



Second Draft of Report #35:
Cumulative Update to Sections 201-213 of
the Revised Criminal Code

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

This Draft Report consists of two parts: (1) draft statutory text for an enacted Title 22 of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision.

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 Second Draft of Report #35 - Cumulative Update to Sections 201-213 of the Revised Criminal Code is June 19, 2020 (one month from the date of issue).

Oral comments and written comments received after June 15, 2020 may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

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

- (a) *Proof of Offense Elements Beyond a Reasonable Doubt.* No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt.
- (b) *Offense Element Defined.* “Offense element” includes the objective elements and culpability requirement necessary to establish liability for an offense.
- (c) *Objective Element Defined.* “Objective element” means any conduct element, result element, or circumstance element. For purposes of this Title:
 - (1) “Conduct element” means any act or omission that is required to establish liability for an offense.
 - (2) “Result element” means any consequence caused by a person’s act or omission that is required to establish liability for an offense.
 - (3) “Circumstance element” means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense.
- (d) *Culpability Requirement Defined.* “Culpability requirement” includes:
 - (1) The voluntariness requirement, as provided in RCC § 22E-203(a);
 - (2) The culpable mental state requirement, as provided in RCC § 22E-205(a); and
 - (3) Any other aspect of culpability specifically required by an offense.
- (e) *Other Definitions.*
 - (1) “Act” has the meaning specified in RCC § 22E-201(b).
 - (2) “Omission” has the meaning specified in RCC § 22E-201(c).

COMMENTARY

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

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

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

[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society

‘to prove beyond a reasonable doubt all of the elements included in the definition of the offense.’”²

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

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

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

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

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

Explanatory Note. Subsection (c) provides the definition of “objective element” applicable to subsection (b) and throughout the RCC. It establishes that the objective elements of an offense—often referred to as an offense’s *actus reus*—are the conduct

that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id.

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

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

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

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

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

elements, result elements, and circumstance elements contained in an offense definition. All of these elements are subject to the burden of proof set forth in subsection (a).

Subsection (c) also provides precise definitions for these three kinds of objective elements. “Conduct element” is narrowly defined in paragraph (c)(1) as an “act” or “omission,” which terms are in turn respectively defined in section 202 as a “bodily movement” or “failure to act” under specified circumstances.⁷ This definition of conduct element makes it easier to analytically separate what is usually inconsequential (i.e., the required bodily movement, or where relevant, the failure to make one), from other aspects of a criminal offense that are more central to assessing culpability.⁸ One such aspect is a “result element,” which is defined in paragraph (c)(2) as “any consequence caused by a person’s act or omission that is required to establish liability for an offense.” The other relevant aspect is a “circumstance element,” which paragraph (c)(3) defines as “any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense.”

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

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

⁷ RCC §§ 22E-202(b), (c).

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

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

offense that prohibits “knowingly taking property of another without consent,” the verb “taking” implies an act or omission—for example, reaching for a wallet—performed by the defendant (a conduct element), which is of a specific character, namely, it amounts to a taking in the particular context in which it occurs (a circumstance element).¹⁰

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

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

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

Explanatory Note. Subsection (d) provides the definition of “culpability requirement” applicable to subsection (b) and throughout the RCC. It is an open-ended

¹⁰ Note that the same verb employed in an offense definition may constitute either a combined conduct/circumstance element or conduct/result element depending upon how the crime was committed in a given case. For example, although the verb “taking” may typically constitute a combined conduct/circumstance element (see above theft illustration), it would constitute a combined conduct/result element in a theft prosecution where the causal nexus between the defendant’s conduct and the prohibited social harm is mediated by another person or object. Consider the situation of a parent who tells his young child to go inside a neighbor’s unlocked house and retrieve the neighbor’s wallet resting on the backyard patio based on the lie that the neighbor has “volunteered” to give it to him. Under these conditions, the parent is liable for the theft based on the child’s role as an innocent or irresponsible agent. See RCC § 22E-211(a) (“A person is legally accountable for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.”). In this situation, however, the act, the communication to the child, is clearly distinct from the resultant taking, which does not occur until the child retrieves the wallet. A similar analysis applies if the parent employs a drone, rather than his child, to steal the wallet. Under these conditions, the parent is liable for the theft based on his use of an automated intermediary to retrieve the neighbor’s property. Here again, however, the act, the movement of the drone remote, is clearly distinct from the resultant taking, which does not occur until the drone retrieves the wallet.

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

definition, which establishes that the voluntariness requirement and culpable mental state requirement are among the facts that comprise the culpability requirement of an offense. Also included in this definition is “[a]ny other aspect of culpability specifically required by an offense,” such as, for example, the premeditation, deliberation, and absence of mitigating circumstances that are required to secure a first degree murder conviction.¹² All facts that comprise an offense’s culpability requirement are subject to the burden of proof set forth in subsection (a). What is left unresolved by this non-exclusive list is whether any other aspect of criminal liability not addressed by the RCC should also be treated as part of an offense’s culpability requirement (and therefore subject to that burden of proof).¹³ Under subsection (d), these issues are left for judicial resolution.

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

¹² See, e.g., RCC § 22E-1101(b) (requiring premeditation and deliberation for first degree murder); *id.* at § (f)(3) (“If evidence of mitigation is present at trial, the government must prove the absence of such circumstances beyond a reasonable doubt [for murder].”).

¹³ Other aspects of liability not addressed by this provision include facts establishing the absence of a general excuse defense.

RCC § 22E-202. CONDUCT REQUIREMENT.

(a) *Conduct Requirement.* No person may be convicted of an offense unless the person’s liability is based on an act or omission.

(b) *Act Defined.* “Act” means a bodily movement.

(c) *Omission Defined.* “Omission” means a failure to act when:

- (1) A person is under a legal duty to act; and
- (2) The person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists.

(d) *Existence of Legal Duty.* For purposes of this Title, a legal duty to act exists when:

- (1) The failure to act is expressly made sufficient by the law defining the offense; or
- (2) A duty to perform the omitted act is otherwise imposed by law.

COMMENTARY

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

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

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

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

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

Id.

³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04(c) (6th ed. 2012) (“Some conduct by the defendant is constitutionally required in order to punish a person.”) (discussing *Robinson v. California*, 392

Possession satisfies the conduct requirement whenever it is based on an act,⁴ as defined in subsection (b), or an omission,⁵ as defined in subsection (c).⁶

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a statement on the conduct requirement, the DCCA has clearly recognized that the conduct requirement is a basic and necessary ingredient of criminal liability given that “bad thoughts alone cannot constitute a crime.”⁷

2. RCC § 22E-202(b)—Act Defined

Explanatory Note. Subsection (b) provides the definition of “act” applicable to both subsection (a) and throughout the RCC. It establishes that the term “act” is to be understood narrowly, as a person’s bodily movement. This narrow definition should make it easier to distinguish between a person’s relevant conduct—for example, throwing an object in the direction of a child—and any results or circumstances associated with

U.S. 514 (1968) and *Powell v. Texas*, 392 U.S. 514 (1968)); see LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b) (“A statute purporting to make it criminal simply to think bad thoughts would, in the United States, be held unconstitutional.”) (collecting cases).

⁴ For example, where purchaser X and dealer Y engage in a direct, hand-to-hand exchange of cash for drugs, X’s physical possession is based on an act, and therefore would satisfy the conduct requirement. See RCC § 22E-202(b) (defining “act” as a “bodily movement”); see also *id.* at 901(X)(1) (defining “possesses” as “[h]olds or carries on one’s person”).

⁵ For example, where purchaser X electronically delivers payment for controlled substances to dealer Y, and Y in turn drops the controlled substances in a mailbox over which X has the ability and desire to exercise control, X’s constructive possession is based on an omission, and therefore would satisfy the conduct requirement. See RCC § 22E-202(c) (defining “omission” as “a failure to act when,” *inter alia*, [a] person is under a legal duty to act”); see also *id.* at 901(X)(2) (defining “possesses” as “[h]as the ability and desire to exercise control over”).

⁶ As Dressler observes:

Possession crimes do not necessarily dispense with the voluntary act requirement. Courts typically interpret possession statutes to require proof that the defendant knowingly procured or received the property possessed (thus, a voluntary act must be proven), or that she failed to dispossess herself of the object after she became aware of its presence. In the latter case, “possession” is equivalent to an omission, in which the defendant has a statutory duty to dispossess herself of the property. She is not guilty if the contraband was “planted” on her, and she did not have sufficient time to terminate her possession after she learned of its presence.

Dressler, *supra* note 3, at § 9.03(c); see, e.g., LAFAVE, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(e) (“So construed, knowingly receiving an item or retention after awareness of control over it could be considered a sufficient act or omission to serve as the proper basis for a crime.”); Francisco Muñoz-Conde & Luis Ernesto Chiesa, *The Act Requirement As A Basic Concept of Criminal Law*, 28 CARDOZO L. REV. 2461, 2477 (2007) (“[P]roperly understood, possession crimes do not pose a problem for criminal liability because what is really being punished is either the act of acquiring the object or the failure to get rid of it.”) (citing GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 8 (2d ed. 1961)).

⁷ *Trice v. United States*, 525 A.2d 176, 187 n.5 (D.C. 1987) (Mack, J. dissenting) (internal quotations and alterations omitted); see, e.g., *Conley v. United States*, 79 A.3d 270, 278-79 (D.C. 2013); *Rose v. United States*, 535 A.2d 849, 852 (D.C. 1987).

that conduct—for example, the serious bodily injury to the child inflicted by the projectile.⁸

Relation to Current District Law. Subsection (b) fills a gap in District law. Neither the D.C. Code nor District case law provides a definition of the term “act.” However, the DCCA has recognized in passing that an “act” is, generally speaking, a “bodily movement.”⁹

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

Explanatory Note. Subsection (c) provides the definition of “omission” applicable to subsection (a) and throughout the RCC. Broadly speaking, this definition establishes that the term “omission” is to be understood narrowly, as a person’s failure to engage in an “act” (i.e., a bodily movement) that he or she is otherwise obligated to perform. This narrow definition should make it easier to distinguish between a person’s relevant conduct—for example, failing to turn off the bath water after having placed one’s infant child in the tub—and any results or circumstances associated with that conduct—for example, the fatal drowning of the infant that ensues after the parent leaves the room for a significant period of time.¹⁰

The definition of omission contained in subsection (c) also incorporates two important principles of omission liability. The first principle, set forth in paragraph (c)(1), is that only a failure to perform a *legal* duty constitutes an omission. Pursuant to this well-established common law principle, “[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.”¹¹

The second principle, set forth in paragraph (c)(2), is that the requisite legal duty must be one of which the accused is either aware or culpably unaware.¹² This limitation on omission liability amounts to a culpability requirement governing the existence of a legal duty in omission prosecutions.¹³ It is intended to codify the D.C. Court of Appeals’ decision in *Conley v. United States*,¹⁴ which interprets the U.S. Supreme Court’s decision

⁸ See RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).

⁹ *Trice*, 525 A.2d at 187 n.5 (Mack, J. dissenting).

¹⁰ See RCC § 22E-201(c): Explanatory Note (discussing differences between conduct, result, and circumstance elements).

¹¹ See, e.g., *United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (“It is a long-established principle that criminal law generally regulates action, rather than omission, and that ‘[f]or criminal liability to be based upon a failure to act it must first be found that there is a duty to act—a legal duty and not simply a moral duty.’”) (quoting *LAFAVE*, *supra* note 2, at 1 SUBST. CRIM. L. § 6.1(b)); Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1571 (2013) (“[T]he general rule is that one is not liable for omissions absent a legal duty to act.”).

¹² A person is “culpably unaware” of a legal duty when a reasonable person in the actor’s situation would have been aware of the legal duty.

¹³ See, e.g., *Graham Hughes*, *Criminal Omissions*, 67 YALE L.J. 590, 602 (1958) (“The maxim, ‘ignorance of the law is no excuse,’ ought to have no application in the field of criminal omissions, for the mind of the offender has no relationship to the prescribed conduct if he has no knowledge of the relevant regulation. The strictest liability that makes any sense is a liability for culpable ignorance.”).

¹⁴ 79 A.3d at 273.

in *Lambert v. California*¹⁵ to stand for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”¹⁶

Subsection (d) addresses the scope of a legal duty to act for purposes of omission liability. Specifically, it establishes that a legal duty to act exists under two different sets of circumstances. The first, addressed in paragraph (d)(1), is where the criminal statute for which the accused is being prosecuted expressly defines the offense in terms of an omission.¹⁷ The second, addressed in paragraph (d)(2), is where a law—whether criminal or civil—distinct from the offense for which the defendant is being prosecuted creates a legal duty.¹⁸

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

While the D.C. Code does not contain a generally applicable definition of omission (or any other general statement on omission liability), a handful of District statutes expressly criminalize omissions to fulfill particular legal duties, such as the “duty to provide care [to] a vulnerable adult or elderly person”¹⁹ or the duty “to appear before any court or judicial officer as [legally] required.”²⁰ And District case law generally establishes that the imposition of criminal liability under these circumstances is appropriate.²¹

District case law also establishes, however, that omission liability premised on the failure to perform a legal duty not otherwise specified in an offense definition may be appropriate. For example, the U.S. Court of Appeals for the District of Columbia Circuit (CADDC) in *Jones v. United States*²²—a decision handed down before the creation of the local District judicial system²³—recognized that “the omission of a duty owed by one individual to another, where such omission results in the death of the one to whom the duty is owing, [can] make the other chargeable.”²⁴ However, the *Jones* court also noted that “the omission of a duty owed by one individual to another” can only establish criminal liability when “the duty neglected [is] a legal duty”—i.e., “[i]t must be a duty imposed by law or by contract” rather than a “mere moral obligation.”²⁵

Recently, the DCCA appears to have established that not just any legal duty will suffice for purposes of omission liability. Rather, it must be a legal duty that the actor

¹⁵ 355 U.S. 225 (1957).

¹⁶ *Conley*, 79 A.3d at 273.

¹⁷ Illustrative of such offenses are statutes criminalizing a motorist’s failure to stop after involvement in an accident, a taxpayer’s failure to file a tax return, a parent’s neglect of the health of his child, and a failure to report certain communicable diseases. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 86 (Westlaw 2019).

¹⁸ Illustrative of such duties are those created by special relationships, landowners, contract, voluntary assumption of responsibility, and the creation of peril. ROBINSON, *supra* note 17, at 1 CRIM. L. DEF. § 86.

¹⁹ D.C. Code § 22-934.

²⁰ D.C. Code § 23-1327.

²¹ *See, e.g., Fearwell v. United States*, 886 A.2d 95, 100 (D.C. 2005); *Jackson v. United States*, 996 A.2d 796 (D.C. 2010).

²² 308 F.2d 307 (D.C. Cir. 1962).

²³ *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

²⁴ *Jones*, 308 F.2d at 310 (citations and internal quotation marks omitted).

²⁵ *Id.*

“knew or should have known” about under the circumstances.²⁶ In *Conley v. United States*, the DCCA struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm²⁷ on the basis that it “criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise.”²⁸ Observing that “the average person [would not] know that he may be committing a felony offense merely by remaining in [a] vehicle, even if the gun belongs to someone else and he has nothing to do with it,” the DCCA concluded that the statute created a form of omission liability that violated the requirements of due process, and, therefore, was “facially unconstitutional.”²⁹

The *Conley* decision rested upon the court’s reading of the U.S. Supreme Court’s opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”³⁰

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

²⁶ *Conley*, 79 A.3d at 281.

²⁷ D.C. Code § 22-2511 (Repealed).

²⁸ 79 A.3d at 273.

²⁹ *Id.* at 286.

³⁰ *Id.* at 273.

RCC § 22E-203. VOLUNTARINESS REQUIREMENT.

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

(b) *Scope of Voluntariness Requirement.*

(1) Voluntariness of Act. When a person’s act provides the basis for liability, a person voluntarily commits the conduct element of an offense when the act is:

- (A) The product of conscious effort or determination; or
- (B) Otherwise subject to the person’s control.

(2) Voluntariness of Omission. When a person’s omission provides the basis for liability, a person voluntarily commits the conduct element of an offense when:

- (A) The person has the physical capacity to perform the required legal duty; or
- (B) The failure to act is otherwise subject to the person’s control.

(c) *Other Definitions.*

- (1) “Conduct element” has the meaning specified in RCC § 22E-201(c)(1).
- (2) “Act” has the meaning specified in RCC § 22E-201(b).
- (3) “Omission” has the meaning specified in RCC § 22E-201(c).

COMMENTARY

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

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

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

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

opportunity to avoid committing the charged offense,³ or that criminal liability would be appropriate under the circumstances.⁴

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

For example, in *Conley v. United States*, the DCCA recognized that the requirement of a voluntary act is a “basic jurisprudential point” supported by a wide range of authorities.⁵ The court also recognized that the same basic principle applies to omissions as well: “[n]o one, of course, can be held criminally liable for failing to do an act that he is physically incapable of performing.”⁶ And in *Easter v. District of Columbia*, the U.S. Court of Appeals for the D.C. Circuit (in an oft-cited pre-1971 decision) observed the basic principle underlying the voluntariness requirement: “An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. Action within the definition is not enough. To be guilty of the crime a person must engage responsibly in the action.”⁷

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

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

Paragraph (b)(1) is directed towards situations where a person’s act provides the basis for liability. Specifically, it establishes that the conduct element of an offense is voluntarily committed when the required act was the product of conscious effort or determination⁸; or, if it was not the product of conscious effort or determination, when it was otherwise subject to the control of the actor.⁹

The “conscious effort and determination” standard stated in subparagraph (b)(1)(A) calls upon the factfinder to consider whether the requisite act was an external manifestation of the defendant’s will. This is the crux of the voluntariness requirement, and in all but the most rare cases involving physical abnormalities—such as those where

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

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

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

⁶ *Conley*, 79 A.3d at 279.

⁷ 361 F.2d 50, 52 (1966).

⁸ RCC § 22E-203(b)(1)(A).

⁹ RCC § 22E-203(b)(1)(B).

the requisite act was a reflex, part of an epileptic seizure, or occurred while the actor was sleeping—it is likely to be satisfied.

The “otherwise subject to the person’s control” standard stated in subparagraph (b)(1)(B) constitutes an alternative, catch-all means of establishing the voluntariness requirement. It is intended to address exceptional situations¹⁰ where, although the act most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.¹¹

Paragraph (b)(2) is directed towards situations where a person’s omission provides the basis for liability. Specifically, it establishes that the conduct element of an offense is voluntarily committed where a person is physically capable of performing the required legal duty¹²; or, if the person lacked that physical capacity, then where the failure to act was otherwise subject to the control of the actor.¹³

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

The “otherwise subject to the person’s control” standard stated in subparagraph (b)(2)(B) recognizes the same alternative, catch-all means of establishing the voluntariness requirement applicable under subparagraph (b)(1)(B) in situations where a person’s omission provides the basis for liability. It is intended to address exceptional situations¹⁴ where, although the omission most directly linked to the social harm may not be the product of conscious effort or determination, there nevertheless exists an

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

¹¹ Under RCC § 22E-203(b)(1)(B), there is no specific threshold level of risk awareness that must be met at Time 1 concerning the likelihood that an act which is not the product of conscious effort or determination would occur at Time 2 in order to deem that act subject to a person’s control at Time 1. However, the person’s level of awareness at Time 1 must at the very least be sufficient to meet the culpability requirement governing the charged offense. Consider, for example, the situation of a person, X, who suffers from chronic epilepsy but declines to take her medically necessary anti-seizure medication. At Time 1, X decides to drive on the highway un-medicated. Sixty minutes later, at Time 2, X suffers a seizure on the road, which leads her to crash into another driver on the road, V, who dies from the impact. X ultimately survives the accident and is charged with reckless manslaughter. To establish that X recklessly killed V, the government would have to prove that at Time 1—when X decided to get behind the wheel of her car un-medicated—X was aware of a substantial risk that she might suffer a deadly seizure while on the road, and that X’s decision was clearly blameworthy under the circumstances. *See* RCC § 22E-206(d).

¹² RCC § 22E-203(b)(2)(A).

¹³ RCC § 22E-203(b)(2)(B).

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

acceptable basis for determining that the defendant, due to some earlier culpable conduct, possessed a reasonable opportunity to avoid committing the offense.¹⁵

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

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

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

¹⁶ Consider the situation of a person, X, who becomes intoxicated at a friend's home and is thereafter carried against his will into a public space by another partygoer, Y. If X is subsequently arrested for public intoxication, there would be an insufficient basis for deeming X's conduct voluntary under section 203. Here, the physical interference of Y is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct. The same can also be said about the situation of a person, X, who places a controlled substance in her pocket while at home, is immediately thereafter arrested, and then transported to jail without ever being searched or asked about the contraband. If, having entered the jail (and still physically restrained), X is subjected to another charge for introducing a controlled substance into a government facility, there would be an insufficient basis for deeming X's conduct voluntary under section 203. Here, the physical interference of the police is sufficient to deny X a reasonable opportunity to avoid engaging in the proscribed conduct.

RCC § 22E-204. CAUSATION REQUIREMENT.

(a) *Causation Requirement.* No person may be convicted of an offense that contains a result element unless the person’s conduct is the factual cause and legal cause of the result.

(b) *Factual Cause Defined.* A person’s conduct is the factual cause of a result if:

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

(c) *Legal Cause Defined.* A person’s conduct is the legal cause of a result if:

- (1) The result is reasonably foreseeable in its manner of occurrence; and
- (2) When the result depends on another person’s volitional conduct, the actor is justly held responsible for the result.

(d) *Other Definitions.* “Result element” has the meaning specified in RCC § 22E-201(c)(2).

COMMENTARY

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

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

Relation to Current District Law. Subsection (a) codifies District law. While the D.C. Code does not contain a general statement on causation, the DCCA has addressed the requirement of causation on many occasions. It is well-established in case law that

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

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

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

causation is a basic element of criminal responsibility, which requires the government to prove—for all crimes involving result elements—that the defendant was the factual and legal cause of the harm for which he or she is charged.⁴

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

Explanatory Note. Subsection (b) provides a comprehensive definition of “factual cause.” In the vast majority of cases, factual causation will be proven under paragraph (b)(1) by showing that the defendant was the logical, but-for cause of a result.⁵ The inquiry required by this paragraph is essentially empirical, though also hypothetical: it asks what the world would have been like if the defendant had not performed his or her conduct.⁶ In rare cases, however, when the defendant is one of multiple actors that independently contribute to producing a particular result, factual causation may also be proven under paragraph (b)(2) by showing that the defendant’s conduct was sufficient—even if not necessary—to produce the prohibited result.⁷ Although in this situation it cannot be said that, but for the defendant’s conduct, the result in question would not have occurred, the fact that the defendant’s conduct was by itself sufficient to cause the result provides an adequate basis for treating the defendant as a factual cause.⁸

For prosecutions based on an omission, the principles codified in subsection (b) will rarely provide a useful test for assigning liability.⁹ Whereas factual causation generally presumes a chain of causal forces that affirmatively change the circumstances of the world, omissions do not affirmatively change the circumstances of the world; at most, they constitute failures to interfere with the changes made by other forces.¹⁰ That

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

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

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

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

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

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

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

said, it is certainly possible for an omission to fall short of satisfying the principles codified in subsection (b).¹¹ And where this is the case, the government’s inability to prove the factual causation requirement beyond a reasonable doubt precludes the imposition of liability for a result element crime under the RCC.

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

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

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

Insofar as the DCCA’s reliance on the test is concerned, two main critiques can be made. First, application of the substantial factor test to deal with *all* issues of factual

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

¹² See, e.g., *District of Columbia v. Carlson*, 793 A.2d 1285, 1288 (D.C. 2002); *Lacy v. District of Columbia*, 424 A.2d 317, 321 (D.C. 1980); *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003).

¹³ *Blaize v. United States*, 21 A.3d 78, 81 (D.C. 2011); D.C. Crim. Jur. Instr. § 4.230.

¹⁴ *Blaize*, 21 A.3d at 82; see also *Roy v. United States*, 871 A.2d 507, 5087 (D.C. 2005) (citing *Butts v. United States*, 822 A.2d 407, 417 (D.C. 2003)).

¹⁵ *United States v. Pitt-Des Moines, Inc.*, 970 F. Supp. 1359, 1364-65 (N.D. Ill. 1997) *aff’d*, 168 F.3d 976 (7th Cir. 1999).

¹⁶ See, e.g., David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1264-66 (1978); LAFAVE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4; W. PAGE KEETON, PROSSER AND KEETON ON TORTS § 41, at 267-68 (5th ed. 1984).

¹⁷ RESTATEMENT (THIRD) OF TORTS § 26 cmt. j (Tentative Draft No. 2, 2002).

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

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

Given the uncertain scope of the substantial factor test, it’s possible—though by no means clear—that replacing it with the approach in RCC § 22E-204(b) could modestly circumscribe the scope of criminal liability under District law in some situations.²³

¹⁸ See, e.g., Eric Johnson, *Criminal Liability for Loss of A Chance*, 91 IOWA L. REV. 59, 87-88 (2005); Model Penal Code § 2.03 cmt. at 259; *United States v. Needle*, 72 F.3d 1104, 1120 (3d Cir. 1995) *amended*, 79 F.3d 14 (3d Cir. 1996) (Becker, J. dissenting).

¹⁹ Robert Strassfeld, *Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 355 (1992); see Kimberly Kessler, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2201-02 (1994).

²⁰ *Pitt-Des Moines, Inc.*, 970 F. Supp. at 1364-65.

²¹ Johnson, *supra* note 18, at 89 n.190.

²² *Burrage*, 134 S. Ct. at 892.

²³ Consider, for example, the District’s current approach to factual causation in gun battle cases, where X and D culpably shoot at one another, and D subsequently hits either an innocent victim or another culpable participant. Under these circumstances, X will be held criminally responsible for D’s conduct so long as X’s conduct is, *inter alia*, “a substantial factor in bringing about the death. D.C. Crim. Jur. Instr. § 4.230; see, e.g., *Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011). This approach, which is currently being reconsidered by the DCCA *en banc*, effectively “ignore[s] the actual or but-for cause requirement” governing the District’s homicide statutes. *Fleming v. United States*, 148 A.3d 1175, 1187 (D.C. 2016), *reh’g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017) (Easterly, J., dissenting). In contrast, under RCC § 22E-204(b), the government would have to prove that either: (1) but for X’s shooting at D, D would not have shot the innocent bystander or another culpable participant; or (2) X’s conduct was sufficient—even if not necessary—to lead D to shoot an innocent bystander or another culpable participant. While the RCC’s analytical approach differs from that in past DCCA case law, the RCC approach does not preclude liability in gun battle cases. See, e.g., *Phillips v. Com.*, 17 S.W.3d 870, 874 (Ky. 2000) (upholding homicide conviction of a defendant who participated in a gun battle but did not fire the shot which caused the death of an innocent bystander notwithstanding state criminal code’s traditional factual causation requirement); *Com. v. Gaynor*, 538 Pa. 258, 263, 648 A.2d 295, 298 (1994) (same); *Com. v. Santiago*, 425 Mass. 491, 504, 681 N.E.2d 1205, 1215 (1997) (“By choosing to engage in a shootout, a defendant may be the cause of a shooting by either side because the death of a bystander is a

However, “[g]iven the need for clarity and certainty in the criminal law,” this circumscription—to the extent it would occur—better reflects sound policy.²⁴

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

Explanatory Note. Subsection (c) provides a comprehensive definition of “legal cause.” Under the proscribed definition, legal causation exists where it can be proven that the result was reasonably foreseeable in its manner of occurrence, and not too dependent upon another’s volitional conduct to hold the person justly responsible for it.²⁵ This is a normative evaluation, which requires the factfinder to assess whether it would be appropriate to hold a person criminally responsible for a social harm of which he or she is the cause in fact due to the influence of intervening forces, such as natural events, the conduct of a third party, or the conduct of the victim.²⁶

The influence of these intervening forces can generally be divided into two categories. The first category, codified under paragraph (c)(1), relates to foreseeability; the focus here is on the extent to which a given result can be attributed to intervening forces—whether human²⁷ or natural²⁸—of a remote and/or accidental nature.²⁹ The second category, codified under paragraph (c)(2), relates to human volition; the focus here is on whether a person may *justly* be held liable for a given result that can be

natural result of a shootout, and the shootout could not occur without participation from both sides.”); Model Penal Code § 2.03 cmt. at 263 (“[I]f one of the participants in a robbery shoots at a policeman with intent to kill and provokes a return of fire by that officer that kills a bystander . . . the robber who initiates the gunfire could be charged with purposeful murder.”).

²⁴ *Burrage*, 134 S. Ct. at 892.

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

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

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

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

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

attributed to the free, deliberate, and informed conduct of a third party³⁰ or the victim.³¹ Under paragraph (c)(2), there is no legal causation when intervening volitional conduct³² was reasonably foreseeable, if holding the actor criminally liable for causing the result would be unjust. Determining whether a person may justly be held liable is a normative judgment that depends on analysis of the totality of the facts of a given case, including the inherent wrongfulness of the actor's conduct, whether the actor desired the prohibited result to occur, and the amount of time between the initial conduct and the intervening act. Inherent wrongfulness of the conduct, desire to cause the prohibited result³³, and short passage of time³⁴ are not required in order to find legal causation. However, all else being equal, inherent wrongfulness of the conduct, desire to cause the result, and short passage of time between the initial act and intervening act weigh in favor of finding legal causation.

There is no precise formula for determining the point at which intervening influences becomes so great as to break the causal chain between a defendant's conduct and the prohibited result for which he or she is being prosecuted.³⁵ Rather, the legal

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

³¹ For example, consider a hypothetical where A intends to end a romantic relationship with B, and B says that as a result he will commit suicide. A does not want B to commit suicide, but is practically certain that he will do so. A ends the relationship, and as a result B commits suicide. Even though B's actions were reasonably foreseeable, it would be unjust to hold A criminally liable for causing B's death. A's conduct was not inherently wrongful, and A did not desire to cause the death of another. *Compare with, United States v. Hamilton*, 182 F. Supp. 548, 549 (D.D.C 1960) (The defendant severely beat the decedent, causing him to fall into a semi-comatose state. While in the hospital, the decedent pulled out his breathing tubes, which caused death by asphyxiation. The Court found the defendant guilty of manslaughter, despite the decedent's intervening act.)

