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

(Second Draft)

SUBMITTED FOR ADVISORY GROUP REVIEW
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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.ccrc.dc.gov.

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

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

The deadline for the Advisory Group's written comments on this Second Draft of Report No. 2, *Recommendations for Chapter 2 of the Revised Criminal Code — Basic Requirements of Offense Liability*, is June 16, 2017 (six weeks from the date of issue). Oral comments and written comments received after June 16, 2017 will not be reflected in the Third Draft of Report No. 2. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 206 HIERARCHY OF CULPABLE MENTAL STATES

(a) PURPOSE DEFINED.

(1) A person acts purposely with respect to a result when that person consciously desires that one's conduct cause the result.

(2) A person acts purposely with respect to a circumstance when that person consciously desires that the circumstance exists.

(b) KNOWLEDGE & INTENT DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that one's conduct is practically certain to cause the result.

(2) A person acts knowingly with respect to a circumstance when that person is practically certain that the circumstance exists.

(3) A person acts intentionally with respect to a result when that person believes that one's conduct is practically certain to cause the result.

(4) A person acts intentionally with respect to a circumstance when that person believes it is practically certain that the circumstance exists.

COMMENTARY

1. §§ 206(a) & (b)—Purpose Defined and Knowledge & Intent Defined

Explanatory Notes. Subsections (a)(1) and (2) together provide a comprehensive definition of purpose, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts purposely with respect to a result when that person consciously desires that the person's conduct cause a prohibited result (e.g., as when a person pulls the trigger of a loaded gun with the goal of killing the victim). Likewise, a person acts purposely with respect to a circumstance when that person consciously desires that the prohibited circumstance exists (e.g., as when a person assaults a uniformed police officer because of the victim's status as a police officer). Under this definition, the fact that a person has some ulterior motive, above and beyond the person's conscious desire to cause a prohibited result or act under specified circumstances, should not preclude a finding of purpose. However, the conscious desire required by § 206(a) must be accompanied by a belief on behalf of the actor that it is at least possible that the person's conduct will cause the requisite result or that the circumstance exists.

Subsections (b)(1) and (b)(2) together provide a comprehensive definition of knowledge, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts knowingly with respect to a result when that person is aware that it is practically certain that the person's conduct will cause a prohibited result (e.g., as when a child rights advocate blows up a manufacturing facility that relies upon child

labor and kills the on-duty night guard, practically certain that the guard, who the advocate would prefer not to injure, will be killed). Likewise, a person acts knowingly with respect to a circumstance when that person is aware that it is practically certain that the prohibited circumstance exists (e.g., as when a person is practically certain that the gun-shaped object she is buying is, in fact, a prohibited firearm).

Subsections (b)(3) and (b)(4) together provide a comprehensive definition of intent, sensitive to the kind of objective element to which the term applies. The definition of intent set forth in these subsections is equivalent to the definition of knowledge set forth in §§ 206(b)(1) and (b)(2). 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 incorporated into § 206 respectively reflect this communicative distinction: whereas knowledge is defined in terms of "aware[ness]" as to a practical certainty, the definition of intent references "belie[f]" as to a practical certainty. The Revised Criminal Code codifies a definition of intent as an alternative to knowledge to facilitate the clear drafting of inchoate offenses, the hallmark of which is the imposition of liability for unrealized criminal plans.[1]

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. Use of the term knowledge suggests that the actor's beliefs must be accurate, and, therefore, that the requisite results and/or circumstances modified by the phrase "with knowledge" actually need to occur or exist.[2] A central feature of inchoate offenses, however, is that the requisite results and/or circumstances that comprise the core culpable mental state requirement need not actually occur or exist. 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.

In accordance with the foregoing analysis, the legislature should utilize the phrase "with intent," rather than "with knowledge," to communicate the core culpable mental state requirements of inchoate offenses under the Revised Criminal Code. Consistent with the definitions provided in §§ 206(b)(3) and (b)(4), use of the phrase "with intent" will establish that: (1) a subjective belief (as to a practical certainty) 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.

