve a defense.”¹¹⁶

The purposeful avoidance requirement incorporated into § (c)(2) reflects the latter, more demanding approach. It establishes that the basis for the person’s conduct—avoiding confirming or failed to investigate whether the circumstance existed—must be a purpose to avoid criminal liability. This is consistent with the view of the numerous courts that apply a comparable standard,¹¹⁷ and it better captures those situations where an actor’s conduct is truly the “moral equivalent” of knowledge, namely, where it is motivated by a desire to avoid criminal liability.¹¹⁸ In other situations, such as where the “failure to gain more information [was] due to mere laziness, stupidity, or the absence of curiosity,” the actor’s conduct does not appear to be just as culpable as knowing conduct.¹¹⁹

Which is not to say that such individuals—or any other kind of actor who avoids the acquisition of guilty knowledge for reasons beyond the preservation of a criminal defense—are *morally blameless*. Indeed, many such individuals may have recklessly disregarded a given circumstance. However, the legislature may always lower the culpable mental state requirement governing a prohibited circumstance from knowledge to recklessness to capture these individuals. What the legislature should not do, however—and which the federal courts have warned against—is ignore the fact that “recklessness [is] not the same as intentional [or] knowing conduct,” or formulate willful

¹¹⁴ See, e.g., *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003); *United States v. Stadtmayer*, 620 F.3d 238, 257 (3d Cir. 2010); *United States v. Mendoza-Medina*, 346 F.3d 121, 132-33 (5th Cir. 2003); *United States v. Mitchell*, 681 F.3d 867, 876 (6th Cir. 2012); *United States v. Geisen*, 612 F.3d 471, 485-86 (6th Cir. 2010).

¹¹⁵ Sarch, *supra* note 113, at 1046.

¹¹⁶ *Id.*; see, e.g., *United States v. Fernandez*, 553 F. App’x 927, 936-37 (11th Cir. 2014); *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1237 (11th Cir. 2009); *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011); *United States v. Aleman*, 548 F.3d 1158, 1166 (8th Cir. 2008). The circuit split is recognized in *Alston-Graves*, 435 F.3d at 341. Although the U.S. Supreme Court in *Global-Tech Appliances, Inc.* does not endorse a side, it’s worth noting the following recognition in the majority opinion hints at a motive requirement: “On the facts of this case, we cannot fathom what motive Sham could have had for withholding this information other than to manufacture a claim of plausible deniability in the event that his company was later accused of patent infringement.” 131 S. Ct. at 2071.

¹¹⁷ See sources cited *supra* note 116.

¹¹⁸ Husak & Callender, *supra* note 85, at 37-38; see, e.g., LAFAVE, *supra* note 20, at 1 SUBST. CRIM. L. § 5.2; Sarch, *supra* note 113, at 1046.

¹¹⁹ Husak & Callender, *supra* note 85, at 37-38.

blindness doctrine in a manner that creates a risk that the “jury [will] convict a defendant for [merely] acting recklessly.”¹²⁰

Subsection (c)(2), by imposing a narrower purposeful avoidance requirement oriented towards the avoidance of criminal liability, should avoid these kinds of issues, while the broader subjective belief requirement reflected in § (c)(1) should avoid unnecessarily excluding otherwise deliberately ignorant actors from the scope of willful blindness doctrine. When viewed collectively, therefore, § (c) provides a clear, comprehensive, and proportionate mechanism for imputing knowledge in those situations where deliberate ignorance is truly the moral equivalent of knowledge.

¹²⁰ *Alston-Graves*, 435 F.3d at 340. One policy reason for safeguarding this distinction, recently articulated by a federal court of appeals, is to avoid imposing “unpleasant and sometimes risky obligation[s]” on many people”:

Shall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things? . . . Shall all of us who give a ride to child’s friend search her purse or his backpack? No[thing] prevents FedEx from opening packages before accepting them, or prevents bus companies from going through the luggage of suspicious looking passengers. But these businesses are not “knowingly” transporting drugs in any particular package, even though they know that in a volume business in all likelihood they sometimes must be. They forego inspection to save time, or money, or offense to customers, not to avoid criminal responsibility . . . For that matter, someone driving his mother, a child of the sixties, to Thanksgiving weekend, and putting her suitcase in the trunk, should not have to open it and go through her clothes.

United States v. Heredia, 483 F.3d 913, 928 (9th Cir. 2007) (*en banc*) (Kleinfeld, J concurring).

§ 22A-209 PRINCIPLES OF LIABILITY GOVERNING INTOXICATION

(a) **RELEVANCE OF INTOXICATION TO LIABILITY.** A person is not liable for an offense when that person's intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense.

(1) *Definition of Intoxication.* "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

(b) **CORRESPONDENCE BETWEEN INTOXICATION AND CULPABLE MENTAL STATE REQUIREMENTS.**

(1) *Purpose.* A person's intoxication negates the existence of the culpable mental state of purpose applicable to a result or circumstance when, due to the person's intoxicated state, that person does not consciously desire to cause that result or that the circumstance exists.

(2) *Knowledge.* A person's intoxication negates the existence of the culpable mental state of knowledge applicable to a result or circumstance when, due to the person's intoxicated state, that person is not practically certain that the person's conduct will cause that result or that the circumstance exists.

(3) *Recklessness.* A person's intoxication negates the existence of the culpable mental state of recklessness applicable to a result or circumstance when, due to the person's intoxicated state, that person is not aware of a substantial risk that the person's conduct will cause that result or that the circumstance exists, unless that person's conduct satisfies subsection (c), in which case the culpable mental state of recklessness is established.

(c) **IMPUTATION OF RECKLESSNESS FOR SELF-INDUCED INTOXICATION.** When a culpable mental state of recklessness applies to a result or circumstance in an offense, recklessness is established if:

(1) The person, due to self-induced intoxication, fails to perceive a substantial risk that the person's conduct will cause that result or that the circumstance exists; and

(2) The person is negligent as to whether the person's conduct will cause that result or as to whether that circumstance exists.

COMMENTARY

Explanatory Note. Subsection (a) states the general effect of intoxication—defined as a disturbance of mental or physical capacities resulting from the introduction of substances into the body—on offense liability. It broadly clarifies what is otherwise implicit in the requirement that a conviction rest upon proof of all offense elements

beyond a reasonable doubt: that a person’s intoxication will, at least generally speaking, relieve that person of liability when (and only when) it negates the existence of the requisite culpable mental state applicable to an objective element. This means that the relationship between intoxication and culpable mental states is one of logical relevance: the intoxicated state of an actor is relevant when (but only when) it prevents the government from meeting its burden of proof with respect to any given culpable mental state required by an offense definition under § 201(a).