³² Intervening volitional conduct may include both acts and omissions of others. For example, if a driver speeds through an intersection and strikes a child, initially causing minor injury. If the child's parent does not seek medical care which causes the child's injury to become much more severe, the driver may argue that the parent's omission negates legal causation as to the degree of injury.

³³ This issue may be especially likely to arise with offenses that require recklessness or negligence as to causing the result element. For example, if a person fires several gunshots in a crowded theater, and in the ensuing panic a person is trampled and suffers injuries, legal causation may be appropriate if the actor was reckless, but did not desire to cause the injury.

³⁴ For example, if A seriously but non-fatally injures B, and B dies days later because B fails to fully comply with his physician's complex instructions, legal causation may be appropriate despite this passage of time between the initial injury and B's failure to follow the physician's instructions.

³⁵ *See, e.g., Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 n.13 (1982) (“[T]he principle of proximate cause is hardly a rigorous analytic tool.”); LLOYD L. WEINREB, *Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3*, in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON

causation standard enunciated in subsection (c) simply (and necessarily) calls for an “intuitive judgment”³⁶ that revolves around whether “although intervening occurrences may have contributed to [a result], the defendant can still, in all fairness, be held criminally responsible for [causing it].”³⁷

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

It is well established in the District that “a criminal defendant proximately causes, and thus can be held criminally accountable for, all harms that are reasonably foreseeable consequences of his or her actions.”³⁸ Reasonable foreseeability is thus at the heart of legal causation under District law—a point reflected in the D.C. Criminal Jury Instructions on homicide which state that “A person causes the death of another person if . . . it was reasonably foreseeable that death or serious bodily injury could result from such conduct.”³⁹ Notwithstanding the centrality of the phrase “reasonably foreseeable” in the District’s law of causation, however, it is far from clear what it actually means.

District courts have made a wide range of statements on the nature of reasonable foreseeability. Relying on the requirement of reasonable foreseeability, for example, the DCCA has held that a defendant “may not be held liable for harm actually caused where the chain of events leading to the injury appears ‘highly extraordinary in retrospect.’”⁴⁰ Reasonable foreseeability is also the basis of the DCCA’s observation that “[a]n intervening cause will be considered a superseding legal cause that exonerates the original actor if it was so unforeseeable that the actor’s . . . conduct, though still a substantial causative factor, should not result in the actor’s liability.”⁴¹

The diversity and complexity of statements regarding the nature of reasonable foreseeability perhaps explains why at least some District judges have refrained from providing jurors with any further elaboration of the concept in their instructions—notwithstanding specific requests from jurors for further clarification.⁴² This is

REFORM OF FEDERAL CRIMINAL LAWS 144 (1970)) (noting the difficulty of reducing the requirement of legal causation to “readily understood rules”).

³⁶ Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 439 (1988); see, e.g., *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 351-52 (Andrews, J., dissenting) (defining legal causation in terms of “a rough sense of justice,” wherein “the law arbitrarily declines to trace a series of events beyond a certain point”); Model Penal Code § 2.03 cmt. at 260 (one advantage of “putting the issue squarely to the jury’s sense of justice is that it does not attempt to force a result which the jury may resist.”).

³⁷ *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).

³⁸ *Blaize*, 21 A.3d at 81 (quoting *McKinnon v. United States*, 550 A.2d 915, 918 (D.C. 1988)).

³⁹ D.C. Crim. Jur. Instr. § 4.230.

⁴⁰ *Blaize*, 21 A.3d at 83; *Majeska v. District of Columbia*, 812 A.2d 948, 951 (D.C.2002) (citing *Morgan v. District of Columbia*, 468 A.2d 1306, 1318 (D.C.1983) (en banc)).

⁴¹ *Butts*, 822 A.2d at 418 (citing Restatement (Second) of Torts § 440 (1965)).

⁴² *Blaize*, 21 A.3d at 84.

unfortunate, however, given that these statements all revolve around a basic and intuitive moral question (which is reflected in the case law): can the defendant, given all of the “intervening occurrences [that] may have contributed to” producing the result for which he or she is being prosecuted, “in all fairness[] be held criminally responsible” for that result?⁴³

Paragraph (c)(1) is intended to give voice to this principle by codifying the requirement of reasonable foreseeability in terms of whether the manner in which a result occurs is, in fact, reasonably foreseeable. Thereafter, the explanatory note provides further clarity on this inquiry by highlighting that “the focus here is on the extent to which a given result can be attributed to intervening forces—whether human or natural—of a remote or accidental nature,” while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions articulate the unnecessarily legalistic and complicated DCCA case law on reasonable foreseeability in a more accessible and transparent way.

Paragraph (c)(2) addresses a different problem reflected in the District approach to legal causation: the failure of reasonable foreseeability to account for the independent causal significance of the volitional conduct of another. The following scenario is illustrative:

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

In this scenario, X is the factual cause of V’s injuries: but for X’s scoring the game-winning basket, D would not have gone on to assault V. But is X the legal cause of V’s injuries? Intuitively, it would seem that the answer to this question should be “no” given that D freely chose to assault, while X did not in any way desire D to engage in such conduct—rather, D merely desired to win the game. Thus, after accounting for all of the “intervening occurrences [that] may have contributed to” producing V’s injury—namely, D’s volitional conduct—it cannot be said that “in all fairness” X should “be held criminally responsible” for V’s injuries.⁴⁴ And yet, under a strict reasonable foreseeability approach it would appear that X *must* be deemed the legal cause of V’s injury since D’s intervening conduct was in no way a surprise—indeed, D’s intervening conduct was specifically foreseen by X.

District law and practice does recognize that potentially foreseeable intervening acts may nonetheless negate legal causation. The District’s criminal jury instructions, specifying when medical treatment constitutes an intervening cause state: “[A]s a matter of law, grossly negligent medical treatment is not reasonably foreseeable if it is the sole

⁴³ *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting); see, e.g., *McKinnon*, 550 A.2d at 917.

⁴⁴ *Matter of J.N.*, 406 A.2d at 1287 (Newman, C.J., dissenting).

cause of death”⁴⁵ This rule, which effectively allows for grossly negligent medical treatment to break the chain of legal causation, is sensible. For example, where X inflicts a minor injury on V, only to have medical professional D give V a fatal dose of a sedative mislabeled by D as Tylenol, it’s intuitive that D’s gross negligence would break the chain of legal causation. But here again, the rule is not necessarily contingent upon considerations of foreseeability.⁴⁶ For the outcome would appear to be the same even if the assault took place in a small town with a single hospital with a known penchant for grossly negligent medical care.⁴⁷

One additional aspect of District law that weighs in favor of viewing the volitional conduct of another as a distinct consideration independent of reasonable foreseeability is the law of accomplice liability. The law of accomplice liability, both inside and outside the District, constitutes the primary method for holding one actor responsible for the criminal conduct of another.⁴⁸ Yet in order to attribute criminal responsibility in this way, a mere showing of reasonable foreseeability *will not suffice*.⁴⁹ Instead, the would-be accomplice must act with a “purposive attitude towards” the other person’s/principal’s criminal conduct.⁵⁰ So, for example, where X sells D a baseball bat, believing that D will subsequently use it to assault V, X cannot be held criminally liable for D’s conduct as an accomplice.⁵¹ True, D’s conduct may have been foreseen by X (and was surely reasonably foreseeable under the circumstances). Nevertheless, absent proof that X “designedly encouraged or facilitated”⁵² D’s subsequent assault of V, the law of accomplice liability will not support the attribution of criminal responsibility.

This stringent approach to dealing with the attribution of criminal responsibility is founded upon the general belief that “the way in which a person’s acts produce results in the physical world is significantly different from the way in which a person’s acts produce results that take the form of the volitional actions of others.”⁵³ As such, it would

⁴⁵ D.C. Crim. Jur. Instr. § 4.230.

⁴⁶ See also LAFAYE, *supra* note 1, at 1 SUBST. CRIM. L. § 6.4(f)(4) (noting that “there may well be instances . . . in which the refusal [of medical treatment] is so extremely foolish as to be abnormal,” and that “voluntary harm-doing usually suffices to break the chain of legal cause”).

⁴⁷ *Id.*

⁴⁸ See generally Commentary on RCC § 22E-210: Accomplice Liability.

⁴⁹ *Wilson-Bey v. United States*, 903 A.2d 818, 838 (D.C. 2006) (*en banc*) (“We therefore conclude that it serves neither the ends of justice nor the purposes of the criminal law to permit an accomplice to be convicted under a reasonable foreseeability standard when a principal must be shown to have specifically intended the decedent’s death and to have acted with premeditation and deliberation, and when such intent, premeditation, and deliberation are elements of the offense.”).

⁵⁰ *Id.* at 831.

⁵¹ *Id.* (“To establish a defendant’s criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . wished to bring about [the criminal venture]”); see, e.g., *Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

⁵² *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); see also *English v. United States*, 25 A.3d 46, 53 (D.C. 2011) (“The key question is whether, drawing all reasonable inferences in the prosecution’s favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English’s reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.”).

⁵³ Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 Cal. L. Rev. 323, 327, 369-70 (1985) (other people’s criminal conduct are not typically viewed “as caused

be inappropriate to view criminal responsibility for the volitional actions of others as solely being a matter of reasonable foreseeability. Conceptually, this would reduce the culpable choices of others to mere “caused happenings,” rather than the independently blameworthy subjects of prosecution that the criminal law assumes them to be.⁵⁴ And as a matter of practice, it would effectively negate—by rendering superfluous—the District’s well-established principles of accomplice liability.⁵⁵

Paragraph (c)(2) is intended to give voice to the above considerations by stating that—in addition to assessing reasonable foreseeability—“when the result depends on another person’s volitional conduct,” the fact finder must consider whether the “actor is justly held responsible for the result.” Thereafter, the explanatory note provides further clarity on this inquiry by noting that whether a person may be justly responsible requires an analysis of all facts of a given case, including the inherent wrongfulness of the actor’s conduct, whether the actor desired a prohibited result to occur, and the passage of time between the initial conduct and the intervening act, while providing numerous illustrative examples of how such considerations operate in practice. Viewed collectively, these provisions expand the District approach to legal causation in a manner that better coheres with District law as a whole.

These provisions clarify operative causal principles governing second-degree murder.⁵⁶ Specifically, the District law governing homicides arising from gun battles dictates that where X and D culpably shoot at one another, and D subsequently hits either an innocent bystander or another culpable participant, that X may be held criminally

happenings, but as the product of the actor’s self-determined choices, so that it is the actor who is the cause of what he does, not [the individual] who set the stage for his action.”); *see, e.g.*, H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* 326 (2d ed. 1985) (“The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.”); JOHN KAPLAN ET AL., *CRIMINAL LAW* 261 (6th ed. 2008) (“Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions.”).

⁵⁴ Kadish, *supra* note 51, at 391.

⁵⁵ As the DCCA has observed:

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

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

⁵⁶ *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable), with *Fleming v. United States*, 148 A.3d 1175, 1177 (D.C. 2016) (Easterly, J., dissenting) (“[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an ‘intervening cause’ that breaks this chain of criminal causation.”). The DCCA noted in *Fleming* that “[t]he causation principles we have discussed in this case are generally applicable in second-degree-murder cases, not special principles applicable in some distinctive way to gun battles.” *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020).

responsible for D’s conduct if “it was reasonably foreseeable that death or serious bodily injury could result.”⁵⁷ In *Fleming v. United States*, DCCA held that “the intervening actions of a third party do not by themselves defeat proximate cause if those actions were reasonably foreseeable to the defendant,”⁵⁸ rejecting the argument raised by appellant that an intervening volitional act categorically negates legal causation. However, the DCCA did not hold that reasonable foreseeability is the *only* relevant consideration in determining whether an actor legally caused a prohibited result. The Court specifically declined to decide whether a significant passage of time between the initial actor’s conduct and the intervening act of another can negate legal causation, even when the intervening act is reasonably foreseeable.⁵⁹ The Court provided a model instruction to guide juries’ decision making in accordance with the principles set forth in *Fleming*. However, the Court noted that the model instruction is only to be used in second-degree murder cases, and that the instruction “leaves open whether causation operates differently under [the] felony-murder statute.”⁶⁰ The model instruction includes bracketed language suggesting that the passage of time may negate legal causation, but “does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case.”⁶¹ Although holding that an actor may be held liable for results caused by the intervening volitional act of another, the Court recognized that in a variety of situations, intervening acts may negate legal causation even when they are reasonably foreseeable. However, the DCCA did not specify when reasonably foreseeable intervening acts negate causation, or which factors are relevant in making this determination.

In contrast, the RCC clarifies that although an intervening volitional act does not *necessarily* negate legal causation, it will in cases where it would be unjust to hold the actor responsible for the act of another. The commentary further clarifies that the determination of whether it is just to hold an actor liable for the acts of another depends on analysis of the totality of facts of a given case, and identifies three particularly relevant factors.

⁵⁷ D.C. Crim. Jur. Instr. § 4.230; *see, e.g., Roy v. United States*, 871 A.2d 498, 508 (D.C. 2005); *Bryant v. United States*, 148 A.3d 689, 2016 WL 6543533 (D.C. 2016); *McCray v. United States*, 133 A.3d 205 (D.C. 2016); *Blaize v. United States*, 21 A.3d 78 (D.C. 2011); *Blaine v. United States*, 18 A.3d 766 (D.C. 2011).

⁵⁸ *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *7 (D.C. Jan. 30, 2020) (en banc).

⁵⁹ The DCCA provided a model jury instruction which addresses “the issue of temporal attenuation,” but “does not attempt to provide any concrete guidance about that issue, because the issue was not raised in this case.” *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020). This suggests that legal causation may be negated even when an intervening act is reasonably foreseeable if too much time passes between an actor’s initial conduct and the intervening act. Notably, at oral argument, “the United States took the position that a person who started a deadly feud between two groups might not properly be held criminally responsible for reasonably foreseeable killings that took place years or even a day after the person’s initial conduct.” *Id.* at 6.

⁶⁰ *Fleming v. United States*, No. 14-CF-1074, 2020 WL 488651, at *9 (D.C. Jan. 30, 2020) (en banc).

⁶¹ *Id.* at 9.

RCC § 22E-205. CULPABLE MENTAL STATE REQUIREMENT.

(a) *Culpable Mental State Requirement.* No person may be convicted of an offense unless the person acts with a culpable mental state as to every result element and circumstance element required by that offense, with the exception of any result element or circumstance element for which that person is strictly liable under RCC § 22E-207(b).

(b) *Culpable Mental State Defined.* “Culpable mental state” means:

- (1) Purpose, knowledge, intent, recklessness, negligence, or a comparable mental state specified in this Title; and
- (2) The object of the phrases “with intent” and “with the purpose.”

(c) *Strictly Liability Defined.* “Strictly liable” and “strict liability” means liability as to a result element or circumstance element in the absence of a culpable mental state.

(d) *Other Definitions.*

- (1) “Result element” has the meaning specified in RCC § 22E- 201(c)(2).
- (2) “Circumstance element” has the meaning specified in RCC § 22E- 201(c)(3).
- (3) “Purpose” has the meaning specified in RCC § 22E-206(a).
- (4) “Knowledge” has the meaning specified in RCC § 22E-206(b).
- (5) “Intent” has the meaning specified in RCC § 22E-206(c).
- (6) “Recklessness” has the meaning specified in RCC § 22E-206(d).
- (7) “Negligence” has the meaning specified in RCC § 22E-206(e).

COMMENTARY

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

In so doing, subsection (a) more broadly communicates the RCC’s basic commitment to viewing culpable mental states on an element-by-element basis—a practice known as “element analysis.”² This commitment is based on the dual recognition that: (1) “the mental ingredients of a particular crime may differ with regard

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

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

to the different elements of the crime”³; and, therefore, (2) “clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”⁴

Under the RCC approach to element analysis, it is necessary to consider what culpable mental state (if any) applies to the result and circumstance elements in an offense definition.⁵ Conduct elements are accordingly excluded from the requisite culpable mental state evaluation required by subsection (a).⁶ In practice, this means that the only aspect of an actor’s culpability as to his or her own present conduct⁷ which is necessary to establish affirmative liability under the RCC is its voluntariness, as proscribed in RCC § 22E-203.⁸

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

Subsection (b) provides the definition of “culpable mental state” applicable to RCC § 22E-205(a) and throughout the RCC. The first part of this definition refers to the primary culpability terms employed in the RCC—purpose, knowledge, intent, recklessness, and negligence, as defined in RCC § 22E-206. Proof that the defendant

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

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

Id.

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

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

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

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

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

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

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

brought about the result and circumstance elements required by an offense with a state of mind that satisfies any one of these terms will satisfy the culpable mental state requirement codified in subsection (a).¹¹

The first part of this definition also establishes that proof that the defendant brought about the result and circumstance elements required by an offense with a state of mind comparable to any one of these primary culpability terms will also satisfy the culpable mental state requirement.¹² Although purpose, knowledge, intent, recklessness, and negligence are envisioned to serve as the sole mental states that provide the basis for criminal liability under the RCC, it is possible that a subsequent legislature may enact a criminal statute that utilizes a different culpability term. In that case, the legislature's new mental state would satisfy the culpable mental state requirement codified in subsection (a), so long as it is comparable to one of the mental states defined in RCC § 22E-206.

The second part of subsection (b) establishes that the object of the phrases “with intent” and “with the purpose” also constitutes part of a “culpable mental state.” This aspect of the definition is intended to clarify the nature of the culpable mental state requirement governing the RCC's various inchoate offenses (e.g., theft, burglary, and attempt),¹³ the hallmark of which is the imposition of liability for unrealized criminal plans.¹⁴

It is helpful to think of the object of the phrases “with intent to” and “with the purpose of” as part of the culpable mental state governing these inchoate offenses since the relevant propositional content need only exist in an actor's mind. The RCC's

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

¹² Again, assuming the offense of prosecution does not require proof of a more culpable state of mind. *See supra* note 11.

¹³ There exist two categories of inchoate offenses: general inchoate offenses and specific inchoate offenses. *See generally* Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1 (1989). Specific inchoate offenses, such as burglary and theft, require proof of some preliminary consummated harm—for example, an unlawful entry or taking—accompanied by a requirement that this conduct have been committed “with intent to” commit a more serious harm—for example, a crime inside the structure or a permanent deprivation. *See, e.g.*, JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* § 27 (4th ed. 2012).

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

For example, whereas burglary and theft respectively require proof of a taking or a trespass, a criminal attempt merely requires proof of significant progress towards completion of the target offense—without regard to whether this progress was itself harmful. Like burglary and theft, however, general inchoate offenses such as criminal attempts similarly incorporate a “with intent to” requirement, that is, a requirement that the relevant conduct have been committed “with intent to” commit the target offense. *See generally* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

¹⁴ *E.g.*, Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012). For example, theft is an inchoate offense because it does not require proof that the defendant *actually* deprived the victim of property in a permanent manner; instead, proof of a taking committed “with intent to deprive” will suffice. Similarly, attempt (to commit murder) is an inchoate offense because it does not require proof that the defendant *actually* killed the victim; instead, proof that the defendant, acting “with intent to kill,” engaged in significant conduct, which goes beyond mere preparation, directed towards killing the victim will suffice.

possession of stolen property statute is illustrative.¹⁵ The objective elements of this offense, the “purchase[.]” or “possess[ion]” of “property,” are subject to two distinct culpable mental states, (1) “with intent *that the property be stolen*” and (2) “with intent *to deprive the owner of the property*.”¹⁶ Here, the objects of both culpable mental states—the stolen-ness of the property and the deprivation to the owner—do not actually need to transpire to support liability.¹⁷

Classifying the object of the phrases “with intent” and “with the purpose” as part of the culpable mental state governing an inchoate offense also appropriately ensures that the relevant propositional content will be subject to the burden of proof stated in RCC § 22E-201.¹⁸

Subsection (c) provides the definition of “strict liability” applicable to subsection (a) and throughout the RCC. It establishes that strict liability means liability as to a result element or circumstance element in the absence of a culpable mental state.¹⁹ Implicit in

¹⁵ RCC § 22E-2401.

¹⁶ *Id.* It should be noted that the purchase or possession of property is also subject to a “knowingly” mental state under RCC § 22E-2401.

¹⁷ A similar analysis is also applicable to the RCC crime of attempted second-degree assault, per subparagraph (c)(2)(A) of the assault statute in conjunction with the general attempt provision. *See* RCC § 22E-1202(c)(2)(A) (“A person commits the offense of second degree assault when that person . . . (2) Recklessly causes significant bodily injury to another person; and . . . [s]uch injury is caused with recklessness as to whether the complainant is a protected person.”); RCC § 22E-301 (criminalizing attempts to commit an offense). The objective elements of this offense, “enag[ing] in conduct . . . that comes *dangerously close to completing that offense*,” must be perpetrated with two culpable mental states comprised of distinct objects that need not occur, (1) intending *to cause significant bodily injury* and (2) a substantial belief *that the victim is a protected person*. *See* RCC § 22E-301(a) (setting forth dangerous proximity requirement for attempt); *id.* at § (b) (“[T]o be guilty of an attempt the defendant must at least have the intent to cause any results required by the target offense.”).

¹⁸ This is because subsections 201(a) and (b) require the government to prove the “objective elements” and “culpability requirement” of an offense beyond a reasonable doubt. RCC § 22E-201(a) (“No person may be convicted of an offense unless the government proves each offense element beyond a reasonable doubt.”); *id.* at § (b) (“‘Offense element’ includes the objective elements and culpability requirement necessary to establish liability for an offense.”). As the object of the phrases “with intent” and “with the purpose” need not occur, the relevant propositional content (e.g., the *deprivation* in theft or the crime *committed within the dwelling* for burglary) clearly does not constitute part of that offense’s “objective elements,” all of which by definition must actually occur. RCC § 22E-201(c)(1) (“Conduct element” means any act or omission that is required to establish liability for an offense.”); *id.* at § (c)(2) (“Result element” means “any consequence caused by a person’s act or omission that is required to establish liability for an offense.”); *id.* at § (c)(3) (“Circumstance element” means any characteristic or condition relating to either a conduct element or result element that is required to establish liability for an offense.”). Consequently, it is necessary to incorporate these inchoate elements into an offense’s “culpability requirement” through the definition of “culpable mental state,” so as to afford them the protections of proof beyond a reasonable doubt under section 201. *See* RCC § 22E-201(d) (“Culpability requirement” includes,” *inter alia*, “[t]he culpable mental state requirement, as provided in RCC § 22E-205(a).”).

¹⁹ *See, e.g.,* Sanford H. Kadish, *Excusing Crime*, 75 CAL. L. REV. 257, 267 (1987) (“Strict liability imposes guilt without regard to whether the defendant knew or could reasonably have known some relevant feature of the situation.”). As Kadish illustrates:

The defendant did an act that, judged from his or her perspective, is blameless: she drove a car; she rented her home in another city; he presided over a pharmaceutical company that bought packaged drugs and cosmetics and reshipped them under its own label. But the facts were not as they thought. The driver could not see a stop sign at the intersection, because it was obscured by a bush. The homeowner’s otherwise respectable

this understanding of strict liability is the view that the voluntary commission of an offense, while a necessary prerequisite for criminal liability under RCC § 22E-203, does not constitute a culpable mental state, as defined in RCC § 22E-205(b).²⁰ Nevertheless, pure strict liability offenses,²¹ which require proof of voluntariness and nothing more, are possible under the RCC if explicitly specified by the legislature.

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

Generally speaking, the District’s criminal statutes do not reflect element analysis. Which is to say, they are not drafted in a manner that “make[s] clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for [each of an offense’s objective elements] (for example, conduct, resulting harm, or an attendant circumstance).”²² Instead, the District’s criminal statutes most often generally state some culpable mental state requirement—whether comprised of one,²³ two,²⁴

tenants decided to throw a [party involving controlled substances]. The drugs and cosmetics the pharmaceutical company reshipped were mislabeled by the manufacturer and there was nothing the defendant officer could practically have done about it. These circumstances would surely be a defense to a charge of moral fault and usually, under the requirement of *mens rea* or the doctrine of reasonable mistake, they would be a legal defense as well. But . . . many jurisdictions would disallow the excuse of reasonable mistake because, it would be explained, these are instances of strict liability.

Id.

²⁰ Which is to say: requiring proof of voluntary conduct, and nothing more, is entirely consistent with strict liability. For example, consider the situation of a person who quickly reaches for a soda on the counter, when, unbeknownst to the person, a small child darts in front of the soda prior to the person’s ability to reach it. If the child suffers a facial injury in the process one can say that the person’s voluntary act (factually) caused bodily injury to the child. That the relevant conduct was the product of effort or determination, however, is not to say that the person was in any way blameworthy or at fault for causing the child’s injury. On this view, then, a criminal offense that premised liability on the mere fact that the person’s conduct was voluntary—that is, regardless of whether the person acted purposely, knowingly, recklessly, or negligently as to the relevant result and circumstance elements—is appropriately understood as a strict liability offense.

²¹ “Pure” strict liability offenses, which do not require proof of a culpable mental state as to *any* of an offense’s objective elements, are to be distinguished from “impure” strict liability offenses, which merely fail to require proof of a culpable mental state as to only some of an offense’s objective elements. Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1081-82 (1997).

²² *Jones v. United States*, 124 A.3d 127, 130 n.3 (D.C. 2015)) (citing *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011))

²³ *E.g.*, D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.

²⁴ *E.g.*, D.C. Code § 22-404.01; D.C. Code § 22-3312.01.

three,²⁵ or even four²⁶ culpability terms—at the beginning of an offense definition, without clarifying how these culpability terms are intended to be distributed among the offense’s objective elements.

The more recent of these District statutes typically employ modern culpability terms, such as purpose, knowledge, recklessness, and negligence.²⁷ However, many of the District’s older statutes employ more ambiguous culpability terms, such as “maliciously,”²⁸ “willfully,”²⁹ “wanton[ly],”³⁰ “reckless indifference,”³¹ and “having reason to believe.”³² And some of the District’s most important criminal statutes merely codify the penalty applicable to an offense, and, therefore, enumerate no culpable mental state at all.³³ In the absence of a legislative statement of offense elements, the common law definition of these offenses—typically comprised of an ambiguous culpable mental state requirement framed in terms very different from element analysis—is read in by the courts.³⁴

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

Historically, District courts have similarly refrained from using element analysis in their interpretation of criminal statutes. For a long time, the DCCA, when faced with clarifying a criminal statute’s ambiguous culpability requirement, employed an approach known as “offense analysis,” analyzing the appropriate culpable mental state for an offense as a whole (rather than each of its parts). Rather than ask whether any particular objective element in an offense was subject to a culpable mental state—and if so, whether it is akin to purpose, knowledge, recklessness, or negligence—the court typically sought to determine the *mens rea* governing the crime as a whole, which it characterized as one of “general intent” or “specific intent.”³⁵ More recently, however, the DCCA has recognized how problematic this practice is for the administration of justice, and has thus sought to shift its focus away from this common law approach.

For example, in a pair of 2011 decisions, *Perry v. United States* and *Buchanan v. United States*, the DCCA observed that the terms “general intent” or “specific intent” are little more than “rote incantations” of “dubious value,”³⁶ which “can be too vague or

²⁵ E.g., D.C. Code § 22-404; D.C. Code § 22-1101.

²⁶ D.C. Code § 5-1307.

²⁷ E.g., D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.

²⁸ E.g., D.C. Code § 22-303; D.C. Code § 22-3318.

²⁹ E.g., D.C. Code § 22-934; D.C. Code § 22-3312.01.

³⁰ E.g., D.C. Code § 22-934; D.C. Code § 22-3312.01.

³¹ E.g., D.C. Code § 22-934; D.C. Code § 22-404.01.

³² E.g., D.C. Code § 22-723; D.C. Code § 22-3214.

³³ These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.

³⁴ See generally *Buchanan v. United States*, 32 A.3d 990, 1002 (D.C. 2011) (Ruiz, J. concurring). These statutes are to be contrasted with various strict liability offenses in the D.C. Code, where it is clear that no culpable mental state was intended to govern some or all of the offense’s objective elements. For example, as the DCCA observed in *McNeely v. United States*, “[s]trict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past. 874 A.2d 371, 385–86 n.20 (D.C. 2005) (collecting statutes); see also D.C. Code Ann. § 22-3011(a).

³⁵ *Buchanan*, 32 A.3d at 1002.

³⁶ *Id.* at 1001.

misleading to be dispositive or even helpful”³⁷ and can lead to “outright confusion . . . when they are included in jury instructions.”³⁸ For this reason, the District’s criminal jury instructions “avoid[s]” using the terms “general intent” and “specific intent” as the terms are “more confusing than helpful to juries.”³⁹

Thereafter, in the DCCA’s 2013 decision in *Ortberg v. United States*, the court recognized that the problem with “these terms [is that they] fail to distinguish between elements of the crime, to which different mental states may apply.”⁴⁰ The better alternative, as the court goes on to explain, is a “clear analysis” which faces the “question of the kind of culpability required to establish the commission of an offense [] separately with respect to each material element of the crime.”⁴¹

With the foregoing insights in mind, the DCCA observed in the 2015 decision of *Jones v. United States* that “courts and legislatures” should, wherever possible, “simply make clear what mental state (for example, strict liability, negligence, recklessness, knowledge, or purpose) is required for whatever material element is at issue (for example, conduct, resulting harm, or an attendant circumstance).”⁴²

Most recently, the *en banc* DCCA in *Carrell v. United States* (2017) specifically adopted both the element analysis framework⁴³ and accompanying culpable mental state definitions⁴⁴ developed by the Model Penal Code (and subsequently endorsed by the U.S. Supreme Court) in resolving an ongoing conflict surrounding the culpability of criminal threats.⁴⁵

RCC § 22E-205 establishes a legislative framework that broadly accords with all of the foregoing insights. Consistent with the DCCA’s recent case law, RCC § 22E-205(a) “requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime.”⁴⁶ Consistent with the District’s varied criminal statutes, RCC § 22E-205(b) establishes that the kind of culpable mental state at issue will be one of purpose, knowledge, intent, recklessness, negligence, or any other comparable mental state specified by the legislature. And consistent with both District case law and criminal

³⁷ *Perry v. United States*, 36 A.3d 799, 809 n.18 (D.C. 2011)

³⁸ *Id.* at 809.