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[1] So, 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—beyond mere preparation—directed towards killing the victim will suffice.

[2] Consider, for example, 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. 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.

The critical distinction between purpose and knowledge/intent is the presence or absence of a positive desire. Whereas the knowing actor is aware that it is practically certain that a result will occur or that a circumstance exists—and the intentional actor believes that it is practically certain that a result will occur or that a circumstance exists—the purposeful actor consciously desires that the result occur or that a circumstance exists.[3] To differentiate between these two kinds of actors in practice, the factfinder might find it useful to consider the following counterfactual test: "Would the defendant regard himself as having failed if a particular result does not occur, or circumstance does not exist?"[4] An affirmative answer to this question is indicative of a purposeful actor.

Relation to Current District Law. Subsections (a) and (b) fill gaps in District law. The culpable mental states of "purpose," "knowledge," and "intent" appear in a variety of District statutes; however, none of these statutes explicitly define them.[5] Nor, for that matter, has the DCCA clearly defined them. Based on DCCA case law, however, it is relatively clear that the desire and belief states reflected in the definitions set forth in §§ (a) and (b) 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.[6]

District authority relevant to §§ (a) and (b) 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.[7] 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."[8] Ambiguities aside, however, it seems relatively clear from the relevant case law that proof of either of the desire or belief states in §§ (a) and (b) as to a result or circumstance 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.[9] This point has also been made more explicitly, however, in the context of the District's enhanced assault offenses. For example, with respect to assault with intent to kill, the court in *Logan v. United States* observed that "[a] specific intent to kill exists when a person acts with the *purpose* . . . of

[3] Note, however, that under RCC § 206(e), proof of a higher culpable mental state will establish a lower one, and, therefore, the culpable mental states of knowledge and intent may be satisfied by proof of purpose. In practical effect, this means that the conscious desire at issue in purpose constitutes an alternative to the belief states at issue in knowledge and intent.
[4] R.A. DUFF, CRIMINAL ATTEMPTS 17 (1996).
[5] *E.g.*, D.C. Code § 22-404.01; D.C. Code § 22-1101; D.C. Code § 5-1307.
[6] This is not to say, however, that the element-sensitive definition of the term intent in § (b) is the equivalent of the term intent as utilized in the phrase "specific intent" (or, for that matter, "general intent").
[7] *See, e.g., Perry v. United States*, 36 A.3d 799 (D.C. 2011).
[8] *Buchanan v. United States*, 32 A.3d 990, 1000 (D.C. 2011) (Ruiz, J. concurring).
[9] *See, e.g., Wilson-Bey v. United States*, 903 A.2d 818, 833-34 (D.C. 2006) (*en banc*).

causing the death of another,"[10] which in turn seems to entail a desire.[11] Likewise, with respect to assault with intent to rape, the court in *United States v. Huff* observed that the government must present proof of "an intent to persist in [sexually assaultive] force even in the face of and *for the purpose of* overcoming the victim's resistance."[12]

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.[13] Although the court never clarifies what this "conscious intention" entails, the court later equates, in the context of homicide, the *mens rea* of "a specific intent to kill" with "actually . . . fores[eeing] that death [will] result from [one's] act."[14]

Other DCCA case law concerning "specific intent" also supports the inclusion of a knowledge culpable mental state. 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."[15] 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."[16]

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."[17] 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

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

[11] 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).

[12] 442 F.2d 885, 890 (D.C. Cir. 1971).

[13] 483 A.2d at 671.

[14] *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." WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 5.2 (2d ed. Westlaw).

[15] 640 A.2d 1047, 1055-56 (D.C. 1994).