Subsection (b) clarifies the nature of the correspondence between intoxication and culpable mental state requirements. It provides a set of general rules that may serve as a useful guide for the courts in determining when intoxication is capable of negating the existence of a culpable mental state. These rules broadly establish that intoxication has the tendency to negate the existence of any subjective culpable mental state—namely, purpose, knowledge, and recklessness—when, due to the person’s intoxicated state, that person did not act with the desire or level of awareness applicable to a result or circumstance under a given offense definition.¹ Notably absent from these rules, however, is any reference to negligence, the existence of which generally cannot be negated by intoxication.²

Subsection (c) addresses one particularly common situation where, although an actor’s intoxication negates the existence of a culpable mental state, that culpable mental state should be imputed on policy grounds. This is the situation of self-induced intoxication, which occurs when a person culpably introduces a substance into his or her body with the tendency to cause a disturbance of mental or physical capacities.³

A person who becomes intoxicated in this manner and thereafter commits a crime of recklessness may be able to argue that, due to his or her intoxicated state, the person was not aware of a substantial risk that his or her conduct would cause a result or that a circumstance existed. Nevertheless, given the known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his or her own defense, it would be inappropriate to allow for intoxication to exonerate under these circumstances. Consistent with these policy considerations, § (c) authorizes courts to impute the culpable mental state of recklessness in the context of self-induced intoxication based upon proof that: (1) but for the person’s intoxicated state the person would have been aware of a substantial risk that the person’s conduct would cause a result or that a circumstance existed; and (2) the person otherwise acted negligently as to the requisite result or circumstance.

Relation to Current District Law. Section 209 is generally in accordance with, but fills gaps in, District law. Broadly speaking, § 209 statutorily addresses a critical and frequently occurring liability issue—the relationship between intoxication and culpable

¹ Note, however, that the rule of imputation governing self-induced intoxication in § (c) severely limits the situations in which intoxication will actually negate recklessness.

² Revised Criminal Code § 22A-206(d)(3) establishes that: “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.” Self-induced intoxication should not be considered as a relevant situation-specific factor.

³ The Revised Criminal Code uses the phrase “self-induced intoxication,” rather than “voluntary intoxication,” to avoid any confusion with the voluntariness requirement set forth in § 22A-203.

mental states⁴—on which the D.C. Code is almost entirely silent.⁵ More specifically, § 209 addresses the issue by providing a clear and consistent policy mechanism for analyzing intoxication on an element-by-element basis—whereas existing case law only addresses the offenses that courts have identified as general intent or specific intent crimes.

Under District case law, “a person may not voluntarily become intoxicated and use that condition, generally, as a defense to criminal behavior.”⁶ Rather, an actor’s voluntary intoxication, to the extent it is legally relevant, must create a “reasonable doubt about whether [the defendant] could or did form the intent to [commit the charged crime].”⁷ To be entitled to a voluntary intoxication jury instruction under District case law, the defendant is required to meet a high bar; “[t]he evidence required to warrant the ‘intoxication-defense’ instruction must reveal such a degree of complete drunkenness that a person is incapable of forming the necessary intent essential to the commission of the crime charged.”⁸ However, evidence of a defendant’s intoxicated state may still be introduced even when it falls short of justifying a voluntary intoxication jury instruction so long as it negates intent.⁹

To determine when voluntary intoxication can effectively negate intent, District courts typically distinguish between “general intent” crimes, which do not require “an intent that is susceptible to negation through a showing of voluntary intoxication”¹⁰ and “specific intent” crimes, which are susceptible to this kind of negation.¹¹ According to

⁴ This is to be distinguished from the relationship between intoxication and insanity, which is not addressed by § 209. See, e.g., *McNeil v. United States*, 933 A.2d 354 (D.C. 2007); *Bethea v. United States*, 365 A.2d 64, 72 (D.C. 1976).

⁵ One noteworthy example is the District’s medical marijuana statute, D.C. Code § 7-1671.03, which establishes that “[t]he use of medical marijuana as authorized by this chapter and the rules issued pursuant to § 7-1671.13 does not create a defense to any crime and does not negate the mens rea element for any crime except to the extent of the voluntary-intoxication defense recognized in District of Columbia law.”

⁶ *McNeil*, 933 A.2d at 363. The case law discussed in this section generally refers to voluntary (or self-induced) intoxication without saying much about involuntary intoxication. In *Easter v. District of Columbia*, the CADC observed: “Where the accused becomes intoxicated without his consent, through force or fraud of another person, his condition is that of involuntary drunkenness and a criminal act committed by him while in such state may be defended by whatever the circumstances justify.” 209 A.2d 625, 627 (D.C. 1965) (citing *Choate v. State*, 197 P. 1060 (Okla. 1921)). And in *Salzman v. United States*, the CADC observed that “where a person has been involuntarily made intoxicated by the actions of others” he or she “may raise involuntariness as a defense to criminal prosecution.” 405 F.2d 358, 364 (D.C. Cir. 1968).

⁷ D.C. Crim. Jur. Instr. § 9.404; see, e.g., *Harris v. United States*, 375 A.2d 505, 508 (D.C. 1977).

⁸ *Bell v. United States*, 950 A.2d 56, 65 (D.C. 2008) (quotations and citations omitted); see, e.g., *Wilson-Bey v. United States*, 903 A.2d 818, 844-45 (D.C. 2006) (*en banc*); *Smith v. United States*, 309 A.2d 58, 59 (D.C. 1973); *Jones v. Holt*, 893 F. Supp. 2d 185, 198 (D.D.C. 2012). In other words, a jury may only be instructed on the issue of voluntary intoxication upon “evidence that the defendant has reached a point of incapacitating intoxication.” *Washington v. United States*, 689 A.2d 568, 573 (D.C. 1997); see *Heideman v. United States*, 259 F.2d 943, 946 (D.C. Cir. 1958).

⁹ See, e.g., *Bell*, 950 A.2d at 65 n.5; *Washington*, 689 A.2d at 574; *Riddick v. United States*, 806 A.2d 631, 640-41 (D.C. 2002). Whether intoxication evidence may be presented when it cannot negate intent is less clear. Compare *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) with *Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012-13 (D.C. Cir. 1966)); see also *Buchanan v. United States*, 32 A.3d 990, 996 (D.C. 2011) (Ruiz, J., concurring) (discussing *Parker*).

¹⁰ *Parker*, 359 F.2d at 1012-13; see, e.g., *Washington*, 689 A.2d at 573.