³⁹ D.C. Crim. Jur. Instr. § 3.100 *Defendant’s State of Mind—Note*.

⁴⁰ 81 A.3d 303, 307 (D.C. 2013).

⁴¹ *Id.* (citations, quotations, and alterations omitted).

⁴² 124 A.3d 127, 130 n.3 (D.C. 2015).

⁴³ *Carrell v. United States*, 165 A.3d 314, 320 n.13 (D.C. 2017) (*en banc*) (“We adopt these [“conduct element,” “result element,” and “circumstance element”] classifications from the Model Penal Code § 1.13 (9) (Am. Law Inst., Proposed Official Draft 1962).”)

⁴⁴ *Id.* at 323-24 (“Following the lead of the Supreme Court . . . we likewise conclude that more precise gradations of mens rea should be employed. We have previously expressed concern about the use of ‘general’ and ‘specific’ intent. We reiterate our endorsement of more particularized and standardized categorizations of mens rea, and, in the absence of a statutory scheme setting forth such categorizations, we, like the Supreme Court, look to the Model Penal Code terms and their definitions.”)

⁴⁵ *Id.* at 324 (“Applying this hierarchy of mens rea levels to the *actus reus* result element of the crime of threats, we hold that the government may carry its burden of proof by establishing that the defendant acted with the purpose to threaten or with knowledge that his words would be perceived as a threat.”).

⁴⁶ For a discussion of how many of the non-conforming culpable mental states in current District statutes are comparable to purpose, knowledge, intent, recklessness, or negligence, see the Commentary on RCC § 22E-206.

statutes, RCC § 22E-205(c) acknowledges the possibility that no culpable mental state may apply to a given objective element at all.⁴⁷

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

Although the DCCA appears, at times, to envision that conduct, no less than results or circumstances, is subject to a culpable mental state analysis, the court's more recent case law demonstrates the problems and confusion to which this view can lead. For example, the DCCA has frequently defined a "general intent" crime as one requiring proof of "the intent to do the act that constitutes the crime."⁴⁸ Applying this definition to simple assault, a so-called general intent crime, suggests that the government need only prove the intent to perform the acts constituting the assault.⁴⁹ But two recent cases, *Williams v. United States* and *Buchanan v. United States*, appear to reject this view of the culpable mental state requirement governing the offense, holding that the government must prove that the accused intended for that harm to occur.⁵⁰ The reason? The "intent to act" interpretation of simple assault, if taken literally, would—as one DCCA judge phrases it—"allow the prosecution of individuals for criminal assault for actions taken with a complete lack of culpability," and, therefore, is actually consistent with strict liability.⁵¹

Whether or not a strict liability interpretation of simple assault was ever intended by the DCCA is not entirely clear.⁵² What is clear, though, is that other courts have

⁴⁷ See *McNeely*, 874 A.2d at 385.

⁴⁸ E.g., *Dauphine v. United States*, 73 A.3d 1029, 1032 (D.C. 2013).

⁴⁹ *Anthony v. United States*, 361 A.2d 202, 206 n.5; *Ray v. United States*, 575 A.2d 1196, 1198 (D.C. 1990).

⁵⁰ *Buchanan v. United States*, 32 A.3d 990 (D.C. 2011); *Williams v. United States*, 887 A.2d 1000 (D.C. 2005).

⁵¹ *Buchanan*, 32 A.3d at 1002 (Ruiz, J. concurring). It should be noted that the culpable mental state requirement governing simple assault has continued to be a source of litigation and confusion in the District. This is reflected in *Vines v. United States* (2013), where the DCCA went out of its way to *avoid* resolving the culpable mental state of simple assault. 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013).

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

⁵² For example, neither the DCCA nor any other common law authority has explicitly taken the position that simple assault is a strict liability crime. And the DCCA has even interpreted so-called strict liability crimes to require proof of some *mens rea* beyond just voluntary conduct. See, e.g., *McNeely*, 874 A.2d at 387. Moreover, in other contexts, the DCCA has defined a "general intent" crime as requiring the government to prove that the accused was "aware of all those facts which make [one's] conduct criminal,"

unwittingly created strict liability crimes by misconstruing an “intent to act” as amounting to something more than the voluntariness requirement, and that, more generally, the failure to distinguish between voluntary conduct and *mens rea* as to results and circumstances has produced a significant amount of confusion in the law, both inside and outside of the District.⁵³ Subsection (a) is intended to avoid confusion of this nature by excluding conduct—narrowly defined elsewhere in the RCC as an act or failure to act—from the requisite culpable mental state analysis.

Campos v. United States, 617 A.2d 185, 188 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962))—a definition that seems to imply that a knowledge-like *mens rea* is applicable to at least some of the objective elements in an offense such as simple assault.

⁵³ For relevant case law from outside the District, see, for example, *State v. Sigler*, 688 P.2d 749 (Mont. 1984) *overruled by State v. Rothacher*, 901 P.2d 82 (Mont. 1995); *Van Dyken v. Day*, 165 F.3d 37 (9th Cir. 1998); *Alvarado v. State*, 704 S.W.2d 36 (Tex. Crim. App. 1985); *Markley v. State*, 421 N.E.2d 20 (Ind. Ct. App. 1981); *Jennings v. State*, 806 P.2d 1299 (Wyo. 1991); *Pena-Cabanillas v. United States*, 394 F.2d 785 (9th Cir. 1968). And for relevant commentary, see, for example, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994); Paul H. Robinson, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 722 (1983); Eric A. Johnson, *The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1 (2007); Joel M. Schumm, *Recent Developments in Indiana Criminal Law and Procedure*, 44 IND. L. REV. 1135 (2011); Larry Kupers, *Aliens Charged with Illegal Re-Entry Are Denied Due Process and, Thereby, Equal Treatment Under the Law*, 38 U.C. DAVIS L. REV. 861 (2005); J.W.C. Turner, *The Mental Element in Crime at Common Law*, 6 CAMBRIDGE L.J. 31, 34 (1936).

RCC § 22E-206. DEFINITIONS AND HIERARCHY OF CULPABLE MENTAL STATES.

- (a) *Purposely Defined.* A person acts purposely:
- (1) As to a result element, when that person consciously desires to cause the result; and
 - (2) As to a circumstance element, when that person consciously desires that the circumstance exists.
- (b) *Knowingly Defined.* A person acts knowingly:
- (1) As to a result element, when that person is aware that conduct is practically certain to cause the result; and
 - (2) As to a circumstance element, when that person is practically certain that the circumstance exists.
- (c) *Intentionally Defined.* A person acts intentionally:
- (1) As to a result element, when that person believes that conduct is practically certain to cause the result; and
 - (2) As to a circumstance element, when that person believes it is practically certain that the circumstance exists.
- (d) *Recklessly Defined.* A person acts recklessly:
- (1) As to a result element, when:
 - (A) That person consciously disregards a substantial risk that conduct will cause the result; and
 - (B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy; and
 - (2) As to a circumstance element, when:
 - (A) That person consciously disregards a substantial risk that the circumstance exists; and
 - (B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's conscious disregard of that risk is clearly blameworthy.
- (e) *Negligently Defined.* A person acts negligently:
- (1) As to a result element, when:
 - (A) That person should be aware of a substantial risk that conduct will cause the result; and
 - (B) The risk is of such a nature and degree that, considering the nature and purpose of the person's conduct and the circumstances known to the person, the person's failure to perceive that risk is clearly blameworthy; and
 - (2) As to a circumstance element, when:

- (A) That person should be aware of a substantial risk that the circumstance exists; and
- (B) The risk is of such a nature and degree that, considering the nature and purpose of the person’s conduct and the circumstances known to the person, the person’s failure to perceive that risk is clearly blameworthy.

(f) *Hierarchical Relationship of Culpable Mental States.*

- (1) Proof of Negligence. When the law requires negligence as to a result element or circumstance element, the requirement is also satisfied by proof of recklessness, intent, knowledge, or purpose.
- (2) Proof of Recklessness. When the law requires recklessness as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose.
- (3) Proof of Knowledge or Intent. When the law requires knowledge or intent as to a result element or circumstance element, the requirement is also satisfied by proof of purpose.

(g) *Same Definitions for Other Parts of Speech.* The words defined in this section have the same meaning when used in other parts of speech.

(h) *Other Definitions.*

- (1) “Result element” has the meaning specified in RCC § 22E- 201(c)(2).
- (2) “Circumstance element” has the meaning specified in RCC § 22E- 201(c)(3).

COMMENTARY

Explanatory Notes. Section 206 establishes a culpable mental state hierarchy comprised of five terms—purposely, knowingly, intentionally, recklessly, and negligently—separately defined in relation to result and circumstance elements. These five terms are all that is necessary to “prescribe the minimal requirements” of criminal liability and “lay the basis for distinctions that may usefully be drawn” in the grading of offenses under the RCC.¹ The hierarchy these terms comprise is intended to codify,

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

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

Criminal law exhibits a well-known fixation with the defendant’s mind, a fixation that we do not find in other areas of law, including areas in which the mental states of the parties matter to liability. Criminal law responds differently to defendants who are only subtly different in their psychological states; we often give large punishments to some who cause harm while giving low punishments, or even no punishments, to subtly psychologically different actors who cause the very same, or even greater, harms. The

clarify, and refine the “representative modern American culpability scheme,” which was originally developed by the drafters of the Model Penal Code and has subsequently been adopted by legislatures and courts around the country.²

Subsection (a) provides a comprehensive definition of the term “purposely,” sensitive to the kind of objective element to which the term applies. Under this definition, a person acts purposely as to a result element when that person consciously desires to cause the prohibited result.³ Likewise, a person acts purposely as to a circumstance element when that person consciously desires that the prohibited circumstance exist.⁴ It is immaterial to liability under this definition that a person also possesses an ulterior motive, which goes beyond his or her conscious desire to cause a

reason is that subtle differences in psychological states . . . cloak large differences in something fundamental to what it is to be a human being and a citizen of a state who owes an account of his conduct to other people and other citizens: the evaluative weight that we give to others’ interests in comparison to our own . . . From subtle differences in psychology, we are able to infer the presence of large differences [in the level of disregard for the legally protected interests of others that an actor’s harmful or dangerous conduct manifests on a particular occasion].

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

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

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

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

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

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

⁴ For example, if X assaults V, a uniformed police officer, because of the victim’s status as a police officer, X acts “purposely” with respect to assaulting a *police officer*.

prohibited result or that a prohibited circumstance exists.⁵ However, the conscious desire required by subsection (a) must be accompanied by that person’s belief that it is at least possible that the prohibited result will occur or that the prohibited circumstance exists.⁶

Subsection (b) provides a comprehensive definition of the term “knowingly,” sensitive to the kind of objective element to which the term applies. Under this definition, a person acts knowingly as to a result element when that person is aware that it is practically certain that conduct⁷ will cause the prohibited result.⁸ Likewise, a person acts knowingly as to a circumstance element when that person is aware that it is practically certain that the prohibited circumstance exists.⁹

Subsection (c) provides a comprehensive definition of the term “intentionally,” sensitive to the kind of objective element to which the term applies. The definition of intent provided in these subsections is equivalent to the definition of knowledge set forth in subsection (b).¹⁰ There is, however, an important communicative distinction between these two terms: whereas the term knowledge implies a basic correspondence between a person’s subjective belief concerning a proposition and the truth of that proposition, the term intent does not entail this correspondence. The definitions of knowledge and intent reflect this communicative distinction: whereas knowledge is defined in terms of “aware[ness]” as to a practical certainty in subsection (b), intent is defined in terms of “belie[f]” as to a practical certainty in subsection (c).¹¹ The RCC provides this

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

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

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

⁸ Consider the following situation: child rights advocate X blows up a manufacturing facility that relies upon child labor, which in turn causes the death of on-duty night guard V. On these facts, it can be said that X “knowingly” killed V so long as X was practically certain that V would die in the blast. This is so, moreover, although X would prefer that V not be injured in the blast.

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

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

¹¹ This definition of intent, when viewed in light of the fact that proof of a higher culpable mental state can satisfy a lower culpable mental state under RCC § 22E-206(f), appears to reflect common usage. See, e.g.,

definitional alternative to knowledge to facilitate the clear drafting of inchoate offenses (e.g., theft, burglary, and attempt), the hallmark of which is the imposition of liability for unrealized criminal plans.¹²

The critical distinction between purpose and knowledge/intent is the presence or absence of a positive desire.¹³ Whereas the knowing/intentional actor is aware/believes that a result will occur or that a circumstance exists, the purposeful actor consciously desires to cause that result or that the circumstance exists.¹⁴ To differentiate between

Julia Kobick & Joshua Knobe, *How Research on Folk Judgments of Intentionality Can Inform Statutory Analysis*, 75 *BROOK. L. REV.* 409, 421–22 (2009); Adam Feltz, *The Knobe Effect: A Brief Overview*, 28 *J. MIND & BEHAV.* 265 (2007); Alan Leslie, Joshua Knobe & Adam Cohen, *Acting Intentionally and the Side-Effect Effect: ‘Theory of Mind’ and Moral Judgment*, 17 *PSYCHOL. SCI.* 421 (2006).

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

To illustrate, consider a hypothetical theft offense that prohibits taking property “with knowledge of a deprivation.” This language suggests that proof that the defendant’s conduct actually resulted in a permanent deprivation is necessary for a conviction. But if, in contrast, that theft offense instead incorporated the culpable mental state of “with intent to deprive,” then there would be no indication that consummation of the deprivation is necessary for a conviction. Likewise, a hypothetical receipt of stolen property offense phrased in terms of “possessing property with knowledge that it is stolen” suggests that the property must have actually been stolen to support a conviction. But if, in contrast, that offense was instead framed in terms of “possessing property with intent that it be stolen,” then there would be no indication that the property must have been stolen to support a conviction.

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

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

¹⁴ Note, however, that under RCC § 22E-206(f), proof of a higher culpable mental state will establish a lower one, and, therefore, the culpable mental states of knowledge and intent may be satisfied by proof of

these two kinds of culpability in practice, the factfinder may find it useful to consider the following counterfactual test: “Would the defendant regard [him or herself] as having failed if a particular result does not occur, or circumstance does not exist?”¹⁵ An affirmative answer to this question is indicative of a purposeful actor.¹⁶

Subsection (d) provides a comprehensive definition of the term “recklessly,” sensitive to the type of objective element to which the term applies. Under this definition, a person acts recklessly as to a result element when, *inter alia*, that person consciously disregard a substantial risk that conduct will cause the prohibited result.¹⁷ Likewise, a person acts recklessly as to a circumstance element when, *inter alia*, that person consciously disregard a substantial risk that the prohibited circumstance exists.¹⁸

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

The RCC definitions of recklessness and negligence comprise non-intentional mental states, which extend liability to actors who disregard substantial risks of harm. Recklessness involves *conscious* risk-taking, and therefore resembles acting knowingly/intentionally, with one important distinction: the actor’s requisite awareness of a risk need not rise to the level of a *practical certainty*. Rather, for recklessness, the risk consciously disregarded by the actor need only be perceived as *substantial*. Negligence, like recklessness, also involves the *disregard of a substantial risk*. For negligence, however, liability is assigned based upon the actor’s *failure to perceive that*

purpose. In practical effect, this means that a conscious desire constitutes an alternative to the belief states at issue in knowledge and intent.

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

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

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

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

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

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

risk. In this sense, negligence constitutes an objective form of culpability (i.e., it does not require proof of a subjective desire or belief as to a result or circumstance element), which distinguishes it from every other subjective culpability term in the RCC hierarchy.²¹

The other essential component of the RCC definitions of recklessness and negligence is the clear blameworthiness standard, which the second prong of each culpable mental state incorporates in nearly identical terms.²² Pursuant to this standard, recklessness and negligence liability each entail proof that the person’s risk-taking have been “clearly blameworthy” when viewed in light of the morally salient characteristics of that person’s situation. The RCC definitions of recklessness and negligence describe those features as the “nature and degree” of the “risk” that has been disregarded, the “nature and purpose of the person’s conduct,” and “the circumstances known to the person.”²³

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

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

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

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

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

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

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

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

Aside from justified risk-taking, this context-sensitive culpability analysis also excludes from recklessness and negligence liability those actors whose disregard of a risk is attributable to individual or situational factors beyond their control (and thus for which they cannot fairly be blamed).²⁶ Because punishment “represents the moral condemnation of the community,”²⁷ the imposition of criminal liability can only be justified where a person’s risk-taking fails to live up to the community’s values—and, therefore, *deserves* to be condemned—under the circumstances.²⁸ What ultimately

phrase “circumstances known to the actor” as employed in the Model Penal Code definitions of recklessness and negligence, § 2.02(c)-(d)).

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

To illustrate how the weighting of the latter two factors occurs, suppose that at the moment of the blast, 10:00pm on January 1: (1) a nighttime New Year’s charity run was occurring immediately adjacent to the construction site; while (2) the dynamite employed routinely sends scraps of material flying beyond the construction site’s fencing. If X was aware of both of these facts, then the probability that harm would occur would be quite high. But if, in contrast, X was unaware of both of these facts, then the likelihood of harm—again, given X’s perspective—might be quite low given the situation as X perceived it.

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

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

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

²⁸ *See, e.g.* Westen, *supra* note 1, at 151 (“To publicly blame a person is to . . . adjudge that, rather than being motivated in his conduct by proper regard for interests that the law seeks to safeguard, the person placed insufficient value on those interests.”); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9

renders an actor's disregard of a risk blameworthy, then, is whether it reflects a level of concern or attention²⁹ for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant's situation could be expected to exercise.³⁰ Where, in contrast, an actor's risk-taking does manifest a reasonable level of concern or attention for those legally protected interests, and his or her conduct is instead attributable to excusing influences³¹—for example, intellectual deficiencies, physical impairments, immaturity, extreme emotional or mental disturbances, or external coercion³²—then that person would likewise fail to satisfy the clear blameworthiness standard governing the RCC definitions of recklessness and negligence.³³

OHIO ST. J. CRIM. L. 545, 553 (2012) (“[T]he mental states of recklessness and negligence constitute culpability, are morally significant, and contribute to the morally objectionable nature of the agent’s act, thanks to what they indicate about the agent’s attitude towards the legally protected interests of other people.”); cf. Joshua Kleinfeld et. al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1703 (2017) (proof of “moral blameworthiness” should be required for all crimes).

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

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

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

³² This non-exclusive list of factors is consistent with the kind of “[f]acts normally considered excusing in the criminal law.” E.g., Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 442 (2015) (listing as relevant “the offender’s infancy, subnormal intelligence, legal insanity, intoxication, diminished

To illustrate how this situation-specific culpability analysis operates in practice, consider the situation of a driver who turns into an intersection, consciously disregarding a substantial risk that she will hit an unoccupied trailer attached to a construction vehicle that is adjacent to her. If the driver ends up destroying the trailer, her unreasonable operation of her motor vehicle will almost surely subject her to civil liability, without regard to her overarching blameworthiness. But whether her conscious disregard of a substantial risk will subject her to criminal liability under the RCC requires further analysis, which accounts for the “nature and degree” of that risk, the “nature and purpose” of her conduct, and the “circumstances known to her.”

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

The analysis required to determine whether an actor’s failure to perceive a substantial risk meets the clear blameworthiness standard incorporated into the RCC definition of negligence is nearly identical. To illustrate, consider a slightly different hypothetical: a driver turns into the intersection with her eyes fixed on her rearview mirror, failing to perceive the substantial risk that she will (and does) fatally hit a bicyclist who is adjacent to her. If the driver is thereafter prosecuted for negligent

capacity, duress, entrapment, and even provocation.”) (collecting authorities); *see also* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. Rev. 161, 188 (2016) (noting that mitigation for partial or imperfect excuses is generally well established in American criminal justice policy).

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

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

³⁵ That is, the “nature and degree of the risk.”

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

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

homicide,³⁸ the driver’s guilt would again depend upon three main considerations evaluated by the factfinder in light of the driver’s perception of events. The first is the severity of the risk of death that the driver *should have been aware of* under the circumstances.³⁹ The second is the extent to which the driver’s decision to enter the intersection (without looking rightward) was intended to further legitimate societal objectives.⁴⁰ And the third are any individual or situational factors beyond the driver’s control that reasonably hindered her ability to exercise an adequate *level of attention* to the bicyclist’s physical safety.⁴¹ Here again it can be said that, all else being equal, the greater the value assigned to the first consideration, and the lower the value assigned to the second and third considerations, the more likely it is that the clear blameworthiness standard incorporated into the RCC definition of negligence has been met.

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

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

Relation to Current District Law. RCC § 22E-206 codifies, clarifies, fill in gaps, changes, and enhances the proportionality of the District law governing culpable mental

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

³⁹ That is, the “nature and degree of the risk.”

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

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

state evaluations. The District’s current approach to dealing with culpable mental states evaluations is an amalgamation of statutory and decisional law, which is often unclear, frequently inconsistent, and almost always piecemeal. In contrast, the culpable mental state definitions and hierarchy incorporated into Section 206 establishes a clear and comprehensive legislative framework for specifying the state of mind necessary to establish liability for every criminal offense in the RCC.

On a legislative level, the standard District approach to drafting the culpable mental state requirement governing an offense is to generally state one,⁴² or sometimes more (e.g., two,⁴³ three,⁴⁴ or even four⁴⁵), undefined culpability terms at the beginning of an offense definition. Some of these undefined terms reflect the contemporary culpability concepts of purpose, knowledge, intent, recklessness, and negligence.⁴⁶ However, many of the District’s older statutes employ more outdated (and particularly ambiguous) culpability terms, such as “maliciously,”⁴⁷ “willfully,”⁴⁸ “wanton[ly],”⁴⁹ “reckless indifference,”⁵⁰ and “having reason to believe.”⁵¹ In other instances, the District’s criminal statutes enumerate no culpable mental state at all, such that courts must read one in pursuant to common law interpretive principles.⁵²

The legislative vagueness resulting from these drafting practices has the practical effect of delegating a portion of the D.C. Council’s lawmaking authority—namely, its authority to make criminal justice policy through culpability requirements—to the District’s local judiciary.⁵³ Yet the manner in which the District’s local judiciary has carried out this delegation has been and continues to be problematic. Apart from the challenge to democratic representation that arises when unelected officials determine what the law should be (a fact well-recognized by the judiciary⁵⁴), the judges who sit on the D.C. Superior Court and D.C. Court of Appeals have struggled to develop a body of

⁴² E.g., D.C. Code § 22-303; D.C. Code § 22-3318; D.C. Code § 22-3309.

⁴³ E.g., D.C. Code § 22-404.01; D.C. Code § 22-3312.01.

⁴⁴ E.g., D.C. Code § 22-404; D.C. Code § 22-1101.

⁴⁵ D.C. Code § 5-1307.

⁴⁶ E.g., D.C. Code § 22-404.01; D.C. Code § 22-404; D.C. Code § 22-1101; D.C. Code § 5-1307.

⁴⁷ E.g., D.C. Code § 22-303; D.C. Code § 22-3318.

⁴⁸ E.g., D.C. Code § 22-934; D.C. Code § 22-3312.01.

⁴⁹ E.g., D.C. Code § 22-934; D.C. Code § 22-3312.01.

⁵⁰ E.g., D.C. Code § 22-934; D.C. Code § 22-404.01.

⁵¹ E.g., D.C. Code § 22-723; D.C. Code § 22-3214.

⁵² These include assault, D.C. Code § 22-404, murder, D.C. Code § 22-2101, manslaughter, D.C. Code § 22-2105, mayhem, D.C. Code § 22-406, affrays, D.C. Code § 22-1301, and threats, D.C. Code § 22-407.

⁵³ That is, courts must apply criminal statutes to individual cases, so when a local District prosecution calls into question a *mens rea* issue left unresolved by a criminal statute, the judges on the D.C. Superior Court and D.C. Court of Appeals have no choice but to exercise the traditionally legislative function of culpability definition and fill in the resulting gap through the process of common law decision-making. See, e.g., Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977) (noting that legal discretion “is like the hole of a doughnut”: it “does not exist except as an area left open by a surrounding belt of restriction.”) In some cases, legislative history may guide the courts in their exercise of this authority; however, oftentimes the ambiguities will be so large and/or legislative intent so inscrutable, that judicial lawmaking is inevitable.

⁵⁴ *Ruffin v. United States*, 76 A.3d 845, 859 (D.C. 2013) (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)); (“Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define crimes.”).

culpability policies that are clear, consistent, or comprehensive.⁵⁵ The voluminous appellate case law surrounding the culpable mental states governing some of the District’s most routinely charged offenses—for example, threats⁵⁶ and simple assault⁵⁷—and foundational theories of liability—for example, criminal attempts⁵⁸ and complicity⁵⁹—is illustrative. Notwithstanding decades of decisional law, the culpable mental state requirements governing these offenses and theories of liability are still ambiguous and the subject of significant dispute.⁶⁰ Which, in practice, means that some of the most basic and fundamental culpability policy questions in the District remain unresolved.

What explains this state of affairs? To some extent, it’s a product of the fact that older DCCA opinions, to which subsequent courts are bound, rely upon the confusing common law approach to culpability, offense analysis. Such an approach is—as the DCCA’s recent opinions in *Buchanan*,⁶¹ *Ortberg*,⁶² and *Jones*⁶³ helpfully illustrate—a

⁵⁵ See also Kahan, *supra* note 53, at 470 (“[J]udges frequently lack sufficient consensus to make the law uniform”); *id.* at 495 (“Frequent disagreements are inevitable when [many] judges . . . are all independently empowered to identify the best readings of ambiguous criminal statutes.”); *United States v. Harriss*, 347 U.S. 612, 635 (1954) (noting that appellate courts can always change an interpretation of a criminal statute).

⁵⁶ D.C. Code § 22-407 (“Whoever is convicted in the District of threats to do bodily harm shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year.”); D.C. Code § 22-1810 (“Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 20 years, or both.”).

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

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

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

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

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

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

notoriously unreliable means of articulating the culpable mental state requirement governing an offense. At the same time, however, it also reflects the limitations inherent in the common law method of policymaking. Because any court is limited by the facts before it, even a definitive element analysis-based resolution of a culpable mental state issue (e.g., the DCCA’s recent *en banc* opinions in *Wilson-Bey*⁶⁴ and *Carrell*⁶⁵) can only accomplish so much. And, in any event, relying on multiple rounds of appellate litigation to define the culpable mental state requirement governing individual criminal offenses is a highly inefficient means of making basic and fundamental policy decisions.

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

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

The culpable mental states of “purpose,” “knowledge,” and “intent” appear in a variety of District statutes; however, virtually none of these statutes explicitly define them.⁶⁷ Nor, for that matter, has the DCCA clearly defined them. Based on DCCA case

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

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

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

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

⁶⁷ E.g., D.C. Code § 22-404.01; D.C. Code § 22-1101; D.C. Code § 5-1307. *But see* D.C. Code § 22-2201(B) (“[K]nowingly’ means having general knowledge of, or reason to know, or a belief or ground for

law, however, it is relatively clear that the desire and belief states reflected in the definitions set forth in subsections (a), (b) and (c) will satisfy the requirement of a “specific intent,” which is sufficient to establish liability for nearly all of the most serious offenses under District law.⁶⁸

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

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

belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.”); D.C. Code § 22-3101 (“‘Knowingly’ means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both.”); *but see also* D.C. Code § 22-3225.01 (“‘Malice’ means an intentional or deliberate infliction of injury, by furnishing or disclosing information with knowledge that the information is false, or furnishing or disclosing information with reckless disregard for a strong likelihood that the information is false and that injury will occur as a result.”).

⁶⁸ This is not to say, however, that the element-sensitive definition of the term intent in RCC § 22E-206(c) is the equivalent of the term intent as utilized in the phrase “specific intent” (or, for that matter, “general intent”).

⁶⁹ *See, e.g., Perry v. United States*, 36 A.3d 799 (D.C. 2011).

⁷⁰ *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).

⁷¹ *See, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*).

⁷² *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984).

⁷³ As the DCCA later observed in *Arthur v. United States*:

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

602 A.2d 174, 179 n.7 (D.C. 1992).

government must present proof of “an intent to persist in [sexually assaultive] force even in the face of and *for the purpose of* overcoming the victim’s resistance.”⁷⁴

It’s important to note that District law on the specific intent requirement seems to include more than just purposeful conduct, however. In *Logan*, for example, the DCCA notes that where the accused possesses the “conscious intention of causing the death of another,” he or she also possesses the “specific intent” to kill.⁷⁵ Although the court never clarifies what this “conscious intention” entails, the court later equates the *mens rea* of “a specific intent to kill” with “actually . . . fores[eeing] that death [will] result from [one’s] act.”⁷⁶

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

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

Another noteworthy aspect of DCCA case law is the recognition that a common indicator of a specific intent requirement—use of the phrase “with intent”—is also the marker of “an inchoate offense,” which “can occur without completion of the objective.”⁸¹ So, for example, with respect to the crime of assault with intent to kill, “the government is not required to show that the accused actually wounded the victim” in

⁷⁴ 442 F.2d 885, 890 (D.C. Cir. 1971).

⁷⁵ 483 A.2d at 671.

⁷⁶ *Id.* (quoting *United States v. Wharton*, 433 F.2d 451, 456 (D.C. Cir. 1970)). For example, the *Logan* court’s recognition that “[a] specific intent to kill exists when a person acts with the . . . conscious intention of causing [a particular result]” relies upon LaFave’s *Substantive Criminal Law* treatise. See *Logan*, 483 A.2d at 671. However, that same treatise clarifies that “a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; and (2) when he *knows* that that result is *practically certain* to follow from his conduct, whatever his desire may be as to that result.” LAFAVE, *supra* note 5, at 1 SUBST. CRIM. L. § 5.2.

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

⁷⁸ *Id.*

⁷⁹ 568 A.2d 1074, 1075 (D.C. 1990).