[16] *Id.*

[17] 568 A.2d 1074, 1075 (D.C. 1990).

disfigure the person at whom it was thrown [would exist]"—the only question was *whether* the accused indeed possessed this awareness. [18]

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."[19] So, for example, with respect to the crime of assault with intent to kill, "the government is not required to show that the accused actually wounded the victim" in order to prove that an assault was committed with the intent to kill.[20] 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.[21] 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."[22]

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.[23] 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.[24]

The definitions of purpose, knowledge, and intent contained in §§ (a) and (b) 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. However, 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.[25] For example,

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[18] *Id.*

[19] *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 Stat*es, 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).

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

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

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

[23] 563 A.2d 1081, 1082 (D.C. 1989) (citing *Blackledge v. United States*, 447 A.2d 46, 48 (D.C. 1982)).

[24] 952 A.2d 859, 865 (D.C. 2008).

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

RSP allows for a conviction to rest upon proof that the person "knew" or had "reason to believe" he or she was possessing "stolen property."[26] Thereafter, the statute clarifies "that the term 'stolen property' includes property that is not in fact stolen,"[27] 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."[28]

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.[29] To understand this much, however, one needs to read labyrinthine provisions of D.C. Code § 22-3232 in light of the statute's legislative history and applicable DCCA case law.[30] Under the definition of intent as to a circumstance under RCC § 206(b)(4), in contrast, the District's current multi-pronged approach could be replaced with a single clause communicating the relevant point, namely, that RSP involves "receiving property with intent that it be stolen."

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

"The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness."[31] In other words, the common law view was that "a person who acts (or omits to act) *intends* a result of his act (or omission) under two quite different circumstances: (1) when he *consciously desires* that result, whatever the likelihood of that result happening from his conduct; [or] (2) when he *knows* that that

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> (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.

[26] D.C. Code § 22-3232(a).

[27] D.C. Code § 22-3232(d).

[28] D.C. Code § 22-3232(b).

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

[30] *See* sources cited *supra* note 29.

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

result is *practically certain* to follow from his conduct, whatever his desire may be as to that result."[32]

In a departure from the common law, the drafters of the Model Penal Code opted to separate the *awareness* sense of intent from the *desire* sense of the term, labeling the former "knowledge" and applying the label of "purpose" to the latter.[33] The relevant definitions, Model Penal Code §§ 2.02(2)(a) and (b), read as follows:

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

"The essence of the narrow distinction" between purpose and knowledge under the Model Penal Code "is the presence or absence of a positive desire."[34] With respect to results, for example, Model Penal Code § 2.02(a)(i) provides that acting "purposefully" means that the result is the actor's "conscious object," while Model Penal Code § 2.02(b)(ii) provides that acting "knowingly" with respect to a result means that the actor "is aware that it is practically certain that his conduct will cause a particular result." The same basic divide between "will[ing] that the act . . . occur [and] willing to let it occur" shows up in the context of elements involving the nature of one's conduct.[35] Subsection (a)(i) provides that a person acts "purposefully" with respect to an "element [that] involves the nature of his conduct" if it "is his conscious object to engage in conduct of that nature," while Model Penal Code § 2.02(b)(i) provides that acting "knowingly" with respect to an "element [that] involves the nature of his conduct" if "he is aware that his conduct is of that nature."

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[32] LAFAVE, *supra* note 14, 1 SUBST. CRIM. L. § 5.2; *see also Tison v. Arizona*, 481 U.S. 137, 150 (1987).

[33] Under the Model Penal Code, acting "purposefully," "with purpose," "intentionally," or "with intent" with respect to a result element all mean that the result is the actor's "conscious object." Model Penal Code § 1.13.