¹¹ *Kyle v. United States*, 759 A.2d 192, 199-200 (D.C. 2000). In other words, “[i]ntoxication . . . is material only to negate specific intent.” *Id.* (citing *Parker*, 359 F.2d at 1012).

this dichotomy, an intoxication defense may be raised where a specific intent crime is charged, as reflected in DCCA case law on the availability of an intoxication defense for crimes such as attempted burglary,¹² first degree murder,¹³ robbery,¹⁴ and assault with intent to kill.¹⁵ But an intoxication defense is not available where a general intent crime is charged, as reflected in DCCA case law rejecting the viability of an intoxication defense to crimes such as second-degree murder,¹⁶ manslaughter,¹⁷ MDP,¹⁸ assault,¹⁹ and first-degree sex abuse.²⁰

The intoxication framework in § 209 is broadly consistent with the DCCA’s determinations as to the availability of an intoxication defense. The Revised Criminal Code, like District law, views the overarching relevance of intoxication to be a product of whether it precludes the government from proving an offense’s culpable mental state requirements beyond a reasonable doubt.²¹ At the same time, however, the Revised Criminal Code—again consistent with District law—recognizes a policy-based exception to this principle.²² Under DCCA case law, this exception revolves around the identification of general intent crimes, to which an intoxication defense may not be raised.²³ Under the Revised Criminal Code, in contrast, the culpable mental state of recklessness, as defined under § 206(c), may be imputed—notwithstanding the absence of awareness of a substantial risk—based upon the self-induced intoxication of the actor.

Substantively speaking, there is significant overlap between these two frameworks. Subsections (a) and (b) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, while § (c) precludes exculpation based on self-induced intoxication for recklessness or negligence.²⁴ This roughly corresponds with the common law framework currently employed by the DCCA: the DCCA *typically* associates specific intent crimes—to which an intoxication defense may be raised—with offenses requiring proof of purpose or

¹² See *Hebble v. United States*, 257 A.2d 483 (D.C. 1969).

¹³ See *Harris*, 375 A.2d at 505.

¹⁴ See *Bell*, 950 A.2d at 74.

¹⁵ See *Washington*, 689 A.2d at 573.

¹⁶ See *Wheeler*, 832 A.2d at 1273.

¹⁷ See *Bishop v. United States*, 107 F.2d 297, 301 (D.C. Cir. 1939).

¹⁸ See *Carter*, 531 A.2d at 961.

¹⁹ See *Parker*, 359 F.2d at 1013.

²⁰ See *Kyle*, 759 A.2d at 200.

²¹ As the District’s criminal jury instructions phrase the question facing the fact-finder:

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

D.C. Crim. Jur. Instr. § 9.404.

²² See, e.g., *Davidson v. United States*, 137 A.3d 973 (D.C. 2016); *Carter*, 531 A.2d at 959.

²³ See sources cited *supra* notes 10 and 16-20.

²⁴ Note, however, that intoxication that is not self-induced may negate the culpable mental state of recklessness under § 209(a). See Revised Criminal Code § 209(b)(3).

knowledge,²⁵ while *typically* associating general intent crimes—to which an intoxication defense may not be raised—with offenses requiring proof of recklessness or negligence.²⁶

Importantly, however, this overlap is by no means complete. For example, there are at least a few non-conforming offenses, which do not reflect the above pattern: namely, those offenses that the DCCA has classified as “general intent” crimes, yet also has interpreted to require proof of one or more purpose or knowledge-like mental states.²⁷ For these non-conforming offenses, adoption of § 209 *could*—but would not *necessarily*—change the availability of an intoxication defense as it currently exists under District law.²⁸

Adoption of § 209 would change District law in two more general ways. First, it would effectively resolve many unsettled questions of law. For example, there are hundreds of offenses in the D.C. Code that the DCCA has not classified as either “general intent” or “specific intent” crimes for purposes of the District’s law of intoxication (or otherwise). Absent a general intoxication provision, the availability of an intoxication defense for each of these offenses would be left to the DCCA for resolution on an *ad hoc* basis. Under § 209, in contrast, these issues will be resolved for every offense incorporated into the Revised Criminal Code.

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

Under the Revised Criminal Code, it will no longer be necessary to rely on the ambiguous and unpredictable distinctions of general intent and specific intent crimes to address issues of intoxication as “defenses” at all. Instead, District courts will only need to consider whether the government is able to meet its affirmative burden of proof as to the culpable mental state requirement governing each offense based upon the standard rules of liability set forth in § 206, or, alternatively, based upon the rule of recklessness imputation set forth in § (c) of this section. In either case, the ultimate policy decision as to the effect of intoxication will be a legislative decision that is clearly communicated for each revised offense.

²⁵ See, e.g., *McNeil*, 933 A.2d at 363 (quoting *Proctor v. United States*, 85 U.S.App. D.C. 341, 342 (1949)); *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984); *Jones v. United States*, 124 A.3d 127, 130 (D.C. 2015).

²⁶ See, e.g., *Carter*, 531 A.2d at 962; *Wheeler*, 832 A.2d at 1275; *Ortberg v. United States*, 81 A.3d 303, 306 (D.C. 2013).

²⁷ Potential non-conforming offenses include: (1) D.C. Code § 22-3215, Unlawful Use of Motor Vehicles, see *Carter*, 531 A.2d at 962 n.13; (2) D.C. Code § 22-3216, Taking Property Without Right, see *Schafer v. United States*, 656 A.2d 1185, 1188 (D.C. 1995); and (3) D.C. Code § 48-904.01(a)(1) Drug Distribution, see *Lampkins v. United States*, 973 A.2d 171, 174 (D.C. 2009).

²⁸ For example, this outcome can be avoided by applying a mental state of recklessly to the revised version of any non-conforming offense in lieu of the purpose or knowledge-like mental state applicable under current law to that offense. Alternatively, offense-specific exceptions to the principles set forth in § 209 could be made through an individual offense definition. Either way, the effect of § 209 depends on how each specific offense is revised.