⁸⁰ *Id.*

⁸¹ *Owens v. United States*, 688 A.2d 399, 403 (D.C. 1996); see, e.g., *United States v. Fox*, 433 F.2d 1235, 1236 (D.C. Cir. 1970); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994); *Monroe v. United States*, 598 A.2d 439, 442 (D.C. 1991); *Warrick v. United States*, 528 A.2d 438, 442 (D.C. 1987); *Cash v. United States*, 700 A.2d 1208, 1212 (D.C. 1997); *Hebron v. United States*, 804 A.2d 270, 273-74 (D.C. 2002); *Price v. United States*, 985 A.2d 434, 437 (D.C. 2009).

order to prove that an assault was committed with the intent to kill.⁸² The same is also true with respect to “[p]ossession of narcotics with intent to distribute them,” which does not require proof that “the objective” of distribution was completed.⁸³ And it is likewise true with respect to “burglary,” which merely requires proof that the unlawful entry was “accompanied by an intent to steal once therein”—without regard to whether “the intended theft [was] consummated.”⁸⁴

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

It’s important to qualify the above analysis with a two-fold acknowledgement that: (1) the correspondence between the culpable mental states of purpose, knowledge, and intent as defined in subsections (a), (b), and (c) and what is labeled a specific intent offense in District law is not absolute; and, therefore (2) a simple translation from current District case law to these RCC culpable mental states simply is not possible. To take just one example, consider that there exists both DCCA and U.S. Supreme Court precedent indicating that the culpable mental state of knowledge is actually most akin to a “general intent” standard. The DCCA’s recent *en banc* decision in *Carrell v. United States* (2017) is illustrative. In one of the District’s strongest statements to date regarding the need for *mens rea* modernization, seven of the DCCA’s appellate judges specifically adopted both the element analysis framework⁸⁷ and accompanying culpable mental state definitions⁸⁸ of purpose and knowledge developed by the Model Penal Code (and subsequently endorsed by the U.S. Supreme Court) in resolving an ongoing conflict surrounding the

⁸² *Nixon v. United States*, 730 A.2d 145, 148-49 (D.C. 1999). For this reason, “a lethal intent can be demonstrated without showing that the assailant succeeded in wounding his intended victim.” *Bedney v. United States*, 471 A.2d 1022, 1024 (D.C. 1984). Likewise, with respect to the offense of assault with intent to rob, the DCCA has held that a defendant who, after searching the victim at gunpoint, leaves the victim with his valuables can still have the requisite specific intent. *See Downtin v. United States*, 330 A.2d 749, 750 (D.C. 1975).

⁸³ *Owens*, 688 A.2d at 403.

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

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

⁸⁶ 952 A.2d 859, 865 (D.C. 2008).

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

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

culpability of criminal threats.⁸⁹ In so doing, however, the majority opinion—citing to U.S. Supreme Court case law—also indicated that knowledge may at least “loosely” correspond to a general intent standard.⁹⁰ The lack of an easy translation from the old offense analysis categories of general and specific intent to the Model Penal Code framework recognized by the DCCA only bolsters the need for legislative specification of new culpable mental states.

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

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

The foregoing provisions were collectively intended to make RSP an inchoate offense, applicable to actors who merely believe the property they possess to be stolen—even if the property isn’t actually stolen.⁹⁵ To understand this much, however, one needs

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

⁹⁰ *Carrell*, 165 A.3d at 322 n.22 (“It is not entirely clear what the [*Elonis*] Court meant by this, but, read in the context of *Carter*, it appears the Court was distinguishing between “general intent” and “specific intent,” [], which the Court had previously likened to “knowledge” and “purpose,” respectively, *Bailey*, 444 U.S. at 405, 100 S.Ct. 624 (“In a general sense, ‘purpose’ corresponds loosely with the common-law concept of specific intent, while ‘knowledge’ corresponds loosely with the concept of general intent.”)).”

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

(b) A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen.

(c) It shall not be a defense to a prosecution under this section, alone or in conjunction with § 22-1803, that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

D.C. Code § 22-3231.

⁹² D.C. Code § 22-3232(a).

⁹³ D.C. Code § 22-3232(d).

⁹⁴ D.C. Code § 22-3232(b).

⁹⁵ See *Owens v. United States*, 90 A.3d 1118, 1121 (D.C. 2014). “[A]ctual knowledge,” as the Council notes, is not required for an RSP conviction. D.C. COUNCIL, REPORT ON BILL 4–133 at 54 (Feb. 12, 1981). The same report also notes (with respect to the similarly worded TSP statute) that “it is intended that the

to read labyrinthine provisions of D.C. Code § 22-3232 in light of the statute’s legislative history and applicable DCCA case law.⁹⁶ Under the definition of intent as to a circumstance under subsection (c)(2), in contrast, the District’s current multi-pronged approach can be replaced with a single clause communicating the relevant point, namely, that RSP involves receiving property “with intent that the property be stolen.”⁹⁷

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

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

A central component of District law on recklessness is the District’s cruelty to children statute, D.C. Code § 22-1101, which prohibits, *inter alia*, “recklessly . . . [m]altreat[ing] a child.”⁹⁹ Notably, the statute does not define this key culpable mental

offender’s knowledge or belief may be inferred from the circumstances of the offense and it is not required that the offender know for a fact that the property is stolen. Rather, it is sufficient if the offender had ‘reason to believe’ that the property is stolen.” *Id.* at 49.

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

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

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

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

state. In lieu of a statutory definition, the fourth edition of the D.C. Criminal Jury Instructions (1996) originally recommended that the term “recklessly” be interpreted in general accordance with the Model Penal Code’s definition of recklessness.¹⁰⁰ Then, in *Jones v. United States*, the DCCA had the opportunity to address the issue, determining that the required recklessness could be satisfied by proof that the accused “was aware of and disregarded the grave risk of bodily harm created by his conduct,”¹⁰¹—a definition the *Jones* court deemed generally consistent with the Model Penal Code definition of “recklessly.”¹⁰²

Building on the *Jones* decision, the DCCA, in *Tarpeh v. United States*, applied a similar understanding of recklessness to interpret the requirement of “reckless indifference” in the context of the District’s Criminal Neglect of a Vulnerable Adult statute, D.C. Code § 22–934.¹⁰³ Observing that “Model Penal Code § 2.02(2)(c) [] states that a ‘person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustified risk that the material element exists or will result from his conduct,’” the *Tarpeh* court opted to “[a]pply th[e]se concepts to ‘reckless indifference’” in a manner consistent with *Jones*.¹⁰⁴ Specifically, the DCCA held that “the trier of fact,” to prove reckless indifference, “must show not only that the actor did not care about the consequences of his or her action, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action.”¹⁰⁵

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

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

his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant’s actions, with *reckless* disregard for that probability” (emphasis added)).

¹⁰⁰ D.C. Crim. Jur. Instr. § 4.120 cmt. (quoting Model Penal Code § 2.02(2)(c)); see *Jones v. United States*, 813 A.2d 220, 225 (D.C. 2002) (quoting and citing to *id.*).

¹⁰¹ 813 A.2d at 225.

¹⁰² *Id.* (quoting Model Penal Code § 2.02(2)(c)).

¹⁰³ 62 A.3d 1266, 1270 (D.C. 2013).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ 165 A.3d 314 (D.C. 2017) (*en banc*).

¹⁰⁷ *Id.* at 330 (“I write separately to explain why I believe we should hold that recklessness is enough to satisfy the *mens rea* element (at least of § 22–407, if not § 22–1810).”).

114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *see also id.* at 837, 114 S.Ct. 1970 (Recklessness exists “when a person disregards a risk of harm of which he is aware.” (citations omitted)).¹⁰⁸

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

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

¹⁰⁸ *Id.* at 330–31.

¹⁰⁹ *Fauntery v. United States*, 413 A.2d 1294, 1298–99 (D.C. 1980).

¹¹⁰ *Comber*, 584 A.2d at 48.

¹¹¹ *Fauntery*, 413 A.2d at 1298–99.

¹¹² The relevant statutory provision reads:

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

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

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

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

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

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

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

RCC § 22E-207. RULES OF INTERPRETATION APPLICABLE TO CULPABLE MENTAL STATES.

(a) *Distribution of Specified Culpable Mental States.* Any culpable mental state specified in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state is specified, with the exception of any result element or circumstance element for which the person is strictly liable under RCC § 22E-207(b).

(b) *Identification of Elements Subject to Strict Liability.* A person is strictly liable for any result element or circumstance element in an offense:

- (1) That is modified by the phrase “in fact”; or
- (2) When another statutory provision explicitly indicates strict liability applies to that result element or circumstance element.

(c) *Determination of When Recklessness Is Implied.* A culpable mental state of “recklessly” applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).

(d) *Definitions.*

- (1) “Culpable mental state” has the meaning specified in RCC § 22E- 205(b).
- (2) “Result elements” has the meaning specified in RCC § 22E- 201(c)(2).
- (3) “Circumstance elements” has the meaning specified in RCC § 22E- 201(c)(3).
- (4) “Strictly liable” has the meaning specified in RCC § 22E-205(c).
- (5) “Recklessly” has the meaning given in RCC § 22E-206(d).

COMMENTARY

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

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

To illustrate how this rule of interpretation operates, consider an offense that prohibits “knowingly causing bodily injury to a child.” Here, the enumerated culpable

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

mental state of knowingly *could* be interpreted as solely applying to the result element of causing bodily injury. Or it *could* be read to apply to both that result and the requisite circumstance element, namely, that the person to whom bodily injury was caused *have been a child*. Under subsection (a), the latter reading would be the correct one since both of these objective elements follow (i.e., are modified by) the culpable mental state of knowingly.²

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

Relation to Current District Law. Subsection (a) fills a gap in District law. The D.C. Code lacks a fixed rule of interpretation for distributing culpability terms, or for interpreting criminal statutes more generally. In the absence of a rule of this nature, the DCCA tends to employ a highly discretionary and context sensitive approach to interpreting criminal statutes.⁴ On at least one occasion, however, the court has deemed a rule of distribution such as that reflected in subsection (a) to reflect the “most straightforward reading of the [mental state] language” employed in a criminal statute.⁵

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

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

Here is an illustrative example of how each aspect of this provision operate. An offense definition that prohibits “knowingly causing bodily injury to a person who is, in

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

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

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

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

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

fact, a child” should, pursuant to paragraph (b)(1), be understood to apply strict liability to the requisite circumstance element, namely, that the person to whom bodily injury was caused was a child.⁷ In contrast, an offense definition that prohibits “knowingly causing bodily injury to a child” and thereafter explicitly states that “a defendant shall be held strictly liable with respect to whether the victim harmed was a child,” should, pursuant to paragraph (b)(2), be given its intended effect. Although the rule of distribution in subsection (a) indicates that the culpable mental state of “knowingly” travels to all subsequent results and circumstances, the explicit expression of legislative intent reflected in the latter portion of the offense definition is sufficiently clear to overcome this rule.

Subsection (b) facilitates consistency in the law by providing a fixed methodology for appropriately recognizing strict liability elements. However, it also provides the legislature with important drafting shortcuts. Whenever the legislature intends to apply strict liability to a single result or circumstance, use of the phrase “in fact” is a simple and efficient means of communicating this point. When, however, the legislature intends to apply strict liability to more than one (or even all) of the results and circumstances in an offense, an explicit statement to that effect may be more efficient than continually repeating the phrase “in fact” throughout an offense definition.⁸

Relation to Current District Law. Subsection (b) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a standard way to specify offense elements that are subject to strict liability, even though elements and offenses subject to strict liability offenses exist in the District.⁹ However, the DCCA does not lightly infer the absence of a culpable mental state; rather, it must be “clear the legislature intended to create a strict liability offense.”¹⁰ And, in the absence of an “obvious [legislative] purpose” to impose strict liability, “the common law presumption in favor of imposing a *mens rea* requirement where a statute is otherwise silent” operates.¹¹

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

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

⁸ So, for example, when the legislature intends to create a pure strict liability offense it might state something to the effect of “no culpable mental state applies to any objective element in this offense.”

Another means of applying strict liability to multiple objective elements in an offense is to draft an offense definition using “in fact” followed by a colon and a list of objective elements. This usage of “in fact” followed by a colon clearly communicates that strict liability applies to the ensuing list of objective elements.

⁹ As the DCCA observed in *McNeely v. United States*, “Strict liability criminal offenses—including felonies—are not unprecedented in the District of Columbia; the Council has enacted several such statutes in the past.” 874 A.2d 371, 385–86 (D.C. 2005) (collecting statutes); *see also In re E.F.*, 740 A.2d 547, 550-51 (D.C. 1999) (discussing D.C. Code § 22-3011(a)).

¹⁰ *Conley v. United States*, 79 A.3d 270, 289 n.91 (D.C. 2013) (quoting *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

¹¹ *McNeely*, 874 A.2d at 379–80. “[W]here the legislature is acting in its capacity to regulate public welfare,” however, mere “silence can be construed as a legislative choice to dispense with the *mens rea* requirement.” *Id.* at 388.

Explanatory Note. Subsection (c) states a default rule, which addresses any interpretive ambiguities concerning culpable mental states that remain after consideration of the previous rules set forth in section 207.¹² Specifically, this rule establishes that an offense definition which fails to clarify the culpable mental state (or strict liability) applicable to a given result or circumstance should be interpreted as applying a default of recklessness to that element.¹³

Here are two illustrative examples of the kinds of situations where this default rule might apply. First, an offense definition might not specify any culpable mental state at all, such that the rule of distribution stated in subsection (a) is inapplicable, while, at the same time, failing to clarify that strict liability is applicable under subsection (b). Consider, for example, a hypothetical theft of government property offense that reads: “No person shall take government property without consent.” Second, an offense definition might specify a culpable mental state but do so after some objective elements have already been enumerated, and which are neither governed by an explicitly specified culpable mental state nor clearly subject to strict liability. Consider, for example, a hypothetical aggravated theft of government property offense that reads: “No person shall take government property without consent and knowingly sell it to another.” In each of these situations, the default rule reflected in subsection (c) establishes that the relevant objective elements are subject to a culpable mental state of recklessness.¹⁴

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

Relation to Current District Law. Subsection (c) fills a gap in, but generally coheres with, District law. The D.C. Code lacks a fixed rule of interpretation for implying culpable mental state terms. In the absence of a rule of this nature, the DCCA employs “an interpretive presumption that *mens rea* is required,” notwithstanding statutory silence to the contrary, so long as the implication of a culpable mental state would not be contrary to legislative intent.¹⁵ As the DCCA has recognized, “[t]he

¹² See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[M]ere omission from a criminal enactment of any mention of criminal intent’ should not be read ‘as dispensing with it,’ which ‘rule of construction reflects the basic principle that ‘wrongdoing must be conscious to be criminal.’”) (quoting *Morissette v. United States*, 342 U.S. 246, 249 (1952)); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (Stevens, J., concurring) (courts have for a long time opted to “interpret criminal statutes to include broadly applicable [*mens rea*] requirements, even where the statute by its terms does not contain them”).

¹³ See, e.g., Model Penal Code § 2.02(3), cmt. at 127 (recklessness default rule reflects “the common law position”); Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 683 (1983) (“recklessness is generally accepted as the theoretical norm” for criminal liability); *Elonis*, 135 S. Ct. at 2015 (Alito, J. concurring) (recklessness provides sound basis for punishment and offers most appropriate default rule for courts to employ “without stepping over the line that separates interpretation from amendment”).

¹⁴ Specifically, the objective elements of a “taking,” that the object taken be “government property,” and that the taking occur “without consent” would all be subject to recklessness.

¹⁵ *Conley*, 79 A.3d 289 (citing *Santos v. District of Columbia*, 940 A.2d 113, 116–17 (D.C. 2007)).

presumption is based on the common understanding of malum in se offenses, which traditionally are ‘generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.’”¹⁶

¹⁶ *McNeely*, 874 A.2d at 388 (quoting *Morrisette v. United States*, 342 U.S. 246, 251 (1952)). For a sustained argument by one judge on the DCCA in support of a recklessness default in the context of the District’s criminal threats statute, see *Carrell v. United States*, 165 A.3d 314, 330-39 (D.C. 2017) (Thompson, J., concurring in part and dissenting in part).

RCC § 22E-208. PRINCIPLES OF LIABILITY GOVERNING ACCIDENT, MISTAKE, AND IGNORANCE.

(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 element or circumstance element required by 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 element:

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

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

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

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

(c) *Mistake or Ignorance as to Criminality.* A person may be held liable for an offense although he or she is mistaken or ignorant as to the illegality of his or her conduct unless:

(1)(A) The offense or some other provision in the Code expressly requires proof of a culpable mental state as to:

(i) Whether conduct constitutes that offense; or

(ii) The existence, meaning, or application of the law defining an offense;
and

(B) The person's mistake or ignorance negates that culpable mental state; or

(2) The person's mistake or ignorance satisfies the requirements for a general excuse defense.

(d) *Imputation of Knowledge for Deliberate Ignorance.* When a culpable mental state of knowledge applies to a circumstance element, the required culpable mental state is established if:

(1) The person is reckless as to whether the circumstance exists; and

(2) The person avoids confirming or fails to investigate whether the circumstance exists with the purpose of avoiding criminal liability.

(e) *Definitions.*

(1) "Culpable mental state" has the meaning specified in RCC § 22E- 205(b).

(2) "Result element" has the meaning specified in RCC § 22E- 201(c)(2).

(3) "Circumstance element" has the meaning specified in RCC § 22E- 201(c)(3).

- (4) “Purpose” has the meaning specified in RCC § 22E-206(a).
- (5) “Knowledge” has the meaning specified in RCC § 22E-206(b).
- (6) “Intent” has the meaning specified in RCC § 22E-206(c).
- (7) “Recklessness” has the meaning specified in RCC § 22E-206(d).
- (8) “Negligence” has the meaning specified in RCC § 22E-206(e).

COMMENTARY

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

Subsection (a) addresses the overarching effect of accidents, mistakes, and ignorance on offense liability. It broadly clarifies that a person’s accident, mistake, or ignorance as to a matter of fact or law will typically relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state applicable to a result or circumstance element.² This means that the relationship between the culpable mental state requirement governing an offense and accident, mistake, and ignorance is typically one of logical relevance: any accident, mistake or ignorance is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state applicable to a result or circumstance element.³ In this sense, accident, mistake and ignorance do not—generally speaking⁴—constitute defenses, but rather, simply describe conditions that may preclude the government from establishing liability.

Subsection (b) clarifies the nature of the correspondence between mistake and the culpable mental state requirement applicable to circumstance elements using the

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

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

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

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

terminology most commonly associated with mistake claims.⁵ The courts, when presented with the claim that a given mistake as to a matter of fact or law negates an offense’s culpability requirement, have historically found it helpful to evaluate the overarching reasonableness of that mistake. Consistent with this evaluation, paragraphs (b)(1) and (2) jointly clarify that any mistake—whether reasonable or unreasonable—has the capacity to negate the existence of the purpose, knowledge, or intent applicable to a circumstance element. Paragraph (b)(3) thereafter states the rule applicable to an area of mistake law where the traditional reasonableness analysis breaks down—the nature of the mistake that will negate the existence of recklessness as to a circumstance element. In this context, any reasonable mistake will preclude the government from meeting its burden of proof; however, an unreasonable mistake will only negate the requisite recklessness if the person was not reckless making the mistake.⁶ Along similar lines, paragraph (b)(4) clarifies that while any reasonable mistake will also categorically negate negligence as to a circumstance element, an unreasonable mistake will only preclude the government from meeting its burden of proof if the defendant was not negligent in making the mistake.⁷

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

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

If, in contrast, the statute is interpreted to require proof of recklessness or negligence as to whether the property was “of another,” then only a reasonable mistake as

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

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

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

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

to the property’s ownership status by the defendant will *categorically preclude* the government from meeting its burden of proof. This is because unreasonable conduct is at the heart of both recklessness and negligence, which, as defined under the RCC, each entail the disregard a “substantial risk” in a manner that is “clearly blameworthy” under the circumstances.⁹

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

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

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

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

⁹ RCC § 22E-206(d); *id.* at (e).

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

¹¹ RCC § 22E-206(d)(2)(A).

¹² See *supra* note 10.

¹³ RCC § 22E-206(d)(2)(B).

¹⁴ RCC § 22E-206(e)(2)(B).

¹⁵ *Conley v. United States*, 79 A.3d 270, 281 (D.C. 2013) (quoting *Barlow v. United States*, 32 U.S. (7 Pet.) 404, 411, 8 L.Ed. 728 (1833)); see, e.g., *McFadden v. United States*, 135 S. Ct. 2298, 2304, 192 L. Ed. 2d 260 (2015) (“[I]gnorance of the law is typically no defense to criminal prosecution”); *Cheek v. United States*, 498 U.S. 192, 199, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (“The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system.”). Consistent with this general principle, “a defendant who knows he is

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

In the first situation, addressed by paragraph (c)(1), the statute for which the defendant is being prosecuted requires proof of a culpable mental state (e.g., knowledge, intent, recklessness, or negligence) as to the illegality of one’s conduct.¹⁷ Under these circumstances, the defendant’s mistake or ignorance as to the prohibited nature of his or her conduct must be subjected to the same logical relevance analysis set forth in subsection (a), namely, did the mistake or ignorance “negate[] th[e] culpable mental state” applicable to the required circumstance element of illegality?

distributing heroin but does not know that heroin is listed on the schedules . . . would [] be guilty of knowingly distributing ‘a controlled substance.’” *McFadden*, 135 S. Ct. at 2304. Under these circumstances, the fact that the defendant is ignorant as to the particular law setting forth the definition of the crime in question does not provide grounds for an excuse.

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

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

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

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

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

Subsection (d) establishes a generally applicable principle of imputation¹⁹ to deal with the situation of an actor who deliberately ignores a prohibited circumstance, otherwise suspected to exist, in order to avoid criminal liability.²⁰ If this actor is later prosecuted for a crime that requires proof of knowledge as to that circumstance under RCC § 22E-206(b)(2), the actor may be able to point to a level of ignorance sufficient to preclude the government from establishing the requisite awareness as to a practical certainty.²¹ Nevertheless, under these specific conditions, that actor is—given his or her initial suspicions and later purposeful avoidance—just as blameworthy as a person who possessed a degree of awareness sufficient to satisfy the RCC definition of knowledge.²²

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

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

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

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

²² Conversely, outside of this narrow context, an actor is unlikely to be just as blameworthy as a person who possesses a degree of awareness sufficient to satisfy the RCC definition of knowledge. For example, consider the situation of a parent driving carpool who declines to check his child’s backpack after smelling what might be a controlled substance for any (or all) of the following reasons: (1) he wants to respect his child’s privacy; (2) he doesn’t want to lose the child’s hard-earned trust; and/or (3) he simply doesn’t want to know whether his child is, in fact, using controlled substances. Under these circumstances, where the parent’s deliberate avoidance is not motivated by a desire to avoid criminal liability, it cannot be said that he is as blameworthy as one who knowingly transports controlled substances. See *United States v. Heredia*, 483 F.3d 913, 924, 928 (9th Cir. 2007) (Absent proof of a “motivation to avoid criminal responsibility,” deliberate ignorance doctrine would effectively create “[a] criminal duty to investigate the wrongdoing of others to avoid wrongdoing of one’s own,” which is a “novelty in the criminal law.” For example, “[s]hall someone who thinks his mother is carrying a stash of marijuana in her suitcase be obligated, when he helps her with it, to rummage through her things?” Or [s]hall all of us who give a ride to child’s friend search her purse or his backpack?”).

In light of this moral equivalency,²³ subsection (d) authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability.²⁴

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

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

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

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

²⁴ Note that the defendant’s purpose of avoiding criminal liability need not be the only, or even the primary, motivation for engaging in the conduct. At the very least, though, it must be a substantial motivating factor. Consider, for example, a bartender who fails to check a young-looking female’s ID: (1) for the primary purpose of making it easier to sexually assault her after the bar closes; and (2) for the lesser, but still substantially motivating reason of avoiding liability for serving a minor in the event the bar is raided. Under these circumstances, the bartender’s non-primary purpose of avoiding liability for serving a minor in the event the bar is raided is sufficient to deem him deliberately ignorant given its substantially motivating nature.

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

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

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

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

²⁵ D.C. Crim. Jur. Instr. § 9.600 (collecting relevant cases). As the DCCA recently observed: “The mistake of fact doctrine shields the accused from criminal liability if his or her mistake rebuts the mental state included in the offense.” *Ortberg v. United States*, 81 A.3d 303, 308 (D.C. 2013).

²⁶ See, e.g., *Simms v. District of Columbia*, 612 A.2d 215, 219 (D.C. 1992).

²⁷ See, e.g., *Hawkins v. United States*, 103 A.3d 199, 201 (D.C. 2014); *In re Mitrano*, 952 A.2d 901, 905 (D.C. 2008).

²⁸ See, e.g., *Simms v. District of Columbia*, 612 A.2d 215, 218 (D.C. 1992); *Goddard v. United States*, 557 A.2d 1315, 1316 (D.C. 1989); *Williams v. United States*, 337 A.2d 772, 774–75 (D.C. 1975).

²⁹ For example, the commentary to the District’s criminal jury instructions states that:

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).

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

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

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

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

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

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

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

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

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

³⁴ *Ortberg*, 81 A.3d at 307.

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

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

The text of this statute clarifies that “the government must prove (1) entry that is (2) unauthorized—because it is without lawful authority and against the will of owner or lawful occupant.” *Ortberg*, 81 A.3d at 309. “What is less clear,” however, “is the mental state or culpable state of mind that must be proved” given that [t]he statute does not expressly address this subject.” *Id.* Nor is there any “legislative history on this provision.” *Id.* Nevertheless, District courts have concluded that the “only state of mind that the government must prove is appellant’s general intent to be on the premises contrary to the will of the lawful owner,” *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.

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

³⁷ As one commentator observes:

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

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

More specifically, if the accident or mistake precludes the government from meeting its burden then it is, by virtue of an offense definition, an appropriate basis for exoneration. But if, in contrast, it does not preclude the government from meeting its burden, then—again, by virtue of an offense definition—that accident or mistake is appropriately ignored. In either case, however, the ultimate policy decision will reside with the legislature, contingent upon the legislature’s decision concerning which culpable mental state, if any, to apply to each objective element of an offense.

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

It is well established under DCCA case law that, in general, neither ignorance nor mistake as to a matter of *penal* law is a defense.⁴⁰ As the DCCA has recently observed, “[it] is a common maxim, familiar to all minds, that ignorance of the law will not excuse

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

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

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

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

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

any person, either civilly or criminally.”⁴¹ In practice, this means that (for example) “a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules [would] be guilty of knowingly distributing ‘a controlled substance.’”⁴² Under these circumstances, the ignorance of the law maxim *precludes* a defendant from prevailing on a claim that his or her lack of knowledge concerning the definition of the crime in question should constitute a defense.⁴³

At the same time, however, the DCCA has also recognized that under “unusual circumstances” this maxim must give way to other general legal principles.⁴⁴ Most obvious is the principle that the government must prove all offense elements beyond a reasonable doubt.⁴⁵ On rare occasion, for example, the District’s criminal offenses appear to explicitly incorporate a knowledge-of-the-law requirement (i.e., apply a culpable mental state of knowingly to the illegality of one’s conduct). To illustrate, consider a penalty provision in the District’s campaign finance statute, which subjects to a five year (maximum) criminal penalty any person who “knowingly violates” any of the relevant prohibitions.⁴⁶ In a prosecution premised on this provision, a person’s mistake

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

⁴² *McFadden*, 135 S. Ct. at 2304.

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

⁴⁴ *Conley*, 79 A.3d at 281.

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

⁴⁶ *See, e.g., D.C. Code § 1-1163.35(c)* (“Any person who knowingly violates any of the provisions of Parts A through E of this subchapter shall be subject to criminal prosecution and, upon conviction, shall be fined not more than the amount set forth in § 22-3571.01, or imprisoned for not longer than 5 years, or both.”); *see also Trice v. United States*, 525 A.2d 176, 179 (D.C. 1987). (“The crime of bail jumping, under D.C.

or ignorance as to the scope of this criminal law presumably *would* “excuse” because: (1) the government must prove the elements of an offense beyond a reasonable doubt; (2) knowledge of the law is an element of the offense; and, therefore, (3) the person’s mistake or ignorance would preclude the government from establishing the requisite knowledge.⁴⁷

Another “bedrock principle[] of American criminal law” that may supersede the “ignorance of the law will not excuse any person” maxim has been articulated by the DCCA as follows: “It is wrong to convict a person of a crime if he had no reason to believe that the act for which he was convicted *was* a crime”⁴⁸ The DCCA’s recent opinion in *Conley v. United States* is illustrative. In that case, the court struck down a District statute criminalizing unlawful presence in a motor vehicle containing a firearm⁴⁹ on the basis that it “criminalize[d] entirely innocent behavior—merely remaining in the vicinity of a firearm in a vehicle[]—without requiring the government to prove that the defendant had notice of any legal duty to behave otherwise.”⁵⁰ The *Conley* decision rested upon the court’s reading of the U.S. Supreme Court’s opinion in *Lambert v. California*, which, in the view of the DCCA, stands for the proposition that “it is incompatible with due process to convict a person of a crime based on the failure to take a legally required action—a crime of omission—if he had no reason to believe he had a legal duty to act, or even that his failure to act was blameworthy.”⁵¹ In practical effect, then, the *Conley* decision amounts to an implicit constitutional requirement of negligence as to illegality in cases of omission liability.

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

Code § 23-1327(a)[], has four elements. The trier of fact must find (1) that the defendant was released pending trial or sentencing, (2) that he was required to appear in court on a specified date or at a specified time, (3) that he failed to appear, and (4) *that his failure was willful.*) (italics added); *Jenkins v. United States*, 415 A.2d 545, 547 (D.C. 1980) (holding that where there was testimony that “certain words had been said to appellant which could have given rise to a good faith and reasonable belief that his case had been dismissed[.]” that story, “if believed by the jury, would constitute a valid defense to a charge of ‘willfully’ failing to appear”).

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

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

⁴⁹ D.C. Code § 22-2511 (Repealed).

⁵⁰ 79 A.3d at 273.

⁵¹ *Id.* at 273.

⁵² 646 A.2d 993, 1000 (D.C. 1994).

⁵³ *Id.* at 1000 (quoting *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) and citing Model Penal Code § 2.04(3)(b).)

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

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

In *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959), the defendants were convicted of contempt for refusing to answer certain questions put to them by a state investigating commission, even though they had relied on prior assurances by the chairman of the same commission that they were entitled to assert their Fifth Amendment privilege against self-incrimination. Unknown to the chairman, his advice was contrary to state law. Nevertheless, the Supreme Court reversed the convictions because of the chairman’s erroneous assurance to the defendants that they could lawfully refuse to answer . . . A few years later, in *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), the Court reversed the convictions of a group of picketers who had been demonstrating across the street from a courthouse, contrary to state law, because the local chief of police had given them permission to picket at that location⁵⁹

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

⁵⁴ *Id.* at 999.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1000.