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

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

The foregoing distinctions reflects a simple but widely shared moral intuition: all else being equal, desiring to cause a given harm is more blameworthy than being aware that it will almost surely result from one's conduct.[36] The intuition is also one with a strong legal basis—as the U.S. Supreme Court in *United States v. Bailey* observed:

> In certain narrow classes of crimes [the] heightened culpability [of purpose] has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy . . . Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior.[37]

Codification of the Model Penal Code definitions of purpose and knowledge is a standard part of modern code reform efforts. The overwhelming majority of reform jurisdictions codify definitions of purpose (or its substantive equivalent[38]) and knowledge modeled on those proposed by the Model Penal Code.[39] Likewise, in those jurisdictions that never modernized their codes, many courts have adopted similar definitions of purpose and knowledge through the common law.[40]

Subsections (a) and (b) are intended to generally reflect the definitions of, and distinctions between, purpose and knowledge reflected in reform codes. Under these

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

[37] *United States v. Bailey*, 444 U.S. 394, 405 (1980). It should be noted, however, "that purpose is rarely the required mens rea for the commission of a crime." Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1571 (2006). As the Model Penal Code drafters recognized, "th[e] distinction [between purpose and knowledge] is inconsequential for most purposes of liability; acting knowingly is ordinarily sufficient." Model Penal Code § 2.02 cmt., at 234.

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

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

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

provisions, the *awareness* sense of intent—labeled "knowingly"—is codified separately in § 206(a) from the *desire* sense of the term—labeled "purposely"—under § 206(b). Further, the definitions of each term correspond to the form of objective element to which it applies. At the same time, however, there are a variety of ways in which the definitions of purpose and knowledge contained in the Revised Criminal Code depart from standard legislative practice.

First, the definitions of purpose and knowledge contained in the Revised Criminal Code collectively differ from the Model Penal Code with respect to their treatment of conduct elements. The Model Penal Code definitions of purpose and knowledge separately address result, circumstance, and conduct elements.[41] In contrast, the definitions of purpose and knowledge contained in the Revised Criminal Code address only results and circumstances; they do not reference conduct elements at all. This reflects the Revised Criminal Code's broader decision to exclude conduct elements from the culpable mental state analysis, which, as discussed in the Commentary on §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to substantially simplify the task of element analysis, and to enhance the clarity of District law.

Second, the element-sensitive definitions of purpose with respect to results and circumstances contained in the Revised Criminal Code revise the comparable Model Penal Code definitions in a few important ways. Both definitions of purpose in the Revised Criminal Code reference a "conscious desire," and, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code's definition of purpose as to a result in § 206(a)(1), this constitutes a minor terminological revision to the comparable Model Penal Code definition, which references an actor's "conscious object" to cause a particular consequence.[42] The language of "conscious desire" seems to more intuitively capture that which is at the heart of purpose than that of "conscious object."[43] In contrast, use of the phrase "conscious desire" in the Revised Criminal Code's definition of purpose as to a circumstance in § 206(a)(2) constitutes a more substantive revision to the comparable Model Penal Code definition.

Consider that under the Model Penal Code, a person acts "purposefully" with respect to circumstances if "the person is *aware* of the existence of such circumstances or

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

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

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

the person *believes* or *hopes* that they exist."[44] This definition is noteworthy not only because it looks so different than the Model Penal Code definition of purpose as to results, but also because it looks so similar to the Model Penal Code definition of knowledge as to a circumstance. For example, Model Penal Code § 2.02(b)(i) similarly provides that an individual acts "knowingly" with respect to circumstances if the person is "*aware* . . . that such circumstances exist." Proof of mere awareness will thus satisfy both the Model Penal Code definitions of purpose and knowledge as to a circumstance, which, in practical effect, means that the distinction between the presence or absence of a positive desire—otherwise reflected in the Model Penal Code definitions of purpose and knowledge as to results—is effectively ignored. The reason? The Model Penal Code's text and explanatory notes are unclear.[45] And "[n]owhere in the Comments to the Model Penal Code is this anomaly . . . explained."[46]

This anomaly is problematic for two reasons. First, if the statutory basis of the narrow distinction between purpose and knowledge with respect to a result is the presence or absence of a positive desire, one would assume—for basic organizational reasons—that the same treatment would be afforded to circumstance elements. Second, the same moral arguments that support the desire/belief distinction in the context of results similarly apply to circumstances.[47] By failing to maintain this distinction, therefore, the drafters of the Model Penal Code produced a more complex general part, which fails to respect the basic principle "that purpose should be regarded as a more serious mental state than knowledge."[48]