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

In “early American law,” there was a “stern rejection of inebriation as a defense” by the courts, which did not “permit the defendant to show that intoxication prevented the requisite *mens rea*.”²⁹ However, “by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant possessed the *mens rea*” in some circumstances.³⁰ At the same time, the courts perennially struggled to identify those circumstances in a principled or clear way.³¹ The cause for the confusion, like that surrounding the common law’s treatment of accident, mistake, and ignorance, was judicial reliance on offense analysis.³²

By conceiving of offenses as being comprised of a singular “umbrella culpability requirement that applie[s] in a general way to the offense as a whole”³³ courts lacked the tools necessary to recognize when intoxication could plausibly negate the existence of the culpable mental state governing one or more objective elements in an offense—let alone devise a principled policy exception to deal with those situations where intoxication should be precluded from providing the basis for exoneration.³⁴ Instead, courts chose, on an offense-by-offense basis, those crimes for which an intoxication defense seemed appropriate.³⁵ The labels of “general intent” and “specific intent” were utilized by courts to describe the *conclusion* of that process, namely, a “specific intent crime” was one for which evidence of voluntary intoxication may be relevant, while a “general intent” crime was one for which an intoxication defense could not be raised.”³⁶

This distinction between general intent and specific intent crimes was generally understood to represent a pragmatic “compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender.”³⁷ Though some courts (including the DCCA³⁸) have at times spoken as though there exists some “intrinsic meaning to the terms,”³⁹ in reality they are little more than “shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor’s voluntary intoxication . . . with offenses that, also as a matter of policy, may not be punished in light of such intoxication.”⁴⁰ Lacking a clear or consistent

²⁹ *Montana v. Egelhoff*, 518 U.S. 37, 44 (1996); see, e.g., Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 484-91 (1997).

³⁰ *Egelhoff*, 518 U.S. at 44; see, e.g., Keiter, *supra* note 29, at 484-91.

³¹ See, e.g., PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2017); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 24.03 (6th ed. 2012).

³² See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

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

³⁴ See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

³⁵ See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

³⁶ See, e.g., ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65; DRESSLER, *supra* note 31, at § 24.03.

³⁷ *People v. Hood*, 1 Cal. 3d 444, 455 (1969).

³⁸ See, e.g., *Kyle*, 759 A.2d at 199; *Washington*, 689 A.2d at 573.

³⁹ Keiter, *supra* note 29, at 497.

⁴⁰ *People v. Whitfield*, 7 Cal. 4th 437, 463 (1994) (Mosk, J., concurring in part and dissenting in part). Which is to say that “[t]he distinction between general intent and specific intent evolved as a judicial response to the problem of the intoxicated offender.” *Hood*, 1 Cal. 3d at 455.

framework to describe the relationship between *mens rea* and intoxication, however, judicial determinations typically lacked “even the pretense of a theoretical justification” or a “logical explanation.”⁴¹

With acceptance of element analysis in reform jurisdictions came a clearer and more nuanced understanding of the issues presented by an intoxicated actor. Most importantly, element analysis highlights that—as with issues of accident, mistake, and ignorance—intoxication is only plausibly relevant when it negates the existence of one or more of the culpable mental states incorporated into the crime charged, which, as a practical matter, is possible for any subjective culpable mental state⁴²—for example, purpose,⁴³ knowledge,⁴⁴ or recklessness.⁴⁵ By clarifying that intoxication can plausibly negate the existence of any subjective culpable mental state, however, element analysis also reveals a fundamental tension presented by an intoxicated actor: whereas that actor may not have been aware of a risk to a protected societal interest *because of* his or her intoxicated state, getting intoxicated is itself a risky activity and thus intuitively seems like an inappropriate basis for exonerating an actor in some cases.⁴⁶

Illustrative is the situation of a person who knowingly drinks a significant amount of alcohol at a house party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which—unbeknownst to the person given his intoxicated state—repeatedly shatter the windows of nearby homes, causing thousands of dollars in damage. If this person is later charged with a property destruction offense that prohibits “recklessly damaging the property of another,” the person may argue that, due to the person’s intoxicated state, he or she lacked the awareness of a substantial risk of harm necessary to establish recklessness under the statute. At the same time, however, given the known risks associated with intoxicants, as well as the fact that the person has in effect culpably created the conditions of his own defense, it may be inappropriate to allow self-induced intoxication of this nature to constitute a means of exoneration.⁴⁷

The drafters of the Model Penal Code, informed by the insights of element analysis, appreciated both the general nature of the relationship between intoxication and culpable mental states, as well as the specific tension that relationship could create under

⁴¹ ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

⁴² See, e.g., Miguel Angel Mendez, *A Sisyphian Task: The Common Law Approach to Mens Rea*, 28 U.C. DAVIS L. REV. 407, 433 (1995); *State v. Coates*, 735 P.2d 64, 72 (Wash. 1987) (Goodloe, J. concurring); *Egelhoff*, 518 U.S. at 62-70 (O’Conner, J. dissenting).

⁴³ Intoxication has the capacity to negate the culpable mental state of purpose when, due to the person’s intoxicated state, that person was unable or otherwise failed to consciously desire to cause a prohibited result or to consciously desire that a prohibited circumstance have existed.

⁴⁴ Intoxication has the capacity to negate the culpable mental state of knowledge when, due to the person’s intoxicated state, that person was unable to or otherwise failed to be practically certain that a prohibited result would follow from his or her conduct or to be practically certain that a prohibited circumstance existed.

⁴⁵ Intoxication has the capacity to negate the culpable mental state of recklessness when, due to the person’s intoxicated state, that person was unable to or otherwise failed to be aware of a substantial risk that a prohibited result would follow from his or her conduct or to be aware of a substantial risk that a prohibited circumstance existed.

⁴⁶ See, e.g., JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 537 (2d ed. 1960).

⁴⁷ See, e.g., WAYNE R. LAFAVE, 2 *SUBST. CRIM. L.* § 9.5 (Westlaw 2017).

particular circumstances.⁴⁸ And they also appreciated the range of problems that judicial reliance on offense analysis had created for the common law of intoxication.⁴⁹

The drafters' solution was the creation of a legislative framework comprised of an imputation approach to intoxication, which generally accepted that evidence of intoxication could be presented whenever relevant to negating the existence of a culpable mental state. However, the framework also provided that where self-induced intoxication was at issue, proof that the actor would have been aware of a risk had he or she been sober could provide an alternative basis for establishing recklessness.⁵⁰

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

When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.⁵¹

In practical effect, this provision “boosts the negligence of voluntarily intoxicated persons” at the time of their conduct “to the culpability of recklessness,” subject to a

⁴⁸ See Model Penal Code § 2.08 cmt. at 354-59.