⁵⁷ *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976)

⁵⁸ *Bsharah*, 646 A.2d at 1000.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1001.

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

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

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

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

The DCCA has only issued one opinion directly addressing the issue of deliberate ignorance, *Owens v. United States*, and it is a case that is primarily concerned with the culpability requirement governing the District’s RSP statute.⁶³ That statute penalizes a person who “buys, receives, possesses, or obtains control of stolen property, knowing or *having reason to believe* that the property was stolen.”⁶⁴

At issue in *Owens* was whether the italicized “having reason to believe” language embodies an objective, negligence-like standard, or, alternatively, a subjective standard akin to knowledge. The DCCA ultimately concluded that “the mental state for RSP is a subjective one” akin to knowledge⁶⁵; however, the *Owens* court also recognized—quoting from the U.S. Court of Appeals for the D.C. Circuit’s (CADC) decision in *United States v. Gallo*⁶⁶—that although “[g]uilty knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant,” it may nevertheless “be satisfied by proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him.”⁶⁷

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

⁶¹ RCC § 22E-208(c)(1).

⁶² RCC § 22E-208(c)(2).

⁶³ 90 A.3d 1118, 1122-23 (D.C. 2014).

⁶⁴ D.C. Code § 22-3232(a).

⁶⁵ *Owens*, 90 A.3d at 1121.

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

⁶⁷ *Owens*, 90 A.3d at 1122.

“the defendant had ‘reason to believe’ the property was stolen,” Superior Court judges should provide an instruction that incorporates the above-quoted language on deliberate ignorance from *Gallo*.⁶⁸

No other DCCA case expressly applies the doctrine of deliberate ignorance; however, the Court of Appeals has, over the years, made a variety of passing observations—in both the criminal⁶⁹ and civil⁷⁰ contexts—which generally suggest that deliberate ignorance doctrine is indeed a generally applicable principle in the District.

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

⁶⁸ *Id.* More specifically, Superior Court judges are supposed to provide an instruction that reads, in relevant part:

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

Id.

⁶⁹ See *Santos v. District of Columbia*, 940 A.2d 113, 117 n.21 (D.C. 2007).

⁷⁰ See *In re Cater*, 887 A.2d 1, 26 (D.C. 2005); *In re Owusu*, 886 A.2d 536, 542 (D.C. 2005).

⁷¹ See also, e.g., *United States v. Alston-Graves*, 435 F.3d 331, 341 (D.C. Cir. 2006) (willful blindness instruction should not be given unless there is evidence that the defendant “purposely contrived to avoid learning all the facts *in order to have a defense in the event of a subsequent prosecution.*”) (quoting *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001) (quoting *United States v. Hanzlicek*, 187 F.3d 1228, 1233 (10th Cir. 1999)) (internal quotation mark omitted); accord *United States v. Heredia*, 429 F.3d 820, 824 (9th Cir. 2005); *United States v. Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States v. Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002).

RCC § 22E-209. PRINCIPLES OF LIABILITY GOVERNING INTOXICATION.

(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 element or circumstance element required by that offense.

(b) *Correspondence Between Intoxication and Culpable Mental State Requirements.* For purposes of determining when intoxication negates the existence of a culpable mental state applicable to a result element or circumstance element:

- (1) Purpose. Intoxication negates the existence of purpose when, due to a person's intoxicated state, that person does not consciously desire to cause the result or that the circumstance exist.
- (2) Knowledge or Intent. Intoxication negates the existence of knowledge or intent when, due to a person's intoxicated state, that person is not practically certain the result will occur or that the circumstance exists.
- (3) Recklessness. Except as provided in subsection (c), intoxication negates the existence of recklessness when, due to a person's intoxicated state:
 - (A) That person is unaware of a substantial risk the result will occur or that the circumstance exists; or
 - (B) That person's disregard of the risk is not clearly blameworthy under RCC §§ 206(d)(1)(B) or (2)(B).
- (4) Negligence. Intoxication negates the existence of negligence when, due to a person's intoxicated state, that person's failure to perceive a substantial risk the result will occur or that the circumstance exists is not clearly blameworthy under RCC §§ 206(e)(1)(B) or (2)(B).

(c) *Imputation of Recklessness for Self-Induced Intoxication.* When a culpable mental state of recklessness applies to a result element or circumstance element, the required culpable mental state is established if:

- (1) A person, due to his or her intoxicated state, is unaware of a substantial risk as to the result or circumstance that the person would have been aware of had he or she been sober;
- (2) The person's intoxicated state is self-induced; and
- (3) The person acts negligently as to that result or circumstance.

(d) *Definitions of Intoxication and Self-Induced Intoxication.*

- (1) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.
- (2) "Self-induced intoxication" means intoxication caused by substances:
 - (A) A person knowingly introduces into his or her body;
 - (B) The tendency of which to cause intoxication the person is aware of or should be aware of; and
 - (C) That have not been introduced pursuant to medical advice or under circumstances that would afford a general defense to a charge of crime.

(e) *Other Definitions.*

- (1) “Culpable mental state” has the meaning specified in RCC § 22E-205(b).
- (2) “Result element” has the meaning specified in RCC § 22E- 201(c)(2).
- (3) “Circumstance element” has the meaning specified in RCC § 22E- 201(c)(3).
- (4) “Purpose” has the meaning specified in RCC § 22E-206(a).
- (5) “Knowledge” has the meaning specified in RCC § 22E-206(b).
- (6) “Intent” has the meaning specified in RCC § 22E-206(c).
- (7) “Recklessness” has the meaning specified in RCC § 22E-206(d).
- (8) “Negligence” has the meaning specified in RCC § 22E-206(e).

COMMENTARY

Explanatory Notes. Section 209 establishes general principles of liability governing the relationship between intoxication and the culpable mental state requirement applicable to individual offenses under the RCC.¹

Subsection (a) states the general effect of intoxication—defined in paragraph (d)(1) as a disturbance of mental or physical capacities resulting from the introduction of substances into one’s body²—on offense liability. It broadly clarifies that a person’s intoxicated state will relieve that person of liability when (but only when) it precludes the person from acting with the culpable mental state applicable to a result or circumstance element.³ This means that the relationship between the culpable mental state requirement governing an offense and intoxication is typically one of logical relevance: intoxication is relevant when (but only when) it prevents the government from meeting its affirmative burden of proof with respect to a culpable mental state applicable to a result or circumstance element.⁴ In this sense, intoxication does not—generally speaking⁵—

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

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

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

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

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

constitute a defense, but rather, simply describes conditions that may preclude the government from establishing liability.⁶

Subsection (b) clarifies the nature of the correspondence between intoxication and culpable mental states under the RCC. It provides a set of general rules that may serve as a useful guide for the courts in determining when intoxication is capable of negating the existence of a culpable mental state. First, these rules generally establish that intoxication negates the existence of any subjective culpable mental state—namely, purpose, knowledge, intent, and the conscious disregard component of recklessness⁷—when, due to a person’s intoxicated state, that person does not act with the necessary desire or level of awareness that must be proven as to a given result or circumstance element.⁸ Second, these rules further clarify that intoxication may also negate the objective component of recklessness and the objective culpable mental state of negligence when, due to a person’s intoxicated state, that person’s disregard of a risk is not clearly blameworthy under the circumstances proscribed by the RCC definitions of recklessness and negligence.⁹

One critical circumstance, for purposes of evaluating the relationship between intoxication and a person’s blameworthiness under this context-sensitive culpability analysis, is the origin of a person’s intoxicated state.¹⁰ The most important distinction to be made relates to whether intoxication is “self-induced,” which is defined in paragraph (d)(2) as the knowing consumption of a substance that one knows (or should know) to be

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

⁶ *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 65 (Westlaw 2019) (“[W]hen an actor’s intoxication negates a culpable state of mind required by an offense definition,” this raises “a ‘failure of proof’ defense where the defendant has a defense because the prosecution is unable to prove all the required elements of the offense.”).

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

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

⁹ That is, the “nature and degree” of the risk, the “nature and purpose of the person’s conduct,” and the “circumstances known to the person.” RCC §§ 206(d)(1)(B), (d)(2)(B), (e)(1)(B), (e)(2)(B), and accompanying Explanatory Notes.

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

intoxicating in the absence of a justification or excuse.¹¹ In general, *self-induced* intoxication *will not* have the tendency to negate a person’s blameworthiness under the RCC, and in many instances will serve to establish it.¹² In contrast, intoxication that is *not self-induced* generally *will* have the tendency to negate a person’s blameworthiness.¹³ Ultimately, though, these are only general presumptions, each of which is subject to possible exception based upon the facts of a given case.¹⁴

¹¹ RCC § 22E-209(d)(2); *see, e.g.*, Model Penal Code § 2.08(5)(a) (defining self-induced intoxication). The RCC uses the phrase “self-induced intoxication,” rather than “voluntary intoxication,” to avoid any confusion with the voluntariness requirement proscribed in RCC § 22E-203.

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

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

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

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

It is also possible, under narrow circumstances, for a person’s self-induced intoxication to negate his or her blameworthiness even when it is not pathological. This is reflected in the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story home. Soon thereafter, X’s sister, V, makes an unannounced visit to X’s home, lets herself in, and then announces that she’s going to walk up to the second story to have a conversation with X. A few moments later, X stumbles into V at the top of the stairs, unaware of V’s proximity, thereby causing V to fall to her death.

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

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

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

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

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

¹⁶ To illustrate, consider again the situation of X, who knowingly drinks a significant amount of alcohol at a rowdy fraternity party, and thereafter, in a highly inebriated state, walks onto the patio, grabs a golf club, and begins hitting golf balls out of the yard, which repeatedly shatter the windows of nearby homes and ultimately causes \$30,000 dollars in damage. *See supra* note 12 (analyzing same hypothetical). Assume that X, due to his intoxicated state, was completely unaware that—at the moment he began hitting golf balls—there was a substantial risk that property damage would result from his conduct. If X is subsequently prosecuted for second-degree criminal damage to property on these facts, X's lack of awareness could, as a matter of logical relevance, preclude the government from securing a conviction under a recklessness theory of liability. *See* RCC § 22E-2503 (“Recklessly damages or destroys property and, in fact, the amount of damage is \$25,000 or more.”). But this would be problematic as a matter of policy/fairness: if the reason why X lacks the requisite awareness is because of his prior culpable decision to get recklessly drunk at the fraternity party, then X's self-induced state of intoxication offers an inappropriate basis for exculpation. *See, e.g.,* Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545, 573 (2012) (“[I]f the defendant's act of becoming intoxicated is unjustified . . . and the defendant is aware of the relevant risked harms when he chooses to become intoxicated, then his act of becoming intoxicated is itself reckless.”); Paul H. Robinson, *Causing the Conditions of One's Own*

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

Relation to Current District Law. Section 209 codifies, clarifies, fills in gaps, changes, and enhances the proportionality of the District law governing the relationship between intoxication and the culpable mental state requirement governing an individual offense.

As a legislative matter, the D.C. Code is almost entirely silent¹⁸ on when an actor’s intoxicated state can or should preclude the government from being able to

Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 VA. L. REV. 1, 31 (1985) (“Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense*, the state should be punish him for causing the ultimate justified or excused conduct.”) (italics added).

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

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

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

¹⁸ One noteworthy example is the District’s medical marijuana statute, D.C. Code § 7-1671.03, which establishes that “[t]he use of medical marijuana as authorized by this chapter and the rules issued pursuant

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

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

to § 7-1671.13 does not create a defense to any crime and does not negate the mens rea element for any crime except to the extent of the voluntary-intoxication defense recognized in District of Columbia law.”

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

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

²¹ *McNeil*, 933 A.2d at 363. The case law discussed in this section generally refers to voluntary (or self-induced) intoxication without saying much about involuntary intoxication. In *Easter v. District of Columbia*, the CADC observed: “Where the accused becomes intoxicated without his consent, through force or fraud of another person, his condition is that of involuntary drunkenness and a criminal act committed by him while in such state may be defended by whatever the circumstances justify.” 209 A.2d 625, 627 (D.C. 1965) (citing *Choate v. State*, 197 P. 1060 (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).

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

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

falls short of the standard for a voluntary intoxication jury instruction so long as it negates intent.²⁴

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

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

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

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

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

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

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

²⁸ See *Harris*, 375 A.2d at 505.

²⁹ See *Bell*, 950 A.2d at 74.

³⁰ See *Washington*, 689 A.2d at 573.

³¹ See *Wheeler*, 832 A.2d at 1273.

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

³³ See *Carter*, 531 A.2d at 961.

³⁴ See *Parker*, 359 F.2d at 1013.

³⁵ See *Kyle*, 759 A.2d at 200.

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

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

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

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

⁴⁰ *Ortberg*, 81 A.3d at 307.

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

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

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

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

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

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

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

⁴⁴ Here’s how this phenomenon operates. Initially, courts may deem an offense to be one of “general intent” so as to preclude a voluntary intoxication defense. However, because “theory appears to dictate that intoxication is relevant to negate any subjective mental element,” judges feel compelled, for consistency’s sake, to “strip the statute defining an offense of subjective mental elements.” Eric A. Johnson, *The Crime That Wasn’t There: Wyoming’s Elusive Second-Degree Murder Statute*, 7 WYO. L. REV. 1, 44 (2007). The ongoing confusion surrounding the *mens rea* of assault under District law provides an illustrative example of this phenomenon—as recognized by Judge Ruiz’s concurrence in *Buchanan v. United States*, 32 A.3d 990, 997 (D.C. 2011).

That confusion seems to be rooted in an oft-cited U.S. Court of Appeals for the D.C. Circuit (CADC) decision, *Parker v. United States* (1966), addressing whether voluntary intoxication is a defense to assault with a dangerous weapon (“ADW”). 359 F.2d at 1009. The *Parker* court ultimately determined that this District statute does not “require[] an intent that is susceptible to negation through a showing of voluntary intoxication,” *Id.* at 1013, a conclusion that, as Judge Ruiz observes, “appears to rest upon the

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

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

unstated premise that simple assault is a ‘general intent’ crime.” *Buchanan*, 32 A.3d at 997. In order to justify this result in a principled fashion, however, the CADC seems to have been led to hold that ADW simply cannot require proof of subjective culpability. *Id.* at 1012. The CADC’s interpretation of the *mens rea* (or lack thereof) applicable to ADW has thereafter been applied by District courts outside of the ADW context to the offense of simple assault. Relying upon “what [was] arguably an over-extension of [the CADC’s] opinion in *Parker*,” *Buchanan*, 32 A.3d at 1001 n.7, these cases held that because assault is a general intent crime, “there need be no subjective intention to bring about an injury.” *Anthony v. United States*, 361 A.2d 202, 206 n.5 (D.C. 1976). In contrast, more recent DCCA cases indicate that the government is requirement to prove that the defendant not only intended to do the acts constituting the assault—akin to a strict liability standard—but also intended to cause (i.e., purposely or knowingly caused) the resulting bodily injury. *See, e.g., Williams v. United States*, 887 A.2d 1000, 1003 (D.C. 2005); *Buchanan*, 32 A.3d at 992.

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

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

⁴⁶ The intersection between the District’s voluntary intoxication principles and the District’s depraved heart form of second-degree murder is illustrative. *See* D.C. Code § 22-2103 (“Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree.”); *see also* D.C. Code § 22-2104 (second degree murder subject to possible life in prison). Although this version of second-degree murder requires proof that “the perpetrator was subjectively aware that his or her conduct created an extreme risk of death or serious bodily injury,” *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*), the DCCA has deemed depraved heart murder to be a general intent crime, to which an intoxication defense may not be raised. *Wheeler v. United States*, 832 A.2d 1271 (D.C. 2003); *see Davidson v. United States*, 137 A.3d 973 (D.C. 2016) (no intoxication defense available for depraved heart version of voluntary manslaughter either); *see also King v. United States*, 372 F.2d 383, 388 (D.C. Cir. 1967) (“[T]he rule that negatives voluntary intoxication as a defense to crimes . . . like manslaughter in effect holds men responsible for their fateful drinking, without regard to the extent of control at the moment of homicide.”) (quoted in *Davidson*, 137 A.3d at 975). This categorical denial of an intoxication defense seems to create a material risk that a minimally culpable actor could be convicted of second-degree murder.

To illustrate, consider the situation of X, who consumes an extremely large amount of alcohol by herself on the second level of her two-story District home. Soon thereafter, X’s sister, V, makes an

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

Substantively, there is significant overlap between these two frameworks. Subsections (a), (b), and (c) collectively establish that evidence of self-induced (or any other form of) intoxication may be adduced to disprove purpose or knowledge, but generally may not be adduced to disprove recklessness or negligence.⁵⁰ This roughly

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

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

⁴⁷ As the District’s criminal jury instructions phrase the question facing the fact-finder:

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

D.C. Crim. Jur. Instr. § 9.404.

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

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

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

corresponds with the common law framework currently employed by the DCCA: the DCCA *typically* associates specific intent crimes—to which an intoxication defense may be raised—with offenses requiring proof of purpose or knowledge,⁵¹ while *typically* associating general intent crimes—to which an intoxication defense may not be raised—with offenses requiring proof of recklessness or negligence.⁵²

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

In addition, the RCC approach leaves open the possibility that a person’s self-induced intoxication⁵⁵ could, under narrow circumstances, be relevant to defending against a recklessness or negligence charge.⁵⁶ The rationale is that when, due to a person’s self-induced state of intoxication, that person’s disregard of a risk is not clearly blameworthy, then it would be disproportionate to impose a criminal conviction for a recklessness or negligence crime.⁵⁷ The fact that current District law appears to impose a categorical bar on the presentation of evidence of self-induced intoxication to disprove the existence of comparable mental states, in contrast, creates a risk of imposing liability

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

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

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

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

⁵⁵ The phrase “self-induced intoxication,” employed in the RCC, mirrors the phrase “voluntary intoxication,” as employed in current District law.

⁵⁶ See RCC § 22E-209(c)-(d) and accompanying Explanatory Notes.

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

Because punishment represents the moral condemnation of the community, the imposition of criminal liability can only be justified where a person’s risk-taking fails to live up to the community’s values—and, therefore, *deserves* to be condemned—under the circumstances. What ultimately renders an actor’s disregard of a risk blameworthy, then, is whether it reflects a level of concern or attention for legally-protected interests that is *lower* than what a reasonable member of the community placed in the defendant’s situation could be expected to exercise.

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

for serious crimes on minimally culpable (or even non-culpable) actors.⁵⁸ RCC § 22E-209 effectively removes this categorical bar in the interests of proportionality.

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

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

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

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

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

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

Current District law has defined “intoxication” and related terminology in contexts where a person’s intoxicated state constitutes an objective element of an offense. See, e.g., D.C. Code § 50-2206.01 (defining intoxication and other related terms for traffic offenses); D.C. Code § 50-2206.11 (“No person shall operate or be in physical control of any vehicle in the District: (1) While the person is *intoxicated*; or (2) While the person is under the *influence of alcohol or any drug or any combination thereof*.”) (italics added). However, this terminology serves materially distinct functions in these latter contexts, and, therefore, does not provide an appropriate foundation for general culpability definitions.

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

RCC § 22E-210. ACCOMPLICE LIABILITY.

(a) *Definition of Accomplice Liability.* A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person:

- (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or
- (2) Purposely encourages another person to engage in specific conduct constituting that offense.

(b) *Principle of Culpable Mental State Elevation Applicable to Circumstances of Target Offense.* Notwithstanding subsection (a), to be an accomplice in the commission of an offense, a person must intend for any circumstance elements required by that offense to exist.

(c) *Grading Distinctions Based on Culpability as to Result Elements.* An accomplice in the commission of an offense that is graded by distinctions in culpability as to result elements is liable for any grade for which he or she possesses the required culpability.

(d) *Relationship Between Accomplice and Principal.* An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein, although the other person claimed to have committed the offense:

- (1) Has not been prosecuted or convicted; or
- (2) Has been convicted of a different offense or degree of an offense; or
- (3) Has been acquitted.

(e) *Definitions.*

- (1) “Culpability” has the meaning specified in RCC § 22E-201(d).
- (2) “Purposely” has the meaning specified in RCC § 22E-206(a).
- (3) “Intend” has the meaning specified in RCC § 22E-206(c).
- (4) “Circumstance elements” has the meaning specified in RCC § 22E- 201(c)(3).
- (5) “Result elements” has the meaning specified in RCC § 22E- 201(c)(2).

COMMENTARY

Explanatory Notes. Section 210 establishes general principles of accomplice liability applicable throughout the RCC.

The prefatory clause of subsection (a) establishes that accomplice liability is a means of holding one person liable for “the commission of an offense by another.” This clarifies that accomplice liability is derivative in nature.¹ That is, a person is not guilty of

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

an independent offense of “aiding and abetting” under the RCC.² Rather, an accomplice’s liability is derived from the liability of the principal actor.³

The derivative nature of accomplice liability has two main implications. First, an accomplice may only be held criminally responsible under section 210 upon proof that the principal actor in fact committed “an offense.”⁴ This reference to “an offense” includes general inchoate crimes, such as a criminal attempt, solicitation, or conspiracy, all of which may serve as the basis for accomplice liability.⁵ Second, an accomplice may

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

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

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

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

be both prosecuted and—contingent upon such proof—punished under section 210 as if he or she were the principal offender.⁶

The prefatory clause of subsection (a) also clarifies that accomplice liability necessarily incorporates “the culpability required by [the target] offense.”⁷ Pursuant to this principle, a defendant may not be held liable as an accomplice under section 210 absent proof that he or she acted with, at minimum, the culpable mental state(s)—in addition to any other broader aspect of culpability⁸—required to establish that offense.⁹

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

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

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

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

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

In this example, police receive a report that someone posing as a janitor in a District of Columbia government building, P, intends to murder a plain-clothes police officer sitting in the lobby to the entrance, V. According to this reliable tip, P’s plan is to quickly unhinge a large television that stands high above V, with the hopes that it will kill V upon impact. Soon thereafter, two officers arrive at the front of the

Paragraphs (a)(1) and (a)(2) establish two alternative means of satisfying the conduct requirement of accomplice liability: by rendering assistance and by offering encouragement.¹⁰ The assistance prong extends to both direct participation in the commission of a crime and any support rendered in the earlier, planning stages.¹¹ Typically, the assistance prong will be satisfied by conduct of an affirmative nature¹²; however, an omission to act also provides a viable basis for accomplice liability, provided that the defendant is under a legal duty to act¹³ and the other requirements of liability are met.¹⁴ The encouragement prong speaks to the promotion of an offense by

building, only to observe an individual, A, with a large collection of packages blocking the front entrance to the building. The officers' entry into the building is delayed due to A's blockage, which in turn enables P to successfully carry out the assassination. If A later finds herself in D.C. Superior Court charged with aiding the murder of a police officer committed by P, can she be convicted as an accomplice? The answer to this question depends upon whether A's state of mind fulfills both of the dual intent requirements governing accomplice liability.

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

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

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

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

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

¹² Illustrative examples of affirmative acts of assistance in support of a bank robbery include: (1) furnishing the principal with the means of committing a bank robbery (e.g., by providing guns, money, supplies or other instrumentalities); or (2) helping the principal with the preparation or execution of the crime (e.g., planning out the details, serving as a lookout, driving the getaway car, signaling the approach of the security guard, or preventing a warning from reaching the security guard). E.g., LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 1, at § 30.04.

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

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

psychological influence.¹⁵ It extends to various forms of influence, including (but not limited to) the rational or emotional support afforded by a command, request, or agreement, advice or counsel, and instigation, incitement, or provocation.¹⁶

To satisfy the conduct requirement of accomplice liability under paragraphs (a)(1) and (a)(2), it is not necessary that the principal actor have been subjectively aware of the effect of the accomplice's assistance or encouragement. However, the accomplice's conduct must have actually assisted or encouraged the principal in some non-trivial way.¹⁷ This means that an unsuccessful accomplice—i.e., one who *attempts* to aid or encourage the principal but fails to promote or facilitate the target offense in any way—is not subject to liability under section 210.¹⁸

Paragraphs (a)(1) and (a)(2) also clarify that the requisite assistance or encouragement must be accompanied by a purpose to facilitate or promote the principal's

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

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

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

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

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

criminal conduct.¹⁹ This “purposive attitude” constitutes the foundation of the culpability requirement governing accomplice liability.²⁰ It can be said to exist when a person, in rendering assistance or encouragement, *consciously desires* to facilitate or promote another person’s criminal conduct.²¹

The corollary to this purpose requirement is that accomplice liability is not supported under section 210 if the defendant’s primary motive was to achieve some other, non-criminal objective (e.g., “conduct[ing] an otherwise lawful business in a profitable manner”).²² And this is so even if the would-be accomplice knew that his or

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

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

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

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

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

her aid or encouragement was likely to promote or facilitate that criminal scheme.²³ Neither awareness of, nor indifference towards, the success of another person’s criminal plans is sufficient to satisfy the purpose requirement incorporated into paragraphs (a)(1) and (a)(2).²⁴

Subsection (b) provides additional clarity concerning the relationship between accomplice liability and the culpability requirement governing the target offense. Whereas the prefatory clause of subsection (a) broadly clarifies that accomplice liability entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the “defendant must intend for any circumstances required by that offense to exist.” The latter requirement incorporates a principle of culpable mental state elevation applicable whenever the target offense is comprised of a circumstance element that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).²⁵ To satisfy this threshold culpable mental state requirement, the

requirement appropriate because, *inter alia*, “there is generally more ambiguity in the overt conduct engaged in by the accomplice, and thus a higher risk of convicting the innocent”).

²³ It has been observed that:

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

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

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

²⁵ *See, e.g. Rosemond v. United States*, 134 S. Ct. 1240, 1242 (2014) (“[A]iding and abetting requires intent extending to the whole crime That requirement is satisfied when a person actively participates in a criminal venture with *full knowledge of the circumstances* constituting the charged offense.”); *United States v. Encarnacion-Ruiz*, 787 F.3d 581, 589 (1st Cir. 2015) (“[U]nder *Rosemond*, an aider and abettor of [the

government must prove that the defendant’s assistance or encouragement was accompanied by a *practically certain belief* that the circumstance elements incorporated into the target offense existed, or, alternatively, that the defendant *consciously desired* for the requisite circumstances to exist.²⁶

Subsection (c) addresses the appropriate disposition of complicity prosecutions involving the commission of an offense that is graded by distinctions in culpability as to result elements.²⁷ In this situation (most common in homicide prosecutions), an accomplice is liable for any grade for which he or she possesses the required culpability, although the person who committed the offense acted with a different kind of culpability.²⁸ Consequently, an accomplice may be convicted of a grade of an offense

crime of producing child pornography] must have *known* the victim was a minor” although the victim’s age is a matter of strict liability for the target offense). For those target offenses that already require proof of intent, knowledge, or purpose as to a circumstance element, subsection (b) does not elevate the applicable culpable mental state.

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

²⁷ The requirement in subsection (c) that the target “offense” be “graded by distinctions in culpability as to result elements” should be broadly construed to support convictions for greater and lesser-included versions of the same substantive offense. This should be done, moreover, even where the relevant criminal statutes are neither (1) formally described in the RCC as distinct degrees of the same offense, nor (2) codified in the same statutory provision. To illustrate, consider the overlapping, hierarchically related offenses of first-degree murder, second-degree manslaughter, and negligent homicide. These three offenses are *not* formally described as distinct degrees of the same offense (e.g., homicide) under the RCC, and each is codified in a different section of the code. See generally RCC §§ 22E-1101, 1102, and 1103. However, because all three of these homicide statutes are graded by distinctions in culpability as to the same result element (death), RCC § 22E-210(c) would authorize the imposition of liability for (among other possibilities) the following in a three person criminal scheme: (1) first-degree murder upon P; (2) second-degree manslaughter on A1; and (3) negligent homicide on A2. See, e.g., DRESSLER, *supra* note 1, at § 30.6 (“It is fair to say [] that when P commits the ‘offense’ of criminal homicide, this ‘crime’ is imputed to [A], whose own liability for the homicide should be predicated on his own level of *mens rea*, whether it is greater or less than that of the primary party.”); Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 386–87 (1997) (same).

²⁸ This means that (for example):

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

that is either higher²⁹ or lower³⁰ than that committed by the principal actor based upon distinctions between the two (or more) actors' states of mind.

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

Section 210 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles. Given the centrality of speech to encouragement, accomplice liability directly implicates a criminal defendant's First Amendment rights.³⁴ And while the U.S. Supreme Court recently clarified that “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,”³⁵ it also reaffirmed the “important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.”³⁶ The RCC respects this distinction by requiring that the defendant encourage the principal actor to engage in “*specific conduct*” constituting an offense under paragraph (a)(2).³⁷ To meet this requirement, it is not necessary that the

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

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

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

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

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

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

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

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

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

³⁷ See, e.g., Model Penal Code § 2.06(3)(a)(i) (“A person is an accomplice of another person in the commission of an offense if,” *inter alia*, he or she “*solicits* such other person to commit it[.]”) (italics)

defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. At the very least, though, it must be proven that the defendant’s communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.³⁸

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

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

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

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

added); Model Penal Code § 5.02(1) (“A person is guilty of solicitation to commit a crime if,” *inter alia*, he or she “*encourages* . . . another person to engage in *specific conduct* that would constitute such crime . . .”) (italics added).

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

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

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

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

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than

This statute “was enacted by Congress in 1901, eight years before its federal analogue.”⁴² It was the product of a “reform movement,” the purpose of which was to enact complicity legislation “abolish[ing] the distinction between principals and accessories and render[ing] them all principals.”⁴³ While the general purpose sought to be achieved by this statute are clear, its precise contours are more ambiguous. The District’s general complicity statute—like its federal analogue—does not define any of the relevant statutory terms it employs. This statutory silence has effectively delegated to District courts the responsibility to establish the elements of accomplice liability.

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

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

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

1/2 the maximum fine or imprisonment, or both, to which the principal offender may be subjected.