Consistent with the foregoing analysis, the Revised Criminal Code treats a "conscious desire" as the *sole* basis for finding purpose as to a circumstance under § 206(a)(2). When viewed in light of the definition of purpose as to a result in § 206(a)(1), this produces a simpler culpable mental state hierarchy that allows legislators to draft more proportionate offenses.[49]

The element-sensitive definitions of knowledge with respect to results and circumstances contained in the Revised Criminal Code also contain a notable revision to the comparable Model Penal Code definitions. Both definitions of knowledge in the Revised Criminal Code reference "aware[ness]" as to a "practical[] certain[ty]," and,

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[44] Model Penal Code § 2.02(a)(ii).

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

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

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

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

Wesson, *supra* note 46, at 174.

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

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

therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code's definition of knowledge as to a result in § 206(b)(1), this does not reflect any meaningful change to the comparable Model Penal Code definition. With respect to the Revised Criminal Code's definition of knowledge as to a circumstance in § 206(b)(2), however, use of the phrase "aware[ness]" as to a "practical[] certain[ty]" departs from the comparable Model Penal Code definition.

Consider that the Model Penal Code definition of knowledge as to a circumstance in § 2.02(2)(c)(ii) generally references an actor's "aware[ness] that such circumstances exist."[50] Just what level of awareness is necessary? It's unclear from the text of the Model Penal Code. The commentary accompanying this definition fleetingly acknowledges that "'knowledge' [in this context] will often be less than absolute certainty," but fails to specify how much less.[51]

Further complicating matters is the general provision in the Model Penal Code intended to address the issue of willful blindness, § 2.02(7), which broadly declares that "[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."[52] Situations involving willful blindness aside, the provision's general reference to knowledge of a fact being established by proof of "aware[ness] of a high probability" seems to control the narrower language of "aware[ness]" of a circumstance referenced in the definition of knowledge under Model Penal Code § 2.02(2)(c)(ii) "since it is a weaker requirement."[53] But if that's true, then one might question what the difference between awareness as to a practical certainty and awareness as to a high probability amounts to—or whether it's worth recognizing this distinction through a criminal code at all.[54]

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

The consistency and ease of use reflected in RCC § 206(b)(1) and (2) is bolstered by the clarity in statutory drafting afforded by the equivalent definitions of intent in RCC § 206(b)(3) and (4). These definitions of intent provide the legislature with a means of more clearly drafting inchoate offenses comprised of a knowledge-like culpable mental state applicable to one or more results and/or circumstances that need not actually occur or exist.[55]

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[50] Model Penal Code § 2.02(2) cmt. 13 at 236.
[51] *Id.*
[52] Model Penal Code § 2.02(7).
[53] Kenneth W. Simons, *Should the Model Penal Code's Mens Rea Provisions Be Amended?*, 1 OHIO ST. J. CRIM. L. 179, 182 n.9 (2003).
[54] *Id.* at 182-83. The issue of willful blindness is addressed by RCC § 208(c), which is discussed in FIRST DRAFT OF REPORT NO. 3, *Recommendations for Chapter 2 of the Revised Criminal Code: Mistake, Deliberate Ignorance, and Intoxication*.
[55] The hallmark of inchoate crimes is the criminalization of unrealized criminal plans. *See, e.g.,* Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 759 (2012). Offenses of this nature provide the legal system with a means of distinguishing between those actors for whom some harmful conduct is an end in itself and those who planned to do some further wrong—without having to actually wait for that harm to occur. *See, e.g.,* Andrew Ashworth & Lucia Zedner, *Prevention and*

The Revised Criminal Code's novel statutory provisions on intent seek to remedy a recognized "linguistic problem" underlying the Model Penal Code's culpability scheme.[56] As discussed above, the Model Penal Code separately codifies the alternative desire and belief states that comprise the traditional understanding of intent as "purpose" and "knowledge," respectively.[57] While this separation has a variety of benefits—and, for that reason, is reflected in the Revised Criminal Code—it also creates at least one notable issue: it makes it difficult to clearly draft inchoate offenses that incorporate a core culpable mental state requirement equivalent to common law intent.