⁴⁹ See *id.*

⁵⁰ The Model Penal Code justified this resolution of the “[t]wo major problems” present by intoxication claims as follows:

The first . . . is the question whether intoxication ought to be accorded a significance that is entirely co-extensive with its relevance to disprove purpose or knowledge We submit that the answer clearly ought to be affirmative [W]hen purpose or knowledge, as distinguished from recklessness, is made essential for conviction, the reason very surely is that in the absence of such states of mind the conduct involved does not present a comparable danger . . . ; or that the actor is not deemed to present as significant a threat . . . ; or, finally, that the ends of legal policy are served by bringing to book or subjecting to graver sanctions those who consciously defy the legal norm

The second and more difficult question relates to recklessness, where awareness of the risk created by the actor's conduct ordinarily is a requisite for liability. . . . [A]wareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes

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

⁵¹ Model Penal Code § 2.08(2).

causation limitation, i.e., the accused’s intoxicated state must have been the *cause of her unawareness* in order to activate the rule.⁵²

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

To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant. When, on the other hand, recklessness or negligence . . . suffices to establish the offense, an exculpation based on intoxication is precluded by the law.⁵³

Viewed through the lens of the common law, then, the logical relevance test in Model Penal Code § 2.08(1) roughly approximates the specific intent rule governing intoxication claims, while the rule of reckless imputation in Model Penal Code § 2.08(2) roughly approximates the general intent rule—an approximation that has been recognized by a range of legal authorities.⁵⁴

The imputation approach to intoxication developed by the Model Penal Code has been quite influential. A substantial number of reform jurisdictions—as well as all major

⁵² Peter Westen, *Egelhoff Again*, 36 AM. CRIM. L. REV. 1203, 1220-21 (1999). Under the Model Penal Code approach, “if negligence is the mens rea required for the crime, and the question is whether defendant failed to advert to a risk to which the reasonable person would have adverted . . . defendant’s voluntary intoxication as the explanation for his not recognizing the risk would establish his inadvertence as unreasonable.” Larry Alexander, *The Supreme Court, Dr. Jekyll, and the Due Process of Proof*, 1996 SUP. CT. REV. 191, 217 (1996). As a result, the Model Penal Code approach also embodies an “Intoxication Negligence Principle: If a defendant is unaware of a condition and intoxicated, and he became intoxicated voluntarily, then in assessing negligence with respect to that condition, he is to be compared to a sober reasonable person.” Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 547 (2012). Note, however, that the Code’s recklessness imputation provision in no way alters the ordinary requirements regarding mental states of purpose or knowledge. Rather, the Model Penal Code framework grants to voluntarily intoxicated persons the same defenses of absence of purpose or absence of knowledge that other persons possess, despite the fact that the intoxication may be responsible for their lack of purpose or knowledge. See Westen, *supra* note 52, at 1220-21.

⁵³ Model Penal Code § 2.08 cmt. at 354.

⁵⁴ For example, the Brown Commission observes that “[t]he [common law] decisions in which intoxication evidence has been considered” with respect to specific intent crimes can fruitfully be understood “in terms of whether . . . purpose or knowledge is required.” NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970) (hereinafter “Working Papers”). Likewise, Wharton’s treatise observes that “[a] ‘specific intent’ is usually interpreted to mean [purposely] or knowingly.” CHARLES E. TORCIA, 2 WHARTON’S CRIMINAL LAW § 111 (15th ed. 2014). And both state and federal courts have observed that “a general intent crime” is one “for which recklessness is the required mens rea, and as to which voluntary intoxication may not provide a defense.” *People v. Carr*, 81 Cal. App. 4th 837, 843 (2000); see, e.g., *United States v. Zunie*, 444 F.3d 1230, 1234-35 (10th Cir. 2006) (citing *United States v. Loera*, 923 F.2d 725 (9th Cir.1991) and *United States v. Ashley*, 255 F.3d 907 (8th Cir. 2001)); see also *Parker*, 359 F.2d at 1012 n.4.

model codes and recent comprehensive code reform projects—codify comparable provisions.⁵⁵ Likewise, “the majority of cases in America support the creation of a special rule relating to intoxication, so that, if the only reason why the defendant does not realize the riskiness of his conduct is that he is too intoxicated to realize it, he is guilty of the recklessness which the crime requires.”⁵⁶

Nevertheless, adherence to the imputation approach is by no means universal among reform jurisdictions. For example, a significant plurality followed a different legislative path to addressing intoxication—what might be referred to as the “evidentiary approach.”⁵⁷ At the heart of the evidentiary approach is an evidentiary exclusion, which broadly limits the presentation of evidence regarding the voluntary intoxication of an accused as it pertains to a required culpable mental state.⁵⁸

Illustrative is § 45-2-203 of the Montana Criminal Code, which establishes that “an intoxicated condition . . . may not be taken into consideration in determining the existence of a mental state that is an element of the offense.”⁵⁹ Or, similarly, consider § 702-230 of the Hawaii Criminal Code, which establishes that “[e]vidence of self-induced intoxication of the defendant is not admissible to negative the state of mind sufficient to establish an element of the offense.”⁶⁰

Generally speaking, these statutes dictate that a defendant may not present, and the jury may not consider, intoxication evidence for the purpose of disproving any kind of culpable mental state⁶¹—though it should be noted that some reform jurisdictions which otherwise subscribe to the evidentiary approach make exceptions for particular culpable mental states or particular crimes.⁶² Whatever the scope of these general provisions, however, the evidentiary limitations they apply share three similar implications.

⁵⁵ See Ala. Code § 13A-3-2; Ariz. Rev. Stat. Ann. § 13-105; Conn. Gen. Stat. Ann. § 53a-7; Ky. Rev. Stat. Ann. § 501.020(3); Me. Rev. Stat. Ann. tit. 17-A, § 37; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-8; N.Y. Penal Law § 15.05; N.D. Cent. Code § 12.1-04-02; Or. Rev. Stat. § 161.125; Tenn. Code Ann. § 39-11-503; Utah Code Ann. § 76-2-306. Alaska appears to adopt an imputation approach, but applies it to knowledge as well. See Alaska Stat. Ann. § 11.81.900. In contrast, Washington appears to apply a logical relevance test to all culpable mental states in the absence of a rule of imputation. See Wash. Rev. Code Ann. § 9A.16.090. For the imputation approach developed by the drafters of the federal criminal code, see Brown Commission § 502. For the imputation approach applied in recent code reform projects, see Kentucky Revision Project § 503.302 and Illinois Reform Project § 302.

⁵⁶ LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For federal cases citing to the Model Penal Code approach, see, for example, *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984); *Leal v. Holder*, No. 12-73381, 2014 WL 5742137, at *5 (9th Cir. Nov. 6, 2014); *United States v. Johnson*, 879 F.2d 331, 334 n.1 (8th Cir. 1989); *United States v. Fleming*, 739 F.2d 945, 948 n.3 (4th Cir. 1984).

⁵⁷ See, e.g., Haw. Rev. Stat. § 702-230; Mont. Code Ann. § 45-2-203; Ohio Rev. Code Ann. § 2901.21; Ind. Code Ann. § 35-41-2-5. For compilations and analysis of the evidentiary approach, see Westen, *supra* note 52, at 1225-26; ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65 n.11.