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

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

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

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

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

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

For example, the District’s general complicity statute utilizes a number of terms to express the conduct requirement of complicity: “*advising, inciting, or conniving* at the offense, or *aiding* or *abetting* the principal offender.”⁴⁵ The first three terms in this formulation—“advising,” “inciting,” and “conniving” rarely show up in the case law.⁴⁶ Nevertheless, their meaning, when viewed in historical context, is clear enough: they indicate that one may become an accomplice without being “personally present at the commission” of a crime.⁴⁷ Instead, as many modern criminal codes phrase it, “solicitation of the crime is enough.”⁴⁸

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

⁴⁵ D.C. Code § 22-1805.

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

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

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

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

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

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

In *Wesley v. United States*, the DCCA upheld a conviction for armed robbery premised on a complicity theory where the defendant merely engaged in a conversation

conspiracy.” *Tann*, 127 A.3d at 491 (quoting *Pereira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435 (1954)).

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

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

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

⁵² See *Walker v. United States*, 167 A.3d 1191, 1201–02 (D.C. 2017) (noting the alternative requirements of “encouragement or aid”); *Tann*, 127 A.3d at 499 n.11 (“Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.”) (quoting LAFAVE, *supra* note 3, at 2 SUBST. CRIM. L. § 13.2); see also *Tann*, 127 A.3d at 499 n.8 (“Nor has the government been able to find any case, from any jurisdiction, holding a defendant liable as an aider and abettor for the independent criminal act of another that the defendant did not intentionally encourage or assist in some way.”); cf. *English v. United States*, 25 A.3d 46, 53–54 (D.C. 2011) (“This is not a case, for example, in which ‘there appears to be some indication in the record before us that [Anderson] may have urged or directed the driver to take evasive action.’”) (quoting *United States v. Cook*, 181 F.3d 1232, 1235 (11th Cir. 1999)).

⁵³ It is well established under DCCA case law that “[a]lthough mere presence at the scene is not enough to establish guilt under an aiding and abetting theory,” little more than such presence is necessary. *Porter v. U.S.*, 826 A.2d 398, 405 (D.C. 2003); see *Settles*, 522 A.2d at 357 (“[M]ere presence at the scene of the crime, without more, is generally insufficient to prove involvement in the crime, but it will be deemed enough if it is intended to [aid] and does aid the primary actors.”); *Bolden v. United States*, 835 A.2d 532, 538–39 (D.C. 2003); compare *Perry v. United States*, 276 A.2d 719 (D.C. 1971) (mere presence), with *Forsyth v. United States*, 318 A.2d 292 (D.C. 1974) (presence coupled with flight and other circumstances).

⁵⁴ *Price v. United States*, 985 A.2d 434, 438 (D.C. 2009).

with a bystander that enabled the principal to “slip into the barbershop” that was ultimately robbed, and perhaps also “serv[ed] as a lookout” for the principal.⁵⁵

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

One issue relevant to the conduct requirement of accomplice liability upon which District law appears to be silent is whether assistance by omission can, under appropriate circumstances, suffice for liability. For example, may a corrupt police officer who fails to stop a crime with the intent to aid the perpetrators be deemed an accomplice to that crime? There does not appear to be any DCCA case law directly on point.⁵⁷ Nevertheless, general District authority on omission liability would seem to support imposing liability under these circumstances.⁵⁸ So too does the fact that the DCCA has held on multiple occasions that “failure to disassociate” oneself from a criminal scheme alongside “tacit approval” to the offenses perpetrated by the principal will suffice to satisfy the conduct requirement of accomplice liability.⁵⁹

⁵⁵ *Wesley v. United States*, 547 A.2d 1022, 1026–27 (D.C. 1988).

⁵⁶ *Creek v. United States*, 324 A.2d 688, 689 (D.C. 1974); see *In re A.B.H.*, 343 A.2d 573, 575 (D.C. 1975) (sufficient evidence of aiding and abetting where defendant had a close association with co-respondent prior to and after the purse snatching, defendant was present very near the scene of the crime, and fled from the scene with the co-respondent); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (“[T]he jury could reasonably have found that appellant had participated in planning the robbery, driven his friends across town to the robbery site, waited for them while they robbed the decedent, and then picked them up after the crime. This evidence was sufficient to support the conviction of appellant as an aider and abettor of the robbery.”).

⁵⁷ Note, however, that the commentary to the D.C. Criminal Jury Instruction on attempt liability, § 7.101, states that:

The court may wish to modify the instruction where an omission might constitute an attempt to commit a crime. For example, if the government alleges that the defendant did not activate the store’s alarm system as part of a robbery attempt, the court might wish to modify the instruction that the “defendant omitted to do an act”

See also *English v. United States*, 25 A.3d 46, 54 (D.C. 2011) (“Although not directly on point, we note that there is authority for the proposition that, depending on the evidence in a particular case, if the vehicle in which a passenger is riding is involved in an accident causing death or injury, and if he or she fails to stop or to render assistance to the injured person, the passenger may be liable as an aider and abettor.”) (collecting cases).

⁵⁸ See Commentary to RCC § 22E-202(c): Relation to Current District Law.

⁵⁹ *Johnson v. United States*, 883 A.2d 135, 143 (D.C. 2005) (“[H]aving knowledge of the offenses and failing to withdraw can be sufficient to establish implied approval, and hence aiding and abetting.”); *Prophet v. United States*, 602 A.2d 1087, 1093 (D.C. 1992) (“[T]he jury could reasonably conclude that [the defendant] failed to disassociate himself from [his co-defendant] and tacitly approved [his] actions” when he fled with the co-defendant even after “watch[ing] the robbery and murder”); *Clark v. United States*, 418 A.2d 1059 (D.C. 1980) (sidewalk robbery by co-defendant, who ran through alley into defendant’s car; defendant drove at normal speed for one block and stopped car once police emergency lights activated); *Gayden v. United States*, 584 A.2d 578, 582–83 (D.C. 1990) (there was sufficient evidence to support instruction on aiding and abetting where the defendant “traveled to the scene of the crime [,] . . . was present at the killing[,] and . . . fled the scene with [two possible killers]”); *Settles v. United States*, 522 A.2d 348, 358 (D.C. 1987) (there was sufficient evidence of aiding and abetting where the defendant was

Subsection (a) codifies the above District authorities applicable to the conduct requirement of accomplice liability. More specifically, subsections (a)(1) and (a)(2) establish two alternative means of being an accomplice: by rendering assistance and by offering encouragement.⁶⁰ The first prong will most frequently be established by proof of physical assistance rendered by affirmative conduct; however, an omission to act may also provide a viable basis for establishing the assistance prong, provided that the defendant is under a legal duty to act (and the other requirements of liability are met).⁶¹ The encouragement prong, in contrast, encompasses promotion of an offense by psychological influence. It includes various forms of influence, including (but not limited to) the encouragement afforded by a command, request, or agreement, as well as advice, counsel, instigation, incitement, and provocation.

RCC §§ 210 (a), (b), & (c): Relation to Current District Law on Culpable Mental State Requirement. Subsections (a), (b), and (c) codify and clarify District law concerning the culpable mental state requirement governing accomplice liability.

The DCCA has addressed the culpable mental state requirement of accomplice liability on numerous occasions. Generally speaking, it is well established by such case law that “[t]here is a dual mental state requirement for accomplice liability.”⁶² The first requirement speaks to the relationship between the accomplice’s state of mind and the promotion or facilitation of the requisite criminal conduct committed by the principal. The second requirement, in contrast, speaks to the relationship between the accomplice’s state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense).

As it relates to the first of these two culpable mental state requirements, DCCA case law establishes that the defendant must have acted with the *purpose* of promoting or facilitating criminal conduct. The basis for this requirement is the DCCA’s *en banc* decision in *United States v. Wilson-Bey*, which holds that, “[t]o establish a defendant’s criminal liability as an aider and abettor, [] the government must prove . . . that the accomplice . . . *wished to bring about* [the criminal venture], and [] *sought by his action to make it succeed*.”⁶³

potentially a lookout and “was with Settles before the crime, was present during the crime, and fled with Settles after the crime” because the defendant “must have had actual knowledge that a crime was being committed, but . . . he did nothing to disassociate himself from the criminal activity”). *Compare Jones v. United States*, 625 A.2d 281 (D.C. 1993) (fact that defendant brushed by the complainant shortly before co-defendant stabbed complainant, then walked away with co-defendant “laughing and talking” insufficient to prove aiding and abetting) with *Acker v. United States*, 618 A.2d 688 (D.C. 1992) (“jovial quip” to school friend before robbery and failure to prevent robbery of friend insufficient to prove aiding where defendant also failed to facilitate getaway of those actively engaged in the robbery).

⁶⁰ Whether assistance or encouragement is at issue, there is no requirement that the principal actor have *actually* been aware of the effect of the defendant’s conduct. However, the defendant’s conduct *must have, in fact*, assisted or encouraged the principle actor in some way (i.e., an unsuccessful accomplice is not subject to criminal liability under RCC § 22E-210).

⁶¹ See generally RCC § 22E-202(c) (setting forth the requirements of omission liability under the RCC).

⁶² *Tann*, 127 A.3d at 491 (“There is a dual mental state requirement for accomplice liability: the accomplice not only must have the culpable mental state required for the underlying crime committed by the principal; he also must assist[] or encourage[] the commission of the crime committed by the principal with the intent to promote or facilitate such commission.”).

⁶³ *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006).

This requirement of a “purposive attitude” is, as the *Wilson-Bey* court explained, drawn from Judge Hand’s well-known decision in *United States v. Peoni*.⁶⁴ As the DCCA observed:

Although *Peoni* was decided sixty-eight years ago, it remains the prevailing authority defining accomplice liability. In 1949 the Supreme Court explicitly adopted *Peoni*’s purpose-based formulation. *Nye & Nissen v. United States*, 336 U.S. 613, 618, 69 S.Ct. 766, 93 L.Ed. 919 (1949). This court has likewise followed *Peoni*, see, e.g., [*Reginald B.*] *Brooks v. United States*, 599 A.2d 1094, 1099 (D.C.1991); *Hackney*, 389 A.2d at 1342, and we have held that an accomplice “must be concerned in the commission of *the specific crime with which the principal defendant is charged* [;] he must be an associate in guilt of *that crime*.” *Roy v. United States*, 652 A.2d 1098, 1104 (D.C. 1995) (emphasis in original).

Every United States Circuit Court of Appeals has adopted *Peoni*’s requirement that the accomplice be shown to have intended that the principal succeed in committing the charged offense, and the federal appellate courts have thus rejected, explicitly or implicitly, a standard that would permit the conviction of an accomplice without the requisite showing of intent. The majority of state courts have also adopted a purpose-based standard. See also LaFave § 13.2(d), at 349 & n. 97. Federal and state model jury instructions are also generally consistent with *Peoni*, and require proof that the accomplice intended to help the principal to commit the charged offense.⁶⁵

Since *Wilson-Bey*, *Peoni*’s purpose-based standard has been incorporated into the District’s jury instructions,⁶⁶ and reaffirmed in numerous DCCA cases.⁶⁷ At the same time, this standard is not a model of clarity, and has led to subsequent litigation.⁶⁸

⁶⁴ 100 F.2d 401 (2d Cir. 1938). After considering an array of common law authorities, Judge Hand concluded that:

[A]ll these definitions have nothing whatever to do with the probability that the forbidden result would follow upon the accessory’s conduct; . . . [T]hey all demand *that he in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed*. All the words used—even the most colorless, “abet”—carry an implication of purposive attitude towards it.

Id.

⁶⁵ *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006).

⁶⁶ D.C. Crim. Jur. Instr. § 3.200.

⁶⁷ See, e.g., *Robinson v. United States*, 100 A.3d 95, 106 (D.C. 2014); *Gray v. United States*, 79 A.3d 326, 338 (D.C. 2013); *Joya v. United States*, 53 A.3d 309, 314 (D.C. 2012); *Ewing v. United States*, 36 A.3d 839, 846 (D.C. 2012).

⁶⁸ For example, in *Tann v. United States*, a split panel of the DCCA disagreed over the specificity of the purpose requirement, questioning whether an “aider and abettor who acts, as *Wilson-Bey* requires, with the same purpose and intent as the principal must also ‘intentionally associate’ with that specific principal.” 127 A.3d at 440. Which is to say, “[m]ore pointedly, the question [raised in *Tann* was] whether the aider and abettor must know of the presence and conduct of the specific principal and form the intent to help *him*

Nevertheless, this much appears to be clear from the relevant District authorities: in order to be held liable as an accomplice, the defendant must, at minimum, have “designedly encouraged or facilitated” the commission of criminal conduct by another.⁶⁹

As DCCA case law relates to the second culpable mental state requirement applicable to accomplice liability, the relationship between the accomplice’s state of mind and the results and/or circumstances brought about by the principal (and which are prohibited by the target offense), there are a few well established principles.

Most fundamentally, the government must prove that the defendant acted with, at minimum, “the culpable mental state required for the underlying crime committed by the principal.”⁷⁰ Practically speaking, this means that a defendant may never be held

or her with the commission of his or her crime, as opposed to share simply (with whoever shared the aider and abettor’s purpose) in the *mens rea* required to commit the crime itself.” *Id.* The majority opinion answered this question in the negative, determining that:

[T]he case law supports the following propositions rooted in the common law and incorporated in our aiding-and-abetting statute: (1) the aider and abettor must have the *mens rea* of the principal actor, see *Wilson–Bey*, 903 A.2d at 822, and must have the “purposive attitude towards” the criminal venture described in *Peoni*, 100 F.2d at 402; (2) a defendant is not responsible for the actions of a third-party who, wholly unassociated with and independent of the defendant, enters into a crime when there is no community of purpose between the defendant and the third-party . . . however, (3) the defendant need not know of the presence of every participant in a group crime (including the principal) in order to be found guilty under an aiding-and-abetting theory of liability . . . and (4) where the criteria in (1) above are met and the evidence at trial proves that the defendants by their action, foreseeably (and thus, the factfinder may conclude, intentionally) incited action by a third party who shared in their community of purpose, aiding-and-abetting liability may be found . . .

127 A.3d at 444-45. Note that the majority opinion still holds that the government had to prove, *inter alia*, that “Harris and Tann intended to aid any of their fellow crew members who were present and participating in doing so.” *Id.* at 450.

A partial dissenting opinion written by Judge Glickman reached an opposite conclusion, determining that a person “can[not] be found guilty as an aider and abettor under the law of the District of Columbia without proof that he intended to assist or encourage the principal offender.” *Id.* at 499. This is not to say that “the accomplice always must know the identity of the principal offender.” *Id.* Indeed, “it is possible in some circumstances to be an aider and abettor—to help or induce another person to commit a crime, and to do so knowingly and intentionally—without knowing who that other person is.” *Id.* (“A typical example is the person who knowingly attaches himself to a large group, such as a lynch mob, a criminal gang, or a vigilante body, that is engaged in or bent on breaking the law.”) *Id.* Even still, “one cannot be liable as an aider and abettor without having the intent to assist or encourage a principal actor at all.” *Id.* That is, “[o]ne cannot be an inadvertent accomplice.” *Id.*

⁶⁹ *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)); *Evans v. United States*, 160 A.3d 1155, 1161 (D.C. 2017); see also *English v. United States*, 25 A.3d 46, 53 (D.C. 2011) (“The key question is whether, drawing all reasonable inferences in the prosecution’s favor, an impartial jury could fairly find beyond a reasonable doubt that Anderson intentionally participated in English’s reckless flight from the pursuing officer, and that he not only wanted English (and his passengers) to succeed in eluding the police (which Anderson undoubtedly did), but that he also took concrete action to make his hope a reality.”).

⁷⁰ *Tann*, 127 A.3d at 444-45; see, e.g., *Collins v. United States*, 73 A.3d 974, 981 n.3 (D.C. 2013) (in order to convict a defendant as an aider and abettor “the government was required to show that the accomplice had the same intent necessary to prove commission of the underlying substantive offense by the principal”); *Lancaster v. United States*, 975 A.2d 168, 174 (D.C. 2009) (“Because armed robbery is a specific-intent crime, the government must prove that the aider and abettor shared the same *mens rea* required of the

criminally responsible for the conduct of another as an accomplice absent proof that the defendant acted with the culpable mental states governing the results and circumstances that comprise the offense committed by the principal.⁷¹

So, for example, the DCCA in *Wilson Bey* held that, with respect to results, an accomplice to first-degree murder must, like the principal, “be shown to have specifically intended the decedent’s death and to have acted with premeditation and deliberation.”⁷² And, as for circumstances, the DCCA held in *Robinson v. United States* that, “[i]f the principal offender must know he is armed when he is committing a violent or dangerous crime in order to be subject to the ‘while armed’ enhancement of § 22–4502, then the aider and abettor . . . also must know the principal is armed for the enhancement to be applicable to her as well.”⁷³

That proof of the culpable mental states governing the results and circumstances that comprise the target offense is *necessary* to support accomplice liability, however, raises the question of whether it is also *sufficient*? With respect to results, it would appear that it is; DCCA case law seems to endorse a principle of culpable mental state equivalency under which proof of the minimum culpable mental state requirement applicable to the results of the target offense will suffice for accomplice liability.

For example, in *Coleman v. United States*, the DCCA held that an accomplice to depraved heart murder must (but need only) possess the extreme recklessness as to death required of the principal of a depraved heart murder.⁷⁴ And in *Perry v. United States*, the DCCA held that an accomplice to aggravated assault must (but need only) possess the extreme recklessness as to serious bodily required of the principal of an aggravated assault.⁷⁵

As for circumstances, DCCA case law is more ambiguous. Generally speaking, the government is required to show in all cases in which accomplice liability is charged that the defendant’s “participation was with guilty knowledge.”⁷⁶ In practice, this

principals.”); *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006) (“[W]here a specific mens rea is an element of a criminal offense, a defendant must have had that mens rea himself to be guilty of that offense, whether he is charged as the principal actor or as an aider and abettor.”); *Carter v. United States*, 957 A.2d 9, 19 (D.C. 2008).

⁷¹ See, e.g., *Appleton v. United States*, 983 A.2d 970, 977 (D.C. 2009) (“Any instruction on aiding and abetting must make clear that a defendant needs to have the *mens rea* required of the underlying crime in order to be convicted of the crime as an aider and abettor.”); *Wheeler v. United States*, 977 A.2d 973 (D.C. 2009), *reh’g granted, opinion modified*, 987 A.2d 431, 431 (D.C. 2010) (*per curiam*) (The “charged aider and abettor will have to know and intend the steps taken, amounting to the same mental state required of the principal.”).

⁷² *Wilson Bey*, 903 A.2d at 840 (“Because the District’s aiding and abetting statute requires proof that an accomplice acted with the mental state necessary to convict her as a principal, the government here was required to prove, in order for the jury to find [the defendant] guilty of first-degree murder, that she acted with a specific intent to kill after premeditation and deliberation.”).

⁷³ *Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014).

⁷⁴ *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); see *Tann*, 127 A.3d at 430-31 (“Because he was convicted of second-degree murder for aiding and abetting Cooper’s shooting of Terrence Jones, the government was required to prove that Tann had, at a minimum, a “depraved heart” with regard to Terrence Jones’s death.”).

⁷⁵ *Perry v. United States*, 36 A.3d 799, 817–18 (D.C. 2011); see also *Story v. United States*, 16 F.2d 342, 344 (D.C. Cir. 1926) (upholding accomplice liability based on “criminal negligence” as to causing death).

⁷⁶ *Tyree v. United States*, 942 A.2d 629, 636 (D.C. 2008); see, e.g., *Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017); *Tann*, 127 A.3d at 434; *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016);

appears to amount to a principle of culpable mental state elevation, under which proof of awareness or belief as to the target offense’s circumstance elements is necessary to secure a conviction based on accomplice liability.

The clearest statement of this approach is reflected in the DCCA’s decision in *Robinson v. United States*, which specifically held that “[a] person cannot intend to aid an armed offense if she is unaware a weapon will be involved.”⁷⁷ The basis for such a determination is, as the *Robinson* court explains, the more general idea that, in order for an accomplice to be deemed “guilty of a crime”—for example, “an offense committed while armed”—the defendant “must, *inter alia*, intend to facilitate the *entire offense*.”⁷⁸

This effective principle of culpable mental state elevation is, as the *Robinson* court proceeds to explain, both rooted in the DCCA’s *en banc* opinion in *Wilson-Bey*, as well as the U.S. Supreme Court’s recent decision in *Rosemond v. United States*, which held that “an aiding and abetting conviction requires not just an act facilitating one or another element, but also a state of mind extending to the entire crime.”⁷⁹ (Which is to say, as the *Rosemond* Court explained, “[t]he intent must go to the specific and entire crime charged,” such as “predicate crime plus gun use.”⁸⁰) Since *Robinson* was handed down, this rationale has been reaffirmed by the DCCA on multiple occasions.⁸¹

There exists one additional principle governing the culpable mental state of accomplice liability under District law that bears notice. While an accomplice may never be convicted of an offense absent proof of a culpable mental state that satisfies the requirements of the offense charged,⁸² “the principal and the aider and abettor(s) need not have the same *mens rea* as each other if an offense can be committed with an alternate *mens rea*.”⁸³ Rather, where an offense is divided into degrees based upon distinctions in culpability (e.g., homicide), “each participant’s responsibility [turns] on his or her individual intent or *mens rea*.”⁸⁴

Consistent with this principle, the DCCA in *Mayfield v. United States* deemed the defendant’s conviction for premeditated first-degree murder while armed to be appropriate under an aiding and abetting theory, although the principal who had fired fatal shot was convicted of second-degree murder.⁸⁵ Likewise, in at least two other

Wheeler v. United States, 977 A.2d 973, 986 (D.C. 2009), *reh’g granted, opinion modified*, 987 A.2d 431 (D.C. 2010).

⁷⁷ *Robinson*, 100 A.3d at 105–06.

⁷⁸ *Robinson*, 100 A.3d at 106 and n.17 (citing *Wilson-Bey*, 903 A.2d at 831).

⁷⁹ *Robinson*, 100 A.3d at 105–06 (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)).

⁸⁰ See *Rosemond*, 134 S. Ct. at 1249.

⁸¹ See, e.g., *Buskey v. United States*, 148 A.3d 1193, 1207 (D.C. 2016); *Tann*, 127 A.3d at 434; see also *Evans v. United States*, 160 A.3d 1155, 1162 (D.C. 2017) (“Evans was found guilty of the charges relating to weapons via the aiding and abetting theory and accordingly, the government was required to prove Evans’s guilty knowledge.”).

⁸² *Kitt v. United States*, 904 A.2d 348, 356 (D.C. 2006).

⁸³ Commentary on D.C. Crim. Jur. Instr. § 3.200.

⁸⁴ *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008) (quoting *Wilson-Bey v. United States*, 903 A.2d 818 (D.C. 2006) (*en banc*)).

⁸⁵ 659 A.2d 1249, 1254 (D.C. 1995). The U.S. Court of Appeals for the D.C. Circuit, discussing District case law on this point, observes that “[t]here is nothing unfair about [such an outcome].” *United States v. Edmond*, 924 F.2d 261, 267 (D.C. Cir. 1991).

First-degree murder requires premeditation, as when a killing is planned and calculated; second-degree murder does not involve planning, although the homicide is committed

decisions, the DCCA has—again, in accordance with this principle—deemed it appropriate to hold a secondary party liable for second-degree murder, although the principal party committed a premeditated first-degree murder.⁸⁶

Viewed collectively, the above analysis of District law supports four propositions. First, an accomplice must act with the purpose of assisting or encouraging the criminal conduct of another. Second, an accomplice need only act with the culpable mental state applicable to the result element of the offense perpetrated by another. Third, an accomplice must act with at least knowledge of—or intent as to—the circumstances of the offense perpetrated by another, regardless of whether the principal may be convicted based upon some lesser culpable mental state. Fourth, and finally, where an offense is graded based upon distinctions in culpability, an accomplice may be held liable for any grade for which he or she possesses the required culpability.

Section 210 codifies these propositions as follows. The prefatory clause of subsection (a) establishes that the culpability requirement applicable to accomplice liability necessarily incorporates “the culpability required by [the target] offense.” Subparagraphs (a)(1) and (2) thereafter establish that a requirement of purpose is applicable to both the assistance/encouragement as well as to the conduct sought to be brought about by that assistance/encouragement. Next, subsection (b) incorporates a principle of culpable mental state elevation under which proof of intent on behalf of the accomplice is required—regardless of whether the target offense is comprised of a circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). Finally, subsection (c) clarifies where an offense “is divided into degrees based upon distinctions in culpability as to results,” an accomplice may be held “liable for any grade for which he or she possesses the required culpability.”

RCC § 22E-210(d): Relation to Current District Law on Relationship Between Accomplice and Principal. Subsection (d) both codifies and clarifies current District law concerning the nature of the relationship between an accomplice and the principal.

It is well established, both inside and outside of the District, that complicity is not a separate crime; rather, it delineates a theory of liability through which one person can be held legally responsible for one or more crimes committed by another person.⁸⁷ This

intentionally and with malice aforethought. *Harris v. United States*, 375 A.2d 505, 507–08 (D.C.1977); *Austin v. United States*, 382 F.2d 129, 137 (D.C.Cir.1967). In a joint trial, if a jury thought an aider and abettor carefully conceived a murder but enlisted an executioner only at the last possible moment, it could consistently convict the abettor of first-degree murder while finding the actual perpetrator guilty only of the lesser offense. There is no reason why separate juries in separate trials of the principal and the aider and abettor would be acting inconsistently or unfairly if they did the same. The degree of murder in each case depends on the *mens rea* of the defendant who is on trial.

Id.

⁸⁶ *McKnight v. United States*, 102 A.3d 284, 285 (D.C. 2014); *Coleman v. United States*, 948 A.2d 534, 552 (D.C. 2008); see *Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) (“As voluntary manslaughter while armed is a lesser included offense within second-degree murder while armed, the jury necessarily found that codefendant Simpson’s conduct included voluntary manslaughter while armed. Having so found, the jury’s conviction of appellant for aiding and abetting that offense is proper.”).

⁸⁷ See, e.g., *Hawthorne v. United States*, 829 A.2d 948, 952–53 (D.C. 2003); *Payton v. United States*, 305 A.2d 512, 513 (D.C. 1973).

is clearly reflected in the District’s complicity statute, which establishes that “all persons advising, inciting, or conniving at the offense, or aiding and abetting the principal offender, shall be charged as principals and not as accessories.”⁸⁸

One important implication of this aspect of complicity is that liability for “aiding and abetting is predicated upon a proper demonstration of all of the necessary elements of the underlying criminal act.”⁸⁹ Which is to say, as the District’s criminal jury instructions phrase the point: “[f]or a defendant to be convicted as an aider and abettor, the government must prove beyond a reasonable doubt all of the elements of the underlying crime, including commission of the crime by someone other than the accused.”⁹⁰

A good illustration of this basic requirement is the DCCA case law on the intersection of complicity and the District offense of carrying a pistol without a license (CPWL). Where a CPWL charge is in play, it is well-established that a “defendant cannot be convicted . . . on an aiding and abetting theory where there is no proof that the person in actual possession of the pistol did not have a license to carry it.”⁹¹ Relying on this legal proposition, the DCCA has, in turn, overturned complicity-based convictions for CPWL premised upon proof that the defendant him or herself, rather than the principal, lacked the requisite license.⁹²

District case law also provides additional clarity on four important aspects of this basic requirement. First, while proof that a criminal offense was committed is a necessary component of accomplice liability, that offense need not be a *completed* offense. Rather, a person may be held liable for aiding and abetting an *attempt* to commit an offense, so long as it is shown that the principal him or herself committed that attempt.⁹³ Second, “[a]n aider and abettor may be convicted of an offense even though the principal has not been convicted.”⁹⁴ Third, an aider and abettor may be convicted of an offense even though the principal has been acquitted.⁹⁵ And fourth, an “aider and abettor may be convicted of a lesser or greater offense than the principal.”⁹⁶

⁸⁸ D.C. Code § 22-1805.

⁸⁹ *Matter of J. W. Y.*, 363 A.2d 674, 677 (D.C. 1976); *see, e.g., United States v. Wiley*, 492 F.2d 547, 551 (D.C. Cir. 1973); *Hawthorne*, 829 A.2d at 952; *Gray v. United States*, 260 F.2d 483, 484 (D.C. Cir. 1958); *see also* D.C. Crim. Jur. Instr. § 3.200 (“[I]t is not necessary that all the people who committed the crime be caught or identified. It is sufficient if you find beyond a reasonable doubt that the crime was committed by someone and that the defendant knowingly and intentionally aided and abetted in committing the crime.”).

⁹⁰ D.C. Crim. Jur. Instr. § 3.200.

⁹¹ *Jefferson v. U.S.*, 558 A.2d 298, 303-04 (D.C. 1989); *see Halicki v. United States*, 614 A.2d 499, 503-04 (D.C. 1992) (“[W]e have repeatedly held that, in order to convict of CPWL on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed to carry the pistol.”); *Jackson v. U.S.*, 395 A.2d 99, 103 n.6 (D.C. 1978).

⁹² *Jefferson*, 558 A.2d at 303-04; *Jackson*, 395 A.2d at 103 n.6.

⁹³ *See, e.g., Ladrey v. United States*, 155 F.2d 417 (D.C. Cir. 1946) (attempted bribery of witness premised on complicity theory); *Williams v. United States*, 190 A.2d 269 (D.C. 1963) (attempted petit larceny premised on complicity theory); *Montgomery v. United States*, 384 A.2d 655 (D.C.1978) (same); *Carter v. United States*, 957 A.2d 9, 17 (D.C. 2008) (attempted armed robbery premised on complicity theory); *Felder v. United States*, 595 A.2d 974, 975 (D.C. 1991) (same).

⁹⁴ *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995); *Murchison v. United States*, 486 A.2d 77, 81 (D.C. 1984).

⁹⁵ *Morriss v. United States*, 554 A.2d 784, 790 (D.C. 1989) (“[T]he acquittal of a principal does not preclude conviction of an aider and abettor”); *Gray v. U.S.*, 260 F.2d 483 (D.C. Cir. 1958) (conviction of aider and abettor sustained despite acquittal of the principal); *United States v. McCall*, 460 F.2d 952, 958

Consistent with the above analysis of District law, subsection (d) addresses the relation between the prosecution of the accomplice and the treatment of the person who is alleged to have committed the offense as follows. Subsection (d) first establishes that “[a]n accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein.” This clarifies that accomplice liability entails proof of the defendant’s complicity in the commission of an offense that was in fact, committed by another person. Thereafter, subsection (d) identifies various ways in which the legal disposition of the principal’s situation is immaterial to that of the accomplice, namely, it is not a defense to a prosecution premised on a theory of aiding and abetting that “the other person claimed to have committed the offense: (1) has not been prosecuted or convicted; (2) has been convicted of a different offense or degree of an offense; or (3) has been acquitted.”