At the heart of the problem is the fact that the culpable mental state under the Model Penal Code that most accurately translates common law intent is labeled "knowledge."[58] While equivalent to common law intent, the term knowledge implies a basic correspondence between a person's subjective belief concerning a proposition and the truth of that proposition, which the term intent does not otherwise imply. This communicative distinction can lead to problems in the drafting of inchoate offenses, where the phrase "with knowledge" is used as a means of translating "with intent."

To illustrate, consider a hypothetical offense that prohibits "assault with knowledge of killing." Assuming the drafter's goal is to create an inchoate offense that—like the common law offense of assault with intent to kill—provides for liability in the absence of death, use of the term "knowledge" in this context is, at minimum, confusing. As one commentator phrases it, "[k]nowledge would not be the proper way to describe this mental state, because it would be odd to describe the defendant as having

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Criminalization: Justifications and Limits, 15 NEW CRIM. L. REV. 542, 545 (2012). At common law, the requirement that an actor engage in specified conduct "with intent" to commit some particular harm signified an inchoate offense. *See, e.g.*, LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2.

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

[56] Alan C. Michaels, *Acceptance: The Missing Mental State*, 71 S. CAL. L. REV. 953, 1032 n.330 (1998); *see, e.g.*, Paul H. Robinson & Jane Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 758 n.301 (1983); LAFAVE, *supra* note 14, at 1 SUBST. CRIM. L. § 5.2.

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

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

knowledge of a result when the result does not in fact occur."[59] More substantively, however, the phrase "with knowledge of killing" risks leaving the reader with the mistaken impression that the relevant result must actually be realized, thereby obscuring the offense's inchoate status.

The Model Penal Code appears to avoid these communicative issues by employing two different strategies. For some inchoate offenses, the Model Penal Code utilizes the phrase "with purpose" (or its substantive equivalent[60]) in lieu of the phrase "with intent."[61] This substitution avoids any of the communicative issues noted above; however, it also seems to potentially exclude those who act with a sufficiently strong belief concerning the likelihood of a result[62] from the scope of inchoate liability.[63] For other inchoate offenses, in contrast, the Model Penal Code employs the term "belief" as a stand in for the term "knowledge."[64] Notably, however, this term is never defined, which raises a host of questions concerning the meaning of the term "belief"—as well as its relationship with the Model Penal Code's other general culpability provisions.[65]

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

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

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

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

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

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

[65] Use of the term "belief" is ambiguous on its face since beliefs come in various degrees. For example, a belief might be as strong as "a practical certainty," which is the purely subjective form of knowledge. But beliefs can also be moderate: for example, one might "believe that something is likely true." Weaker yet,

To better address the above issues, the Revised Criminal Code provides an alternative to knowledge, the term intent, specifically crafted to facilitate the clear expression of a knowledge-like core culpable mental state requirement in the context of inchoate crimes. The phrase "with intent," in conjunction with §§ 206(b)(3) and (4), communicates that a subjective belief (as to a practical certainty) concerning the likelihood that a given result will occur or that a circumstance exists may provide the basis for liability, without misleadingly suggesting that the relevant results and/or circumstances it modifies need to occur or exist (as would otherwise be the case under the phrase "with knowledge").[66]

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

someone might possess "belief as to a mere possibility." It is, therefore, not clear just how strong a belief the Model Penal Code would require when it employs the term. It is also unclear, however, how the term belief is intended to interact with some of the Model Penal Code's general culpability principles. *See, e.g.*, Model Penal Code § 2.02(5).

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