⁵⁸ The practice of excluding certain kinds of evidence, even if probative, for policy reasons is generally well established. See, e.g., F.R.E. 403; F.R.E. 802; *Taylor v. Illinois*, 484 U.S. 400, 410 (1988).

⁵⁹ Mont. Code Ann. § 45-2-203.

⁶⁰ Haw. Rev. Stat. § 702-230.

⁶¹ *But see* *infra* note 80 for a discussion of ambiguity surrounding the relationship between the evidentiary approach and intoxication-induced accidents or mistakes.

⁶² For example, Colorado appears to allow the presentation of intoxication evidence for “specific intent” crimes. Colo. Rev. Stat. Ann. § 18-1-804. And Pennsylvania appears to allow the presentation of intoxication evidence “whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.” 18 Pa. Stat. and Cons. Stat. Ann. § 308.

First, whereas the limitation *does* preclude the defense from rebutting the government’s burden by relying upon evidence that she was intoxicated, it *does not* prevent the government from using evidence of intoxication to show that a defendant possessed a required culpable mental state for an offense.⁶³

Second, the limitation *does not* preclude the government or defense from presenting proof of self-induced intoxication to show that the accused either did, or did not, commit the *actus reus* of the offense.⁶⁴

Third, and perhaps most importantly, such an approach *does not* enable prosecutors to substitute proof of self-induced intoxication for proof of a statutorily required culpable mental state—indeed, even if the accused was intoxicated at the time of the charged crime, the government nevertheless retains the burden under this approach to prove an offense’s culpability requirement beyond a reasonable doubt.⁶⁵

These implications are quite different than those that follow from the imputation approach (separate and apart from the culpable mental states to which they apply). For example, the imputation approach generally renders intoxication evidence immaterial to disproving recklessness by eliminating recklessness as a culpable mental state that the prosecution is required to prove in cases of voluntary intoxication—negligence plus the absence of recklessness caused by voluntary intoxication will suffice.⁶⁶ In contrast, the evidentiary approach explicitly precludes defendants from introducing evidence of voluntary intoxication to negate the existence of any culpable mental state that the prosecution invariably retains an obligation to prove—even in cases of voluntary intoxication.⁶⁷

⁶³ For example, the government may find it useful to introduce evidence of voluntary intoxication to show that a bartender who tends to get into fights when intoxicated intended to strike a patron whom he struck.

⁶⁴ This is of course obvious where intoxication is actually an element of an offense (e.g., “driving while intoxicated” offenses) that must be proven beyond a reasonable doubt. But it is also true where an accused seeks to raise her intoxication as part of an *alibi defense*, i.e., a claim that the accused, because of her intoxication, could not have actually engaged in the physical activity required for commission of the offense.

⁶⁵ For example, as the Hawaii Supreme Court observed in *State v. Souza*, an evidentiary approach statute “does not deprive a defendant of the opportunity to present evidence to rebut the *mens rea* element of the crime,” but “merely prohibits the jury from considering self-induced intoxication to negate the defendant’s state of mind.” 813 P.2d 1384, 1386 (Haw. 1991).

⁶⁶ Under an imputation approach, a jury may therefore be charged in a case involving the culpable mental state of recklessness to which a voluntary intoxication defense has been raised as follows:

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

Westen, *supra* note 52, at 1226.

⁶⁷ Under an evidentiary approach, a jury could therefore receive the following charge in a case implicating voluntary intoxication:

The foregoing practical differences, in turn, bring with them distinct constitutional implications: whereas the imputation approach does not appear to raise any meaningful constitutional issues,⁶⁸ the evidentiary approach has produced a large amount of constitutional litigation, some of which may still be unfolding.⁶⁹

At the heart of this litigation is the U.S. Supreme Court’s splintered decision in *Montana v. Egelhoff*, where the justices struggled to address the constitutionality of Montana’s intoxication statute, which provides that voluntary intoxication “may not be taken into consideration in determining the existence of a mental state which is an element of [a criminal] offense.”⁷⁰ A 5-4 majority ultimately held that the evidentiary limitation inherent in the Montana statute did not violate a defendant’s constitutional right to present relevant evidence in criminal cases; however, the Court did so in a severely fractured opinion in which a narrow concurrence, penned by Justice Ginsburg, appears to govern.⁷¹

According to Justice Ginsburg, the Montana statute, although framed as an evidentiary limitation, was actually “a measure redefining mens rea.”⁷² That is, she interpreted Montana’s statute to mean that any Montana offense may alternatively be established by proving the defendant, even if lacking one or more of the statutorily required culpable mental states, acted “under circumstances that would otherwise establish [that culpable mental state] ‘but for’ [the defendant’s] voluntary intoxication.”⁷³ Practically speaking, therefore, Justice Ginsburg deemed the evidentiary approach constitutional by more or less interpreting it as a rule of imputation.⁷⁴

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

Westen, *supra* note 52, at 1226.

⁶⁸ Generally speaking, the practice of imputing *mens rea* based on prior culpable conduct is a basic feature of American criminal law, see Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984)—and to the extent constitutional challenges have been raised with respect to the imputation approach to intoxication, they have been summarily rejected. See, e.g., *State v. Shine*, 479 A.2d 218 (Conn. 1984); *State v. Glidden*, 441 A.2d 728, 730 (N.H. 1982).

⁶⁹ See, e.g., *Souza*, 813 P.2d at 1386; *Commonwealth v. Rumsey*, 454 A.2d 1121, 1122 (Pa. 1983); *Sanchez v. State*, 749 N.E.2d 509 (Ind. 2001); *Rothwell v. Hense*, SACV 11-01046 SS, 2011 WL 5295286 (C.D. Cal. Nov. 3, 2011); *Leal v. Long*, No. SACV 12-0934-MWF JPR, 2013 WL 831038 (C.D. Cal. Jan. 15, 2013).

⁷⁰ Mont. Code Ann. § 45-2-203. For general critiques of *Egelhoff*, see, for example, Alexander, *supra* note 52, at 211; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

⁷¹ As the U.S. Supreme Court has observed: “The holding of the Court [in a fractured opinion] may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Marks v. United States*, 430 U.S. 188, 193 (1977).

⁷² *Egelhoff*, 518 U.S. at 58.