(D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *see Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Standefer v. United States*, 447 U.S. 10, 14–20 (1980) (conviction of principal is not a prerequisite to an aiding and abetting conviction, even where principal is acquitted in a separate trial)); *United States v. McCall*, 460 F.2d 952, 958 (D.C. Cir. 1972) (acquittal of principal in separate trial does not preclude conviction of aider and abettor); *U.S. v. Edmond*, 924 F.2d 261 (D.C. Cir. 1991) (defendant could be convicted as aider and abettor to first degree murder after gunman had been acquitted of offense).

⁹⁶ *Mayfield v. United States*, 659 A.2d 1249, 1254 n.4 (D.C. 1995) (citing *Branch v. United States*, 382 A.2d 1033, 1035 (D.C. 1978) (aider and abettor convicted of lesser offense).

RCC § 22E-211. LIABILITY FOR CAUSING CRIME BY AN INNOCENT OR IRRESPONSIBLE PERSON.

(a) *Causing Crime by an Innocent or Irresponsible Person.* A person is legally accountable for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(b) *Innocent or Irresponsible Person Defined.* An “innocent or irresponsible person” within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense:

- (1) Lacks the culpable mental state requirement for that offense; or
- (2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.

(c) *Liability Based on Legal Accountability.* A person is guilty of an offense if it is committed by the conduct of another person for which he or she is legally accountable under subsection (a).

(d) *Other Definitions.*

- (1) “Culpability” has the meaning specified in RCC § 22E-201(d).
- (2) “Causes” has the meaning specified in RCC § 22E-204(a).
- (3) “Culpable mental state” has the meaning specified in RCC § 22E-205(b).

COMMENTARY

Explanatory Notes. Section 211 establishes general principles of legal accountability based on causing crime by an innocent or irresponsible person.¹

The theory of liability codified in this section provide a causal mechanism for holding one party, P, criminally liable for the acts of another party, X, under circumstances where X is innocent or irresponsible, and, therefore, cannot him or herself be held criminally liable.² Where, as in these situations, P has effectively used X as a

¹ That “one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent” is a “universally acknowledged” principle of common law origin. Model Penal Code § 2.06 cmt. at 300; *see, e.g., Morrisey v. State*, 620 A.2d 207, 211 (Del. 1993) (“It is well-established at common law that an individual is criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime.”); Commentary on Ky. Rev. Stat. Ann. § 502.010 (“That an individual may incur criminal liability by procuring a prohibited harm through an act of an innocent or irresponsible agent is a principle of long standing.”); *see also, e.g., United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) (“[This] doctrine is an outgrowth of common law principles of criminal responsibility dating at least as far back as *Regina v. Saunders*, 2 Plowd. 473 (1575); and of principles of civil responsibility established, by force of the maxim *qui facit per alium facit per se*, at least as early as the 14th century”); F.B. Sayre, *Criminal Responsibility for the Acts of Another*, 43 HARV. L. REV. 689 (1930).

² Ordinarily, one party cannot be held criminally liable for the conduct of a second party unless the second party actually commits a crime. *E.g., WAYNE R. LAFAYE*, 2 SUBST. CRIM. L. § 13.1 (3d ed. Westlaw 2019). However, where the second party is an innocent or irresponsible agent who has been manipulated by the first party to commit what would be a crime if the second party were not legally excused, then the first

means of achieving a criminal objective, it is appropriate to view X’s conduct as an extension of P’s for analytical purposes.³ Section 211 authorizes this form of legal accountability⁴ upon proof of three basic requirements.

The first requirement is that the intermediary must qualify as “an innocent or irresponsible person” under subsection (a). This phrase, as further clarified in subsection (b), envisions two different types of actors.⁵ Pursuant to paragraph (b)(1), there are those who, having engaged in conduct that satisfies the objective elements of an offense, lack

party “is considered the perpetrator of the offense, the ‘principal in the first degree’ in traditional common law parlance, based on the ‘innocent instrumentality’ doctrine.” *E.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.03 (6th ed. 2012).

The following hypothetical is illustrative. P, a drug dealer, asks X, his sister, to pick up a package for him at the post office. P credibly tells X—who is unaware of her brother’s means of employment—that the package is filled with cooking spices. However, the package is actually filled with heroin. Soon after picking up the package from the post office, X is arrested in transit. On these facts, X cannot be convicted of possession of narcotics because she lacks the required culpable mental state (i.e., knowledge) as to the nature of the substance possessed. And because X cannot be convicted for directly possessing the heroin, P cannot be convicted for possessing the heroin as X’s accomplice under section 210, which requires “proof of the commission of the offense” by another person. RCC § 22E-210(d); *see also id.* at § (a) (“A person is an accomplice in the commission of an offense by another . . .”). P can, however, be held criminally responsible for possession as a *principal* under section 211 upon proof that: (1) P caused X to possess the heroin; (2) P acted with the culpable mental state for drug possession; and (3) X lacked the culpable mental state for drug possession.

³ *See, e.g.*, Model Penal Code § 2.06(2)(a) (“A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.”).

⁴ Accomplice liability and causing crime by an innocent or irresponsible person constitute distinct bases of legal accountability (that is, ways of holding one person criminally responsible for the conduct of another person). To illustrate the different roles these theories play, consider the difference between: (1) aiding and abetting a theft via a solicitation; and (2) causing an innocent person to commit a theft via a solicitation.

In the first scenario, P says the following to X: “V just bought a really expensive television, and I have his house keys. How about I give them to you, you grab the television while V is away, and then I’ll sell the TV and we can split the profits?” If X agrees to the plan and the scheme is successful, X is the perpetrator of the offense and P is an accomplice to the theft based upon the solicitation under RCC § 22E-210.

In the second scenario, P lies to X: “My new television set is at V’s house. I let V borrow it, but V no longer needs it and has asked me to pick it up/given me his keys. Would you do me a favor, X, and retrieve the TV for me while V is at school?” If X believes P’s false representations and retrieves V’s property, P would not be X’s accomplice since X did not actually commit theft. (That is, although X took V’s property, X did not possess the intent to steal, and, therefore, X cannot be convicted of theft.) P can, however, be convicted of directly perpetrating the theft himself under section 211 based on his having caused innocent person X to satisfy the objective elements of theft with the intent to steal.

See generally DRESSLER, *supra* note 2, at § 28.01 (employing similar illustration).

⁵ The definition of “innocent or irresponsible person” in subsection (b) is not necessarily limited, however, to these two different types of actors. *See* RCC § 22E-211(b) (use of “includes,” rather than “means,” in prefatory clause). This non-exclusive definition leaves open the possibility that an intermediary who is justified, or possesses some other defense other than an excuse, may also qualify as an “innocent or irresponsible person” within the meaning of subsection (a). *See, e.g.*, Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 372-85 (1985) (discussing conceptual difficulties relevant to who qualifies as innocent or irresponsible person); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 82 (Westlaw 2019) (same); *see also, e.g.*, Ky. Rev. Stat. Ann. § 502.010(2) (use of “includes” in comparable statutory definition of innocent or irresponsible person); Ala. § 13A-2-22(2)(b) (same).

the culpable mental state required for that offense.⁶ Pursuant to paragraph (b)(2), there are those who, having engaged in conduct that satisfies the objective elements of an offense, meet the requirements for a general excuse defense,⁷ such as insanity,⁸ immaturity,⁹ duress,¹⁰ or a reasonable mistake as to justification.¹¹

The second requirement is one of causation, namely, the defendant must *cause* the (innocent or irresponsible) intermediary to engage in conduct constituting an offense.¹² To meet this requirement, the nexus between the conduct of the defendant and that of the intermediary must be sufficiently close to satisfy the principles of factual and legal causation set forth in section 204.¹³ In this context, the principle of factual causation entails proof that the defendant did something to manipulate or otherwise impact the innocent or irresponsible person, so that it may be said that, but for the defendant's

⁶ This would apply, for example, in the situation of bank manager, P, who carries out a theft by asking an employee, X, to retrieve funds, based on the lie that the company's CEO has authorized the withdrawal.

⁷ Which is to say, a defense that negates an actor's blameworthiness.

⁸ This would apply, for example, in the situation of P, who induces a mentally ill individual, X, to kill another person on P's behalf.

⁹ This would apply, for example, in the situation of P, who commands his young child, X, to kill another person on P's behalf.

¹⁰ This would apply, for example, in the situation of P, who compels one victim, X, to perform sexual acts upon another victim at gunpoint.

¹¹ This would apply, for example, in the situation of P, who orchestrates the death of an enemy by police officer X through a false 911 call indicating that his enemy is armed, dangerous, and prepared to shoot any member of law enforcement upon arrival. And it would also apply where a robber, P, provokes his target, X, to mistakenly fire in reasonable self-defense at an innocent bystander, thereby resulting in the death of the bystander.

¹² RCC § 22E-211(a) ("the person causes an innocent or irresponsible person to engage in conduct constituting an offense"). The phrase "conduct constituting an offense," as employed in this subsection, refers to "the conduct under the circumstances and causing the results proscribed by the offense definition." Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 733 (1983) ("The objective elements for causing crime by an innocent are relatively straightforward. The defendant need not satisfy the objective elements of the substantive offense; the point of the provision is to hold him legally accountable when he engages in conduct that causes an innocent or irresponsible person to satisfy the objective requirements."); compare Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct.") (italics added).

¹³ See RCC § 22E-204(a) ("No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result."). Section 211 is both based on, but also departs from, normal principles of causation. Typically, "[a]ctions are seen not as caused happenings, but as the product of the actor's self-determined choices, so that it is the actor who is the cause of what he does, not one who set the stage for his action." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 391 (1985); see, e.g., JOHN KAPLAN ET AL., CRIMINAL LAW 261 (6th ed. 2008) ("Rather than distinguish between foreseeable and unforeseeable intervening events . . . the common law generally assumed that individuals were the exclusive cause of their own actions."). Where, however, one party induces another party to engage in generally prohibited conduct that is legally excused, the analysis materially changes. This is because, "[f]or purposes of causation doctrine, excusable and justifiable actions are not seen as completely freely chosen." *Id.* at 370. Under these conditions, "the defendant is seen as causing the other's act in the same way he would be seen to cause a physical event" (i.e., "[t]he primary actor becomes 'merely an instrument' of the secondary actor"). *Id.*

actions, the intermediary would not have engaged in the prohibited conduct.¹⁴ Even where this empirical prerequisite is met, however, the principle of legal causation precludes liability if the nexus between the conduct of the defendant and that of the intermediary is too remote or attenuated to fairly allow for a conviction.¹⁵ Specifically, it must be proven under this section that the defendant’s commission of the target offense through the intermediary’s conduct was not “too unforeseeable in its manner of occurrence . . . to have a just bearing on the defendant’s liability.”¹⁶

The third requirement is that the defendant must act with the “the culpability required by [the target] offense.”¹⁷ This requirement entails proof that the defendant caused an innocent or irresponsible person to engage in conduct constituting an offense with the state of mind—purpose, knowledge, intent, recklessness, negligence, or none at

¹⁴ DRESSLER, *supra* note 2, at § 30.03; *see* RCC § 22E-204(b) (“A person’s conduct is the factual cause of a result if: (1) The result would not have occurred but for the person’s conduct; or (2) In a situation where the conduct of two or more persons contributes to a result, the conduct of each alone would have been sufficient to produce that result.”). For example, where P gives X, an irresponsible agent known to have a penchant for mad driving, the keys to P’s car, P is the factual cause of any injuries X subsequently inflicts on the road. If, however, P merely helps X back out of the driveway while X is driving his own car, P would not be a factual cause of any injuries X subsequently inflicts on the road (provided, of course, that P’s assistance is not a necessary condition to X’s drive).

¹⁵ *See* RCC § 22E-204(c) (“A person’s conduct is the legal cause of a result if the result is not too unforeseeable in its manner of occurrence, and not too dependent upon another’s volitional conduct, to have a just bearing on the person’s liability.”). For example, if a parent leaves a loaded firearm in his toddler’s outdoor play area, and the parent’s own toddler find it, and subsequently uses it to injure a playmate at the parent’s house, that parent is the legal cause of the subsequent harm caused by the toddler. If, in contrast, the parent leaves the loaded firearm in his toddler’s outdoor play area, and an unknown third party thereafter moves the weapon to a park on the other side of the city, the parent would not be the legal cause of any harm caused by another toddler finding the weapon and injuring a playmate at the park.

¹⁶ Note that this articulation of legal causation excludes part of the standard codified in RCC § 22E-204(c), which reads in full: “A person’s conduct is the legal cause of a result if the result is not too unforeseeable in its manner of occurrence, *and not too dependent upon another’s volitional conduct*, to have a just bearing on the person’s liability.” The italicized language, which focuses on causal dependence on another person’s volitional conduct, is not incorporated into the above formulation because an innocent or irresponsible person’s conduct is—virtually by definition—*not volitional*, and therefore, would be unable to break the chain of legal causation under RCC § 22E-204(c). *Compare* RCC § 22E-204(c), Explanatory Notes (“The second category [of legal causation] relates to human volition; the focus here is on the extent to which a given result can be attributed to the free, deliberate, and informed conduct of a third party or the victim.”), *with* RCC § 22E-211(b), Explanatory Notes (describing an “innocent or irresponsible person” in terms incommensurate with free, deliberate, and informed conduct). That said, it is theoretically possible that a prosecution under RCC § 22E-211 *could* involve the causal influence of both an innocent or irresponsible agent *and* some other volitional actor, in which case it would be necessary for the factfinder to evaluate both the foreseeability and dependence prongs of RCC § 22E-204(c).

¹⁷ RCC § 22E-211(a). The term “culpability” includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 22E-201(d) (culpability requirement defined). For example, if the defendant causes an innocent or irresponsible person to engage in conduct constituting an offense, and that offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government is still required to prove these broader aspects of culpability (as to the defendant) to secure a conviction. *See* RCC § 22E-201(d)(3) (“‘Culpability requirement’ includes . . . Any other aspect of culpability specifically required by an offense.”); *id.*, at Explanatory Notes (noting that “premeditation, deliberation, and absence of mitigating circumstances” would so qualify). And, of course, the imposition of liability for causing crime by an innocent under section 211 is subject to the same voluntariness requirement (again, as to the defendant) governing all offenses under RCC § 22E-203(a). *See* RCC § 22E-201(d)(1) (voluntariness requirement also part of culpability requirement).

all (i.e., strict liability)—applicable to each of the objective elements that comprise the offense.¹⁸ In practical effect, this means that a defendant *may* be held criminally liable for a crime of recklessness or negligence under section 211, provided that he or she caused the conduct of an innocent or irresponsible person with the requisite non-intentional culpable mental state.¹⁹ Under no circumstances, however, should section 211 be construed to allow for a conviction upon proof of a lesser form of culpability than that required by the target offense.²⁰

Subsection (c) establishes that the legal accountability arising under subsection (a) from satisfaction of these three requirements provides the basis for holding the defendant guilty of the target offense.²¹

¹⁸ To illustrate, consider the burden of proof with respect to culpability in a rape case brought under section 211 in conjunction with a sexual abuse statute, which prohibits: (1) *knowingly* engaging in sexual intercourse; (2) with *negligence* as to the absence of consent. If P coerces irresponsible agent X to engage in non-consensual sexual intercourse with V, P's guilt will require proof that: (1) P was *practically certain* that his conduct would cause X to engage in sexual intercourse with V, see RCC § 22E-206(b) (definition of knowledge as to a result element); (2) P did so *failing to perceive a substantial risk* that V would not consent to the sexual intercourse, see RCC § 22E-206(e)(2)(A) (prong one of definition of negligence as to a circumstance element); and (3) P's failure to perceive the risk was clearly blameworthy under the circumstances, see RCC § 22E-206(e)(2)(B) (prong two of definition of negligence as to a circumstance element). See, e.g., Model Penal Code § 2.06 cmt. at 303; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1.

¹⁹ The following situation is illustrative. P leaves his car keys out around X, an irresponsible agent known to have a penchant for mad driving. X subsequently finds P's keys, takes P's car out, drives in a dangerously erratic manner, and ends up killing pedestrian V. If P is later prosecuted for recklessly killing V (i.e., manslaughter) based on X's conduct, P's guilt will require proof that: (1) P *consciously disregarded a substantial risk* that, by leaving his keys out, X would take P's car out and kill someone by driving in a dangerous erratic manner, see RCC § 22E-206(d)(1)(A) (prong one of definition of recklessness as to a result element); and (2) P's disregard of that risk was clearly blameworthy under the circumstances, see RCC § 22E-206(d)(1)(B) (prong two of definition of recklessness as to a result element). See, e.g., Model Penal Code § 2.06 cmt. at 303; Commentary on Ky. Rev. Stat. Ann. § 502.010.

²⁰ For example, if obtaining property by false pretenses is a crime only if the false pretenses are made purposely, P does not commit it by negligently causing his lawyer, X, to make statements that are false. Instead, P must do so purposely. See, e.g., Model Penal Code § 2.06 cmt. at 303; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1. According to the same logic, where an offense is graded by distinctions in culpability as to result elements, the principal's "liability shall extend only as far as his mental state will permit." Commentary on Ala. Code § 13A-2-22. For example, if P recklessly causes his child, X, to intentionally kill V, X is guilty of reckless manslaughter but not murder (i.e., X's intent to kill may not be imputed to P, while P's lack of intent precludes murder liability). See, e.g., Model Penal Code § 2.06 cmt. at 302-03; LAFAVE, *supra* note 2, at 2 SUBST. CRIM. L. § 13.1.

²¹ RCC § 22E-211(c) ("A person is guilty of an offense if it is committed by the conduct of another person for which he or she is legally accountable under subsection (a)."); compare RCC § 22E-210(d) ("An accomplice may be convicted of an offense upon proof of the commission of the offense and of his or her complicity therein . . ."). Viewed collectively, then, section 211 "determine[s] liability by the culpability and state of mind of the defendant, coupled with his own overt conduct and the conduct in which he has caused another to engage." Model Penal Code § 2.06 cmt. at 303.

In accordance with this logic, section 211 should be construed to allow for the imputation of *some* of an offense's objective elements, which the defendant causes an innocent or irresponsible person to perpetrate, provided that the defendant him or herself satisfies the rest of them. For example, if P, holding a firearm, coerces irresponsible agent X (who is unarmed) to rape V, P can be convicted of armed sexual abuse (of V) under section 211 based on: (1) P's having caused X to sexually penetrate V; and (2) P's own personal possession of a weapon. See *Morrissey v. State*, 620 A.2d 207, 210 (Del. 1993) ("Consequently, in this case, although the innocent persons who [the defendant] forced to engage in sexual intercourse were

Relation to Current District Law. RCC § 22E-211 codifies, clarifies, and fill in gaps reflected in District law relevant to legal accountability based on causing crime by an innocent or irresponsible person.

There is little District authority on this form of legal accountability. Nevertheless, that which does exist supports the “universally acknowledged principle” that “one is no less guilty of the commission of a crime because he uses the overt conduct of an innocent or irresponsible agent.”²²

For example, more than a century ago, District courts recognized that criminal liability may attach for an offense committed indirectly, including through unwitting agents, such as, for example, “where one procures poison to be administered by an innocent agent to a third person.”²³ And this also remains true today: while there exists ongoing disagreement at the DCCA over whether it is ever appropriate to hold one person criminally responsible for causing a *culpable* actor to engage in prohibited conduct (separate and apart from aider and abettor liability),²⁴ there seems to be agreement that a causal theory of criminal liability is appropriate where “A uses B as an innocent instrumentality.”²⁵

Illustrative is the DCCA’s decision in *Blaize v. United States*.²⁶ At issue in *Blaize* was the defendant’s conviction for voluntary manslaughter, which was based on the following facts: D fires shots at V, sending V running; the noise of the shots also

unarmed, the aggravating element of displaying what appeared to be a deadly weapon was provided by [the defendant’s] own conduct.”) (quoting Model Penal Code § 2.06 cmt. at 303).

²² Model Penal Code § 2.06 cmt. at 300.

²³ *United States v. Guiteau*, 1882 WL 118, at *16 (D.C. Jan. 10, 1882). Similarly, as the U.S. Court of Appeals for the D.C. Circuit observed in *Maxey v. United States*:

It is the known and familiar principle of criminal jurisprudence, that he who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. This is so true that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots employed to administer poison. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency.” *United States v. Gooding*, 12 Wheat. 460, 469, 6 L. ed. 693, 696. *See also* 1 Bishop, *Crim. Law*, secs. 649, 651, 652; *People v. Adams*, 3 Denio, 190, 207, 45 Am. Dec. 468; *Seifert v. State*, 160 Ind. 464, 467, 98 Am. St. Rep. 340, 67 N. E. 100. Those authorities fully sustain the general principle of law declared by the court, that one may be convicted as a principal, though acting in the commission of the crime through an innocent agent.

30 App. D.C. 63, 74–75 (D.C. Cir. 1907).

²⁴ This is reflected in the litigation over the gun battle theory of liability. *See generally Fleming v. United States*, 148 A.3d 1175, (D.C. 2016), *reh’g en banc granted, opinion vacated*, 164 A.3d 72 (D.C. 2017). *Compare Roy v. United States*, 871 A.2d 498, 502 (D.C. 2005) (upholding jury instruction that permitted the jury to find that the defendant, by engaging in a gun battle in a public space, was responsible for causing the death of an innocent bystander killed by a stray bullet even if it was not the defendant who fired the fatal round, provided that the death was reasonably foreseeable) *with Fleming*, 148 A.3d at 1177 (“[E]ven assuming arming oneself with a gun and firing it could satisfy the direct causation requirement, the volitional, felonious act of someone else then shooting and killing the decedent is an ‘intervening cause’ that breaks this chain of criminal causation.”) (Easterly, J., dissenting).

²⁵ *Fleming*, 148 A.3d at 1189 n.14 (Easterly, J., dissenting).

²⁶ *Blaize v. United States*, 21 A.3d 78, 80 (D.C. 2011).

startles X, an illegally parked driver; in response to the shots, X speeds away at a rate of approximately 90 mph; X thereafter hits and kills V.²⁷ On appeal, the DCCA upheld the conviction applying a causal analysis, premised on the proposition that because “[X’s] attempt[] to flee quickly, and without careful attention to pedestrian safety, w[as] entirely predictable,” there was no problem with holding D responsible for the death of V although the immediate cause was X’s conduct.²⁸

This sparse case law is accompanied by a Redbook jury instruction entitled “willfully causing an act to be done.”²⁹ Premised on the federal statute, 18 U.S.C. § 2(b), that instruction reads:

You may find [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts constituting the offense or was personally present at the commission of the offense. A defendant is responsible for an act which s/he willfully causes to be done if the act would be criminal if performed by him/her directly or by another. To “cause” an act to be done means to bring it about. You may convict [name of defendant] of the offense charged if you find that the government has proved beyond a reasonable doubt each element of the offense and that [name of defendant] willfully caused such an act to be done, with the intent to commit the crime.³⁰

This instruction is thereafter accompanied by a brief commentary collecting federal cases, which support the proposition that “an individual can be criminally culpable for causing an intermediary to commit a criminal act even though the intermediary has no criminal intent and is innocent of the substantive crime.”³¹

RCC § 22E-211 is substantively consistent with the above District authorities, while, at the same time, providing a clearer and more comprehensive approach to liability for causing crime by an innocent or irresponsible person. Subsections (a) and (c) collectively establish that a defendant may be held criminally liable for the acts of an innocent or irresponsible person provided that: (1) the principal actor causes the innocent or irresponsible person to engage in conduct constituting an offense; and (2) the principal actor does so with the culpability requirement applicable to that offense. And subsection (b) clarifies the primary bases for viewing a human intermediary as “innocent or irresponsible,” namely, (1) lacking the culpable mental state requirement for an offense; or (2) acting under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to justification.

²⁷ *Blaize*, 21 A.3d at 80-81.

²⁸ *Id.* at 83.

²⁹ D.C. Crim. Jur. Instr. 3.102.

³⁰ *Id.*

³¹ See *Fraley v. U.S.*, 858 F.2d 230, 233 (5th Cir. 1988); *U.S. v. Cook*, 745 F.2d 1311 (10th Cir. 1984); *U.S. v. Rucker*, 586 F.2d 899, 905 (2d Cir. 1978); *U.S. v. Deaton*, 563 F.2d 777, 778 (5th Cir. 1977); *U.S. v. Ordner*, 554 F.2d 24, 29 (2d Cir. 1977); *U.S. v. Rapoport*, 545 F.2d 802, 805-06 (2d Cir. 1976); *U.S. v. Lester*, 363 F.2d 68 (6th Cir. 1966).

RCC § 22E-212. EXCEPTIONS TO LEGAL ACCOUNTABILITY.

(a) *Exceptions to General Principles of Legal Accountability.* A person is not legally accountable for the conduct of another under RCC § 22E-210 or RCC § 22E-211 when:

- (1) The person is a victim of the offense; or
- (2) The person's conduct is inevitably incident to commission of the offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

COMMENTARY

Explanatory Notes. Section 212 establishes two exceptions to the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability; and RCC § 22E-211, Liability for Causing Crime by an Innocent or Irresponsible Person.¹

Paragraph (a)(1) excludes the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under section 210 or for causing an innocent or irresponsible to commit that offense under section 211.² For example, a minor who pursues and agrees to engage in sex with an adult may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged that adult to perpetrate statutory rape against the minor.³ Nevertheless, paragraph (a)(1) precludes holding the minor criminally liable for the statutory rape as an accomplice in the minor's own victimization under section 210.⁴ The outcome would not be any different if the adult involved in the relationship suffered from

¹ See, e.g., WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) (“[O]ne is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . .”); PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (Westlaw 2019) (same); see also *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these are “exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime”).

² See, e.g., Model Penal Code § 2.06(6)(a) (“Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . he is a victim of that offense[.]”). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves. See, e.g., LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (“[T]he victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime.”); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

³ See RCC § 22E-210(a) (“A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person: (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or (2) Purposely encourages another person to engage in specific conduct constituting that offense.”).

⁴ See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09(d) (6th ed. 2012) (“A [minor] may not be convicted as an accomplice in her own victimization”); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (same). The same can also be said about “[t]he businessman who yields to the extortion of a racketeer,” or “the parent who pays ransom to the kidnapper.” Model Penal Code § 2.06(6) cmt. at 324. Although those “who pay extortion, blackmail, or ransom monies” can be understood to have “significantly assisted in the commission of the crime,” the fact they are the “victim of a crime” means that they “may not be indicted as an aider or abettor.” *Southard*, 700 F.2d at 19.

a mental disability sufficient to rise to the level of a complete defense. While it might be said that the minor caused the adult to perpetrate a statutory rape under these circumstances,⁵ paragraph (a)(1) precludes holding the minor legally accountable for the irresponsible person’s conduct under section 211 where the minor was also victimized by it.⁶

Paragraph (a)(2) excludes actors who engage in conduct inevitably incident to commission of an offense—as defined by statute⁷—from being held legally accountable as an accomplice in the commission of that offense under section 210 or for causing an innocent or irresponsible person to commit that offense under section 211.⁸ For example,

⁵ See RCC § 22E-211(a) (“A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense.”); *id.* at (b)(2) (“An ‘innocent or irresponsible person’ within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.”).

⁶ See Ala. Code § 13A-2-24(1) (victim exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists “little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.”).

⁷ That a person’s conduct must be inevitably incident to commission of an offense *as defined by statute* clarifies that paragraph (a)(2) only applies when the offense could not have been committed without the defendant’s participation under any set of facts. This is to be distinguished from the situation of a defendant whose participation was merely useful or conducive to the commission of a crime *as charged in a particular case*. See, e.g., LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (In applying the conduct inevitably incident exception, “the question is whether the crime charged is so defined that the crime could not have been committed without a third party’s involvement, not whether the crime ‘as charged actually involved a third party whose ‘conduct was useful or conducive to’ the crime.”) (quoting *State v. Duffy*, 8 S.W.3d 197, 201-202 (Mo. App. 1999)).

So, for example, the role of a doorman in protecting a particular drug house from being robbed or ripped off may inextricably be part of the main business of that home, the sale and purchase of controlled substances. Nevertheless, because, as a general matter, it is entirely possible to distribute drugs without the assistance of a doorman, the doorman’s conduct—as contrasted with that of the purchaser—is *not* “inevitably incidental” to the commission of the crime of drug distribution. Therefore, subsection (a)(2) would not preclude holding a doorman who assists a drug dealer liable for aiding the distribution of controlled substances. *Wagers v. State*, 810 P.2d 172, 175-76 (Alaska Ct. App. 1991) (“[B]ecause [defendant’s] role as a doorman/guard was not ‘inevitably incidental’ to the commission of the crime of possession with intent to deliver, [he] is not exempt from accomplice liability under AS 11.16.120(b)(2).”).

For another example, consider a prospective bribery scheme involving bribe offeror, B, go-between G, and public official, P. B gives G \$20,000 in cash with instructions to approach P and propose a transaction whereby P will receive the money in return for providing B with a government license to which B is not otherwise entitled. If G agrees with B to participate in this scheme and approaches P, paragraph (a)(2) would *not* preclude holding G liable for aiding the crime of bribe offering. Although G’s agreed-upon role as middleman might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without a go-between. See, e.g., *Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, “as a matter of law,” defendant’s facilitative conduct was not “inevitably incident” to the crime of assault because that offense “does not as defined require one person to identify the victim and another to strike the blow”).