⁷³ *Id.*

⁷⁴ See LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

With the foregoing distinctions and complications in mind, legal commentary has been particularly critical of the evidentiary approach.⁷⁵ For example, Sanford Kadish has described the evidentiary approach as having a deeply problematic “Alice-in-Wonderland quality,” given that it “retain[s] a *mens rea* requirement in the definition of the crime, but keep[s] the defendant from introducing evidence to rebut its presence.”⁷⁶ Others believe the evidentiary approach to be “draconian,”⁷⁷ “arbitrary,”⁷⁸ and “clearly wrong.”⁷⁹ Finally, content aside, legal commentary highlights the extent to which it is unclear—both as a matter of policy and constitutional law—whether the evidentiary approach impermissibly “exclude[s] evidence of intoxication-induced accidents or mistakes” (as distinguished from the “intoxication-induced blackout” at issue in *Egelhoff*).⁸⁰

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

Overall, the imputation approach is a laudable attempt at translating the confusing and haphazard common law approach to intoxication—currently applicable in the District—into clear rules.⁸¹ Although this framework is, as the Model Penal Code drafters themselves recognized, imperfect, it does a better job of collectively balancing the competing policy considerations implicated by the intoxicated actor than does the evidentiary approach.⁸² It also finds strong support in legislative practice among reform

⁷⁵ See, e.g., Westen, *supra* note 52; at 1228-47; LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. For an argument that the evidentiary approach creates a “permissive but irrebuttable inference” of *mens rea* in intoxication cases, see Alexander, *supra* note 52, at 199-200.

⁷⁶ Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 955 (1999); see DRESSLER, *supra* note 31, at § 24.03.

⁷⁷ Alexander, *supra* note 52, at 215.

⁷⁸ *Commonwealth v. Henson*, 476 N.E.2d 947, 954 (Mass. 1985).

⁷⁹ LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5.

⁸⁰ Westen, *supra* note 52, at 1246. As Westen explains, *Egelhoff* involved an intentional killing which, the defendant argued, occurred “while in an automaton-like state of ‘blackout’ of which he had no memory.” *Id.* at 1247. When the defendant “sought to buttress his testimony of blackout with evidence of heavy intoxication at the time, the Montana courts invoked Montana Code section 45-2-203 to bar the evidence.” *Id.* This was directly in accordance with the Montana legislature’s intent, as well as the legislative intent underlying similar statutes, which were “clearly designed to exclude evidence of intoxication-induced blackouts.” *Id.* at 1248. Less clear, however, is how these statutes are intended to deal with the situation of a defendant who seeks to buttress his testimony of mistake or accident with intoxication evidence, as would be the case where “[a] radio thief asserts that he thought the radio belonged to himself” and thereafter attempts to “support his claim, which otherwise might be unbelievable, with evidence that he was drunk.” *Id.* (quoting Arthur A. Murphy, *Has Pennsylvania Found A Satisfactory Intoxication Defense?*, 81 DICK. L. REV. 199, 202 (1977)). As Westen highlights, considerable authority—including an amicus brief submitted by eighteen jurisdictions that apply some form of an evidentiary approach, see Brief of the States of Hawaii, et al., as Amicus Curiae, *Egelhoff* (No. 95-966), at *17-18—suggests that the Montana statute “would not operate to exclude evidence of voluntary intoxication to prove accident or mistake” as a policy matter. Westen, *supra* note 52, at 1248-50 nos. 137-144; see also *id.* at 1250 (noting policy reasons for making this distinction). In any event, *Egelhoff* did not resolve this issue as a constitutional matter. *Id.* at 1250.

⁸¹ See sources cited *supra* notes 53-54 and accompanying text.

⁸² See Model Penal Code § 2.08 cmt. at 358-59; Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431, 436 (1998). Insofar as scholarly views are concerned, support for the imputation approach is less pronounced than the overwhelming disdain for the evidentiary approach. See, e.g., Alexander, *supra* note 52, at 215. For criticism of the Model Penal Code approach, see ROBINSON, 1 CRIM.

jurisdictions and in case law.⁸³ Finally, this framework should avoid the potential constitutional issues implicated by *Egelhoff*.⁸⁴

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

First, the logical relevance principle incorporated into § 209(a) does not reference “defenses” in any capacity; instead, it mirrors the logical relevance principle governing accidents, mistake, and ignorance under § 208(a) by establishing that: “A person is not liable for an offense when that person’s intoxication negates the existence of a culpable mental state applicable to a result or circumstance in that offense.” This is in contrast to the standard logical relevance principle, reflected in MPC § 2.08(1) and incorporated into numerous state criminal codes, which establishes that the “intoxication of the actor is not a defense unless it negatives an element of the offense.”⁸⁵ To improve the clarity and consistency of the Revised Criminal Code, this departure is intended to better communicate that intoxication, like mistake, “does not sanction a true defense, but in fact primarily recognizes an attack on the prosecution’s ability to prove the requisite culpable mental state beyond a reasonable doubt.”⁸⁶

Second, § 209(b) departs from legislative practice by clarifying the nature of the correspondence between intoxication and culpable mental state requirements. Neither the Model Penal Code, nor reform codes, explicitly state when intoxication has the tendency to negate the existence of a given culpable mental state requirement. Subsection 209(b), in contrast, provides a set of general rules, which broadly establish that intoxication has the tendency to negate the existence of any subjective culpable mental state—namely, purpose, knowledge, and recklessness—when, due to the person’s intoxicated state, that person did not act with the desire or level of awareness applicable to a result or circumstance under a given offense definition.⁸⁷ These rules explicitly articulate what is otherwise inherent in the requirement that the government prove the elements of an offense beyond a reasonable doubt. (In this sense, they run parallel with § 208(b), which serves a similar function in the context of mistake.) By providing District judges with

L. DEF. § 65; Alexander, *supra* note 52, at 214-15; Paul H. Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 15-17 (1985); Kimberly Kessler Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597, 609-10 (2001).

⁸³ See sources cited *supra* notes 55-56 and accompanying text.

⁸⁴ Note also that, *Egelhoff* aside, other U.S. Supreme Court case law suggests that jury instructions in jurisdictions that apply the evidentiary approach must be “carefully fashioned.” LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5. That is, an instruction which “creates a reasonable likelihood that the jury would believe that if defendant was intoxicated, he was criminally responsible regardless of his state of mind . . . violates due process under” the U.S. Supreme Court’s decision in *Sandstrom v. Montana*, 442 U.S. 510 (1979). *Id.* (quoting *State v. Erwin*, 848 S.W.2d 476 (Mo. 1993)).

⁸⁵ See sources cited *supra* note 55.

⁸⁶ Danyne Holley, *The Influence of the Model Penal Code's Culpability Provisions on State Legislatures: A Study of Lost Opportunities, Including Abolishing the Mistake of Fact Doctrine*, 27 SW. U. L. REV. 229, 247-49 (1997). Which is to say that the intoxication “defense” most closely resembles a mistake of fact “defense”: “[n]either affirmatively exculpates; rather, they represent a failure of proof of an essential element (the requisite mens rea) of the crime, as evaluated in the act-oriented framework.” Keiter, *supra* note 29, at 497; see DRESSLER, *supra* note 31, at § 24.07.

⁸⁷ Note, however, that the rule of imputation governing self-induced intoxication in § 209(c) severely limits the situations in which intoxication will actually negate recklessness.

these basic rules of translation, § 208(b) should enhance the clarity and consistency of District law.

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

The first flaw is one of drafting: typically, the rule of recklessness imputation is framed in the negative, establishing those situations where “unawareness is immaterial” for purposes of dealing with self-induced intoxication when it ought to be framed in the positive, establishing the government’s affirmative burden of proof with respect to recklessness in cases involving self-induced intoxication. A few reform jurisdictions appear to have recognized this problem, opting to reframe Model Penal Code § 2.08(2) as an alternative definition of “recklessly” contained in their general parts.⁸⁸

Even these jurisdictions, however, fail to address a second flaw in Model Penal Code § 2.08(2): its failure to explicitly clarify what the government’s burden of proof actually is. To generally state, for example, “that defendants are guilty of crimes of recklessness if they ‘would have been aware’ of the risks if sober, can be interpreted in [a variety of] ways.”⁸⁹ That being said, it is reasonably clear from the Model Penal Code commentary that the drafters “intended to hold voluntarily intoxicated persons responsible for conduct that would constitute negligence if they were sober.”⁹⁰ If true, however, then they should have more clearly articulated this “Intoxication Recklessness Principle”⁹¹ through the text of the Model Penal Code itself.

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

One final group of variances relate to intoxication-related issues that the Revised Criminal Code does not address. For example, § 209 is generally silent on the meaning of self-induced intoxication, the difference between self-induced and involuntary intoxication, and on the appropriate treatment of involuntary intoxication that is not

⁸⁸ See, e.g., N.Y. Penal Law § 15.05; N.H. Rev. Stat. Ann. § 626:2; Ala. Code § 13A-2-2.

⁸⁹ Westen, *supra* note 52, at 1220 n.72. For example, Model Penal Code § 2.08(2) *could* be interpreted to “mean that voluntarily intoxicated defendants are responsible for crimes of recklessness at Time2 if they are negligent in being unaware of substantial and unjustified risks at that time, regardless of whether their intoxication causes them to be unaware of risks of which they would otherwise be conscious.” *Id.* However, there does not appear to be any support for this approach in legal authority, see *Glidden*, 441 A.2d at 731, while such an approach would “punish[] [actors] in excess of the risks and harms which their intoxicated creates,” Westen, *supra* note 52, at 1220 n.72.

⁹⁰ Westen, *supra* note 52, at 1222 (discussing Model Penal Code § 2.08 cmt. at 358-59); see *DRESSLER*, *supra* note 31, at § 24.07.

⁹¹ Yaffe, *supra* note 52, at 546. As Yaffe explains, this principle dictates that “[i]f a defendant is negligent and intoxicated, and he became intoxicated voluntarily, then, for legal purposes, he is to be treated as though he were reckless.” *Id.*

logically relevant to negating proof of a required culpable mental state.⁹² This is in contrast to Model Penal Code § 2.08, which codifies an affirmative defense applicable to instances of involuntary intoxication of this nature,⁹³ alongside definitions of “self-induced intoxication”⁹⁴ and “pathological intoxication.”⁹⁵

Section 209 does not incorporate a comparable Model Penal Code-based general provision addressing involuntary intoxication that is not logically relevant to negating proof of a required culpable mental state for pragmatic reasons. These issues are typically—and most appropriately—addressed through affirmative defenses;⁹⁶ however, affirmative defenses are not within the scope of the CCRC’s planned review.⁹⁷

In contrast, § 209 does not codify additional general definitions—beyond that of “intoxication”⁹⁸—for two main policy reasons. First, only “[a] few of the modern recodifications” have codified additional general definitions of this nature.⁹⁹ And second, these definitions are—both as initially developed by the drafters of the Model Penal Code and as thereafter adopted by a handful of state legislatures—comprised of a wide range of flaws, which are not easily remedied.¹⁰⁰

⁹² The explanatory note to § 209(c) generally establishes that self-induced intoxication “occurs when a person culpably introduces a substance into his or her body with the tendency to cause a disturbance of mental or physical capacities.” However, this general language leaves undefined the key term “culpably.”

⁹³ Model Penal Code § 2.08 establishes, in relevant part, that:

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.

(4) Intoxication that (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

⁹⁴ Model Penal Code § 2.08 (5)(b) defines “self-induced intoxication” as “intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.”

⁹⁵ Model Penal Code § 2.08 (5)(c) defines “pathological intoxication” to mean “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.”

⁹⁶ See ROBINSON, *supra* note 31, at 2 CRIM. L. DEF. § 176.

⁹⁷ See Commentary to Revised Criminal Code §§ 201(a) and (b).

⁹⁸ Section 209(a) of the Revised Criminal Code codifies a definition of “intoxication” which is identical to the definition of “intoxication” proposed by the drafters of the Model Penal Code, see Model Penal Code § 2.08(5)(a), and comparable to that codified by many reform jurisdictions, see Ala. Code § 13A-3-2; Alaska Stat. Ann. § 11.81.900; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Conn. Gen. Stat. Ann. § 53a-7; Ga. Code Ann. § 16-3-4; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; N.J. Stat. Ann. § 2C:2-8; Ohio Rev. Code Ann. § 2901.21; Tenn. Code Ann. § 39-11-503; Tex. Penal Code Ann. § 8.04.

⁹⁹ LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5 n.60; see Ala. Code § 13A-3-2; Ark. Code Ann. § 5-2-207; Colo. Rev. Stat. Ann. § 18-1-804; Haw. Rev. Stat. Ann. § 702-230; Me. Rev. Stat. tit. 17-A, § 37; Tenn. Code Ann. § 39-11-503; Wyo. Stat. Ann. § 6-1-202.

¹⁰⁰ For discussion of these flaws, see ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.

The Revised Criminal Code, by remaining silent on the foregoing issues, intends to leave them to the courts—which is where they currently exist under current District law and where they still exist in most reform jurisdictions.¹⁰¹

¹⁰¹ For a collection of relevant case law, see LAFAVE, *supra* note 47, at 2 SUBST. CRIM. L. § 9.5; and ROBINSON, *supra* note 31, at 1 CRIM. L. DEF. § 65.