⁸ See, e.g., Model Penal Code § 2.06(6)(b) (“Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if . . . the offense is so defined that his conduct is inevitably incident to its commission[.]”). This rule effectively *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of

the purchaser in a drug transaction may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged the seller to perpetrate the distribution of a controlled substance.⁹ Nevertheless, paragraph (a)(2) precludes holding the purchaser criminally liable for the seller's distribution as an accomplice under section 210.¹⁰ The outcome would not be any different if the seller suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the purchaser caused the seller to distribute drugs under these circumstances,¹¹ paragraph (a)(2) precludes holding the purchaser legally accountable for the irresponsible person's conduct under section 211.¹²

Subsection (b) establishes an important limitation on the exceptions to legal accountability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that section 212 is only a *default* bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense.¹³ It merely establishes that such actors are excluded from the general principles of legal accountability set forth in sections 210 and 211.¹⁴ As such, the legislature is free to impose criminal liability upon these general

law. *See, e.g.,* LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3 (accomplice liability does not apply "where the crime is so defined that participation by another is inevitably incident to its commission"); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (same).

⁹ *See* RCC § 22E-210(a) ("A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person: (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or (2) Purposely encourages another person to engage in specific conduct constituting that offense.").

¹⁰ That is, because the distribution of narcotics necessarily requires two parties, a seller and a purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception. *See, e.g., State v. Pinson*, 895 P.2d 274, 277 (N.M. Ct. App. 1995) ("When an illegal drug sale is completed, there are two separate crimes committed, trafficking by the seller and possession by the purchaser. Each conduct is necessarily incident to the other crime."); *Wheeler v. State*, 691 P.2d 599, 602 (Wyo. 1984) ("The purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution.").

¹¹ *See* RCC § 22E-211(a) ("A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."); *id.* at § (b)(2) ("An 'innocent or irresponsible person' within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.").

¹² *See* Ala. Code § 13A-2-24(2) (conduct inevitably incident exception equally applicable to accomplice liability and causing crime by an innocent); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (There exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other.").

¹³ *See, e.g.,* Model Penal Code § 2.06(6) cmt. at 323-24 ("If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct 'inevitably incident to' the commission of the crime, the problem inescapably presents itself in defining the crime.").

¹⁴ This reflects the fact that both the victim and conduct inevitably exceptions to legal accountability are justified on the basis of legislative intent. *See, e.g., United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6-7 (S.D.W. Va. July 26, 2016) ("Where the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person.") (quoting LAFAVE,

categories of protected actors on an offense-specific basis.¹⁵ In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.¹⁶

Relation to Current District Law. RCC § 22E-212 codifies and fills in gaps in current District law to improve the clarity and proportionality of the revised statutes.

RCC § 22E-212(a)(1) and (b): Relation to Current District Law on Legal Accountability for Victims. There is no current District law directly addressing whether, as a general principle of criminal law, a victim can be held legally accountable for the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed.

No current District criminal statute explicitly exempts victims from the scope of general accomplice liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District’s first-degree child sex abuse offense subjects to potential life imprisonment a person who, “being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act.”¹⁷ And the District’s second-degree child sex abuse offense subjects to ten years of imprisonment a person who, “being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact.”¹⁸ These current offenses exist specifically for the *protection* of minor-victims.¹⁹

supra note 1, at 2 SUBST. CRIM. L. § 13.3); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (observing that the standard rationale for the conduct inevitably incident exception is “that the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime.”) (citing LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

¹⁵ See, e.g., ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 83 (“The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.”).

¹⁶ The following situation is illustrative: X, the bribe giver in a two-person corruption scheme involving public official Y, agrees to give Y \$20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable as an *accomplice* in the commission of the crime of bribe *receiving* under RCC § 22E-212 since X’s conduct is inevitably incident to Y’s perpetration of that crime. X can, however, *directly* be held criminally liable for his *own conduct* under a statute that, through its express terms, prohibits the *offering of a bribe*. See, e.g., N.Y. Penal Law § 20.00 cmt. (“[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.”) (quoted in *People v. Manini*, 79 N.Y.2d 561, 571 (1992)).

¹⁷ D.C. Code § 22-300 8.

¹⁸ D.C. Code § 22-3009.

¹⁹ See D.C. Code § 22-3011(a) (“Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.”); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) (“[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.”).

At the same time, the normal principles of aider and abettor liability derived from the District’s general complicity statute, D.C. Code § 22-1805,²⁰ would appear to authorize treating a minor-victim legally accountable as an accomplice in the perpetration of child sex abuse against him or herself.²¹ Consider, for example, the situation of a minor who both initiates and pursues a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully assisted and encouraged the adult to commit statutory rape in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.²² In practical effect, then, applying general principles of aider and abettor liability to the District’s child sex abuse statutes would mean that a minor may be subject to the same liability and punishment as the adult who perpetrates the offense.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District’s statutory rape offenses. Given these problems, it’s unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse do not appear to include a single prosecution involving charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to accomplice liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains directly relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.²³ In the second case,

²⁰ D.C. Code § 22-1805 (“In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.”).

²¹ See generally RCC § 22E-210 and accompanying Commentary.

²² See *id.*; *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (An accomplice is someone who “designedly encouraged or facilitated” the commission of criminal conduct by another) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)).

²³ *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) (“The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.”).

The relevant statute, as quoted in *Yeager*, reads:

Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

Thompson v. United States (1908), the Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.²⁴

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District’s prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding “children”—defined as anyone under the age of 18²⁵—from criminal liability for prostitution.²⁶ Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to “refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834.”²⁷ These provisions appear to reflect the D.C. Council’s view, articulated in supporting legislative history, that “[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted.”²⁸

RCC § 22E-212(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them. These provisions exclude the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under RCC § 22E-210, or for causing an innocent or irresponsible person to

²⁴ *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose “miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.”).

The relevant statute, as quoted in *Thompson*, reads:

Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

²⁵ D.C. Code § 22-2701(d)(3).

²⁶ See generally D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it “unlawful for any person to engage in prostitution or to solicit for prostitution,” subject to the “[e]xcept[ion] provided in subsection (d).” *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any “child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value.” *Id.* at § (d)(1).

²⁷ *Id.* at § (d)(2).

²⁸ COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

commit that offense under RCC § 22E-211, unless expressly provided by the target offense.²⁹ (This is consistent with the similar exclusion for victims applicable to the general inchoate crimes of solicitation and conspiracy under RCC § 22E-304.³⁰)

RCC § 22E-212(a)(2) and (b): Relation to Current District Law on Legal Accountability for Conduct Inevitably Incident. There is no current District law directly addressing whether, as a general principle of criminal law, a person can be held legally accountable for the commission of a crime in which his or her conduct was inevitably incident. That said, this exception is consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it has also been implicitly recognized by the DCCA through *dicta* in the course of interpreting one of those statutes.

No current District criminal statute explicitly recognizes an exemption to accomplice liability for those who engage in conduct inevitably incident to the commission of an offense. However, an analysis of the drug statutes in the D.C. Code illustrates why this exception is consistent with legislative intent.

Compare the District’s different approaches to punishing those who distribute and those who merely possess controlled substances. The District’s distribution statute makes it a thirty year felony for “any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance,” which is, in fact, “a narcotic or abusive drug” subject to classification “in Schedule I or II.”³¹ In contrast, the District’s possession statute makes it a 180 day misdemeanor to “knowingly or intentionally to possess a controlled substance” of a similar nature.³² This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.³³

²⁹ Note that under RCC § 22E-22E-212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

³⁰ See generally Commentary on RCC § 22E-304(a)(1).

³¹ D.C. Code § 48-904.01(a)(1)-(2); see *id.* at (a)(2)(A) (“Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]”)

³² D.C. Code § 48-904.01(d)(1) (“It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than \$1,000, or both.”); compare D.C. Code § 48-904.01(d)(2) (“Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.”).

³³ Indeed, “[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct.” *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4-123, THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1981, 2-3 (April 8, 1981)) (hereinafter “Committee Report”).

For example, the legislative history underlying the District’s Uniform Controlled Substances Act observes that:

At the same time, application of the District’s normal principles of aider and abettor liability would appear to authorize holding a purchaser-possessor legally accountable for the distribution of drugs by the seller as an accomplice.³⁴ Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully assisted and encouraged the seller to commit distribution in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.³⁵ In practical effect, then, applying general principles of aider and abettor liability to the District’s drug distribution statute would mean that the drug user could be held liable to the same extent as the seller.

Treating the purchaser-possessor in a drug deal in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District’s controlled substances offenses.³⁶ Given these problems, it’s unsurprising that reported District case law does not appear to include a single drug distribution prosecution brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by *dicta* in at least one reported DCCA opinion. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between “a willing buyer [and] a willing seller” can be held criminally liable for distribution as an accomplice.³⁷ One judge dissented, arguing that,

While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Id. at 5. *See also, e.g., Long*, 623 A.2d at 1150 (observing that “the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District’s Uniform Controlled Substances Act.”); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) (“[A] central purpose of the enactment of the [District’s] local [drug] statute was to abolish the ‘unilateral approach’ of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.”).

³⁴ *See generally* RCC § 22E-210 and accompanying Commentary.

³⁵ *See generally* RCC § 22E-210 and accompanying Commentary.

³⁶ *See* sources cited *supra* notes 21-23 and accompanying text; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be “deemed an aider and abettor to [distribution],” this would effectively “write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.”) (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

³⁷ *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought “a willing buyer to a willing seller” and “specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy”); *see, e.g.,*

among other problems, the majority’s holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.³⁸ In response, the two-judge majority explained that they were “unpersuaded at this point that the court’s interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution,” while citing to federal case law explicitly recognizing that “one who receives drugs does not aid and abet distribution ‘since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession.’”³⁹

The bribery statute in the D.C. Code is susceptible to a similar analysis. The relevant District prohibition on bribery applies a statutory maximum of “not more than ten years” to anyone who:

(1) Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant; or

(2) Corruptly solicits, demands, accepts, or agrees to accept anything of value, directly or indirectly, as a public servant;

in return for an agreement or understanding that an official act of the public servant will be influenced thereby⁴⁰

On its face, the District’s bribery statute embodies a legislative judgment that bribe giving and receiving are equally culpable acts deserving of no more than ten years of potential imprisonment. That said, application of the District’s normal principles of aider and abettor liability would seem to provide the basis for effectively doubling the punishment for either party to a bribery scheme because each party’s conduct is inevitably incident to the other.

Consider, for example, that most (if not all) bribe givers will purposely assist and encourage the bribe receiver’s violation of D.C. Code § 22-712(a)(2), thereby satisfying the requirements of accomplice liability as to bribe receiving. Conversely, most (if not all) bribe receivers will purposely assist and encourage the bribe giver’s violation of D.C. Code § 22-712(a)(1), thereby satisfying the requirements of accomplice liability as to bribe giving. Such an application of accomplice liability, if accepted, would seem to authorize up to twenty years of potential imprisonment in most (if not all) instances of bribery.

Dealing with bribery in this way seems disproportionate, counterintuitive, and in conflict with the penalty structure reflected in the District’s bribery statute. Given these

Griggs v. United States, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was “working,” the defendant escorted the officer to a seller, and the defendant told the seller that the officer “wanted one twenty”); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) (“[B]eing an agent of the buyer is not a defense to a charge of distribution.”).

³⁸ *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that “if the government’s position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori*, every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.”).

³⁹ *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

⁴⁰ D.C. Code § 22-712(a), (c).

problems, it's unsurprising that reported District case law does not appear to include a single prosecution for bribery involving duplicate liability of this nature.⁴¹ This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.⁴²

RCC § 22E-212(a)(2) accords with this implicit understanding, as well as the policy considerations that support it, by excluding conduct inevitably incident to the commission of an offense as a matter of law from the scope of legal accountability under RCC §§ 22E-210 and 211 unless expressly provided by the target offense.⁴³ (This is consistent with the similar exclusion for conduct inevitably incident applicable to the general inchoate crimes of conspiracy and solicitation under RCC § 22E-304.⁴⁴)

⁴¹ The only reported case involving this statute appears to be: *Colbert v. United States*, 601 A.2d 603, 608 (D.C. 1992). Compare *May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

⁴² One other relevant aspect of District law worth noting is the fact that a substantively related exclusion applies to the general inchoate crime of conspiracy by way of the judicially-recognized doctrine of "Wharton's Rule," which "is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)). The meaning and import of DCCA case law on Wharton's Rule is discussed in the Commentary on RCC § 22E-304(a)(2).

⁴³ Note that under RCC § 22E-212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

⁴⁴ See generally Commentary on RCC § 22E-304(a)(2).

RCC § 22E-213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.

(a) *Withdrawal Defense.* It is an affirmative defense to a prosecution under RCC § 22E-210 and RCC § 22E-211 that the defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

- (1) Wholly deprives his or her prior efforts of their effectiveness;
- (2) Gives timely warning to the appropriate law enforcement authorities; or
- (3) Otherwise makes reasonable efforts to prevent the commission of the offense.

(b) *Burden of Proof for Withdrawal Defense.* The defendant has the burden of proof for this affirmative defense and must prove this affirmative defense by a preponderance of the evidence.

COMMENTARY

Explanatory Notes. Section 213 establishes a withdrawal defense to criminal liability premised upon the general principles of legal accountability set forth in RCC § 22E-210, Accomplice Liability, and RCC § 22E-211, Liability for Causing Crime by an Innocent or Irresponsible Person.¹

Subsection (a) sets forth the scope of this affirmative defense, which is comprised of two basic requirements.² The first is that the defendant must “terminate[] his or her efforts to promote or facilitate commission of an offense before it has been committed.”³ This clarifies that only withdrawals from criminal schemes prior to their completion will provide the basis for avoiding legal accountability for the conduct of another under the

¹ Typically, “an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense.” PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019). However, there is an important exception applicable to criminal liability based on legal accountability for the conduct of another, which is similarly applicable in the context of general inchoate crimes. *Id.*; see RCC § 22E-305 (renunciation defense to attempt, solicitation, and conspiracy). In these contexts, the criminal justice system affords an “offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise.” *Id.* As it arises in the context of accomplice liability, this defense is typically referred to as “withdrawal.” *E.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) (3d ed. Westlaw 2019); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 30.07 (6th ed. 2012).

² The idea that “a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party” is both historically rooted and well established. DRESSLER, *supra* note 1, at § 30.07; see, e.g., *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (“Withdrawal is traditionally a defense to crimes of complicity[.]”); CHARLES E. TORCIA, 1 WHARTON’S CRIMINAL LAW § 37 (15th ed. 2018) (“At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime.”); Commentary on Ky. Rev. Stat. § 502.040 (observing the “prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly”); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (“A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability.”).

³ RCC § 22E-213(a) (prefatory clause).

RCC.⁴

The second requirement is that the defendant’s timely withdrawal must be accompanied by “reasonable efforts” at preventing the target offense.⁵ Importantly, this does not mean that the defendant’s conduct *actually* needs to prevent the target offense from being completed.⁶ Rather, a withdrawal defense to legal accountability remains available under the RCC although the defendant’s efforts are unsuccessful.⁷ At the very least, though, the defendant must engage in conduct reasonably calculated towards disrupting—whether directly or indirectly—the offense that he or she initially promoted

⁴ See, e.g., DRESSLER, *supra* note 1, at § 30.07 (A “spontaneous and unannounced withdrawal will not do.”) (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev’d on other grounds*, 387 A.2d 1187 (N.J. 1978)); *State v. Formella*, 158 N.H. 114, 119 (2008) (It must “be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed.”) (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307 (1964)).

⁵ RCC § 22E-213(a)(3); see RCC § 22E-213(a)(2) and (3) (codifying two specific examples of reasonable efforts).

⁶ E.g., LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d); DRESSLER, *supra* note 1, at § 30.07.

⁷ For this reason, the withdrawal defense to legal accountability specified in this section is more lenient than the renunciation defense to general inchoate crimes under section 305, which requires proof that the target offense was actually prevented in order to avoid liability for an attempt, solicitation, or conspiracy. See RCC § 22E-305(a) (“In a prosecution for attempt, solicitation, or conspiracy *in which the target offense was not committed* . . .”) (italics added).

Another way in which the withdrawal defense to legal accountability is more lenient than the renunciation defense to general inchoate crimes relates to the defendant’s motive. Whereas a renunciation defense is *unavailable* where the defendant was motivated by a desire to avoid getting caught, the withdrawal defense does not incorporate a comparable requirement of blameless intent (i.e., any motive underlying the withdrawal will suffice). Compare RCC § 22E-213(a) (no voluntariness requirement), with RCC § 22E-305(a)(2) (requirement of voluntary renunciation); RCC § 22E-305(b)(1) (renunciation not voluntary when “motivated in whole or in part by [a] belief that circumstances exist which . . . Increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; [or] Render accomplishment of the criminal plans more difficult . . .”).

Because of these two differences, it is possible for a defendant to avoid legal accountability for another person’s conduct yet still incur general inchoate liability for his or her own conduct under the RCC. The following example is illustrative. V personally insults P. P is predisposed to let the insult slide, but A persuades P over the phone that P must respond with lethal violence to protect P’s reputation. In providing this encouragement, A consciously desires to bring about the death of V, who A also has an outstanding beef with due to a prior perceived slight that V earlier made against A. One day later, A has a change of heart, which is motivated, in large part, by A’s having been alerted to the fact that the police were monitoring the phone call and are therefore very likely to catch and arrest both P and A. So A decides to again call P, and does his very best to persuade P to desist from violence against V, and, ultimately, to forgive V for the slight. However, A’s reasonable efforts at dissuading P from carrying out the planned execution is unsuccessful; P goes on to kill V anyways.

On these facts, A satisfies the standard for withdrawal under section 213, and, therefore, cannot be deemed an accomplice to P’s murder of V under section 210. A would not, however, be able to avail himself of a renunciation defense under section 305 to avoid liability for his original solicitation of P (to commit murder) under the RCC’s general solicitation statute. See RCC § 22E-302(a) (“A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person: (1) Purposely commands, requests, or tries to persuade another person; (2) To engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and (3) The offense solicited is, in fact, [a crime of violence].”). Specifically, a renunciation defense would not be available to A under section 305 because: (1) the target offense at the heart of A’s solicitation, the murder of V, was completed; and (2) A’s renunciation was not voluntary (i.e., it was motivated by a desire to avoid getting caught).

or facilitated.⁸ Paragraphs (a)(1), (2), and (3) describe three alternative standards for evaluating the sufficiency of the defendant’s conduct in this regard.

Paragraph (a)(1) establishes that a withdrawal defense is available where the defendant “[w]holly deprives his or her prior efforts of their effectiveness.”⁹ The type of conduct that satisfies this standard is necessarily contingent upon the nature of the conduct that provides the basis for the defendant’s legal accountability in the first place.¹⁰ For example, where the defendant’s contribution to a criminal scheme takes the form of verbal encouragement, a clear (and timely) oral statement of disapproval communicated to his or her co-participants may provide the basis for a withdrawal defense.¹¹ However, a statement of this nature will not suffice where the defendant’s participation involved loaning a weapon central to the scheme’s success.¹² In that case, the actual retrieval of the weapon may be necessary to meet the standard proscribed in this paragraph.¹³

Paragraph (a)(2) establishes that a withdrawal defense is available where the defendant “[g]ives timely warning to the appropriate law enforcement authorities.”¹⁴ Under this standard, a defendant who provides reasonable notice to a law enforcement agency with jurisdiction over the requisite criminal scheme may avoid legal accountability.¹⁵ This indirect means of withdrawing from an offense is to be encouraged, particularly where it is: (1) unlikely that the defendant will be able to prevent the consummation of the target offense acting alone,¹⁶ or (2) dangerous for the defendant to attempt to do so on his or her own.¹⁷

⁸ See, e.g., LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (The defendant must terminate his or her participation in a criminal scheme and: “(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable.”); DRESSLER, *supra* note 1, at § 30.07 (“[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance.”).

⁹ See, e.g., Model Penal Code § 2.06(6)(c)(i) (withdrawal defense available where defendant “wholly deprives [aid or encouragement] of effectiveness in the commission of the offense”).

¹⁰ See, e.g., Commentary on Haw. Rev. Stat. § 702-224 (“What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice’s complicity.”).

¹¹ See, e.g., Model Penal Code § 2.06(6) cmt. at 326 (If “complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime.”).

¹² See, e.g., Commentary on Haw. Rev. Stat. § 702-224 (“More will be required of one who distributes arms than one who offers verbal encouragement.”).

¹³ See, e.g., Model Penal Code § 2.06(6) cmt. at 326 (“If the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back the arms, and thus wholly deprive his aid of its effectiveness in the commission of the offense.”).

¹⁴ See, e.g., Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant “gives timely warning to the law enforcement authorities”).

¹⁵ See, e.g., DRESSLER, *supra* note 1, at § 30.07 (In the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) (same).

¹⁶ For example, where A aids an armed robbery planned to take place in another state by providing a weapon to P1 and P2, alerting the relevant legal authorities in that state in a timely fashion may be the only practical alternative if P1 and P2 later become unreachable by phone or email.

¹⁷ For example, where A aids an armed robbery by loaning a weapon to P1 and P2, but P1 and P2 also have many other weapons available to them, and any attempt by A at retrieving the weapon may pose a risk to D’s life, then alerting the relevant legal authorities in a timely fashion would clearly be a more desirable alternative.

Paragraph (a)(3) establishes that a withdrawal defense is available where the defendant “[o]therwise makes reasonable efforts to prevent the commission of the offense.”¹⁸ This catchall “reasonable efforts” alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (a)(1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it.¹⁹ This standard should be evaluated in light of the totality of the circumstances.²⁰

Subsection (b) establishes that the burden of proof for a withdrawal defense lies with the defendant, and is subject to a preponderance of the evidence standard.²¹ This means that the defendant possesses the burden of raising this affirmative defense at trial. Once appropriately raised, the defendant then bears the burden of persuading the fact finder that the elements of a withdrawal defense have been met beyond a preponderance of the evidence.²²

Relation to Current District Law. Subsections (a) and (b) codify, clarify, and fill gaps in District law concerning the availability and burden of proof governing a withdrawal defense to legal accountability.

The D.C. Code does not address the availability of a withdrawal defense; however, the DCCA has discussed it on a few different occasions. The relevant case law can generally be divided into two categories: decisions involving withdrawal from a conspiracy (a topic not addressed by RCC § 22E-213); and decisions involving withdrawal from aider and abettor liability (the focus of RCC § 22E-213).

¹⁸ See, e.g., Model Penal Code § 2.06(6)(c)(ii) (withdrawal defense available where defendant “otherwise makes proper effort to prevent the commission of the offense.”).

¹⁹ See Model Penal Code § 2.06 cmt. at 326 (“The sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule.”).

²⁰ For example, alerting the victim of a criminal scheme of its existence could constitute “reasonable efforts” at preventing the commission of an offense, where: (1) the disclosure to the victim is *timely*; and (2) the disclosure provides the victim with a *reasonably feasible* means of avoiding the target harm. Where, in contrast, the disclosure is made too late, or does not enable to victim to easily and safely escape harm, then the defendant’s conduct would not meet the “reasonable efforts” standard.

²¹ See, e.g., LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3(d) n.64 (“The prevailing view is that the defendant has the burden of proof with respect to such withdrawal.”); ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (“The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant The burden of persuasion is generally on the defendant, by a preponderance of the evidence.”); see also Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 (1975) (identifying relevant policy rationales for this allocation of burdens in the renunciation context).

²² While the examples and analysis in this commentary entry focus on legal accountability based upon accomplice liability under section 210, a withdrawal defense is similarly available where the defendant has been charged with causing an innocent or irresponsible person to commit a crime under section 211. This ensures equivalency of outcome where the defendant’s co-participants in a criminal scheme cannot be held liable due to their being “innocent or irresponsible.” RCC § 22E-211(a); see RCC § 22E-211(b) (“An ‘innocent or irresponsible person’ . . . includes a person who, having engaged in conduct constituting an offense: (1) Lacks the culpable mental state requirement for that offense; or (2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.”).

With respect to the first category, the relevant case law pertains to when an actor may be relieved from the *collateral consequences of a conspiracy*.²³ For example, “a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators.”²⁴ Or the defendant “may want to prove his withdrawal so as to show that as to him the statute of limitations has run.”²⁵ On these kinds of collateral issues, the DCCA recognizes a defense of withdrawal, under which the defendant “must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.”²⁶

With respect to the second category, the relevant case law addresses when an actor may be relieved from liability as an aider and abettor.²⁷ In this context, withdrawal provides the basis for a *complete defense to criminal liability*.²⁸ Which is to say, under District law an accomplice who “take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation” cannot be convicted of the crime for which he or she has been charged with aiding and abetting.²⁹

With respect to both categories, there does not appear to be any reported District case law in which a defendant has successfully raised a withdrawal defense. Rather, the published decisions in these areas of law primarily clarify the kind of proof that fall short of establishing it. For example, in at least two cases the DCCA has determined that where the defendant plays a central role in the planning and facilitation on a crime (e.g.,

²³ ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81 (Westlaw 2018) (“Withdrawal,” commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor’s abandonment to his confederates.”); Model Penal Code § 5.03 cmt. at 456 (distinguishing “withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators”).

²⁴ LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; see DRESSLER, *supra* note 1, at § 29.09 (“If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.”).

²⁵ LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4; see DRESSLER, *supra* note 1, at § 27.07 (“[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor.”); Buscemi, *supra* note 21, at 1168 (“[W]ithdrawal is principally directed toward the time dimension of conspiracy.”).

²⁶ *Bost v. United States*, 178 A.3d 1156, 1200 (D.C. 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); see, e.g., *Tann v. United States*, 127 A.3d 400, 467 (D.C. 2015) (citing *United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011); *Baker v. United States*, 867 A.2d 988, 1007 n.24 (D.C. 2005).

²⁷ See *Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) (“Legal withdrawal has been defined as ‘(1) repudiation of the defendant’s prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.’”) (quoting LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 13.3).

²⁸ ROBINSON, *supra* note 1, at 1 CRIM. L. DEF. § 81.

²⁹ *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) (“Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.”) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); see *In re D.N.*, 65 A.3d at 95 (“Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.”); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994).

providing a weapon), “[l]eaving the scene before a crime occurs is,” by itself, “insufficient to demonstrate withdrawal.”³⁰

The DCCA has also clarified that a withdrawal defense is unavailable although an accused who was intimately involved in a robbery scheme “may have ‘wanted to get out of there, and didn’t want to do further damage to the victim’” after the robbery had commenced.³¹ Observing the requirement that the defendant take “affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation,”³² the court deemed the mere fact that the defendant “regretted the unfolding consequences of the brutal robbery in which he participated” to be insufficient to “relieve him of criminal liability.”³³

One issue relevant to a withdrawal defense that is unresolved by DCCA case law is the *burden of proof*.³⁴ The commentary accompanying the District’s criminal jury instruction on conspiracy seems to recommend that, “[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction,” the burden should be on the “government to prove that the defendant was a member of the conspiracy and did not withdraw it.”³⁵ However, recent U.S. Supreme Court case law—cited to in recent DCCA case law—indicates that the burden of proof should instead rest with the defendant.³⁶ And the commentary accompanying the

³⁰ *Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *Harris*, 377 A.2d at 38) (the fact that appellant merely left the scene before the shooting occurred was “insufficient to establish withdrawal as a matter of law”). Relatedly, the U.S. Court of Appeals for the D.C. Circuit has observed that:

Whatever may be the other requirements of an effective abandonment of a criminal enterprise, it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandonment and the act from responsibility for which escape is sought. It must be possible for a jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. While it may make no difference whether mere fear or actual repentance is the moving cause, one or the other must lead to an actual and effective retirement before the act in question has become so imminent that its avoidance is practically out of the question.

Mumforde v. United States, 130 F.2d 411, 413 (D.C. Cir. 1942) (quoting *People v. Nichols*, 230 N.Y. 221, 222, 129 N.E. 883 (1921)).

³¹ *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013).

³² *Id.* (citing *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)).

³³ *Id.* (citing *Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) (“The defendants’ fleeing of the crime scene after participating in the assault does not constitute legal withdrawal.”)).

³⁴ As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep’t of Employment Servs.*:

The term ‘burden of proof’ [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

³⁵ Commentary on D.C. Crim. Jur. Instr. § 7.102.

³⁶ *Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law); see *Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *id.*).

District’s criminal jury instruction on accomplice liability says nothing at all about the burden of proof for a withdrawal defense.³⁷

Even assuming that under current District law the burden of persuasion for a withdrawal defense to the collateral consequences of a conspiracy rests with the government, there are sound policy and practical reasons (discussed below) to place the burden of persuasion for a withdrawal defense to accomplice liability (the focus of RCC § 22E-213) on the defendant, subject to a preponderance of the evidence standard. And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.³⁸

Consistent with the above analysis, the RCC recognizes a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a preponderance of the evidence.³⁹ (Recognition of a withdrawal defense to legal accountability is broadly congruent with recognition of the renunciation defense to general inchoate crimes under RCC § 22E- 305.⁴⁰)

³⁷ See generally D.C. Crim. Jur. Instr. § 3.200.

³⁸ Most notably, this includes the District’s statutory insanity defense, D.C. Code § 24-501 (“No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence.”); see *Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) (“To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury.”); see also *Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) (“Reasonably viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment.”). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it “is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense,” which “defense shall be established by a preponderance of the evidence.”); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . .”).

³⁹ The withdrawal defense established by RCC § 22E-213 also applies to legal accountability based upon culpably causing an innocent or irresponsible person to commit an offense. It is unclear under current District law whether a withdrawal defense would be available in this rare situation. There are only a handful of reported District cases involving this theory of liability and none implicate withdrawal.

⁴⁰ See RCC § 22E-305(a) (“In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that: (1) The defendant engaged in conduct sufficient to prevent commission of the target offense; (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant’s criminal intent.”). Note, however, that the RCC renunciation defense differs from the RCC withdrawal defense in two primary ways. First, the renunciation defense incorporates an “actual prevention” standard, which entails that the defendant successfully prevent the target of the general inchoate crime from being consummated—whereas “reasonable efforts” on behalf of the defendant will suffice to establish a withdrawal defense. Second, the renunciation defense incorporates a voluntariness requirement, which entails that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the withdrawal defense does not incorporate any subjective requirement. Given these differences, it is possible that a defendant may satisfy the standard for a withdrawal defense, and therefore escape legal accountability under RCC §§ 22E-210 and 211, but fail to satisfy the standard for a renunciation defense, and thus retain criminal liability under one or more of the general inchoate crimes under RCC §§ 22E-301, 302, and 303. See *supra* note 7 (providing illustration).

