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

(Third Draft)

THIRD DRAFT OF REPORT NO. 2
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.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 Third Draft of Report No. 2, *Recommendations for Chapter 2 of the Revised Criminal Code—Basic Requirements of Offense Liability*, is March 2, 2018 (about ten weeks from the date of issue). Oral comments and written comments received after March 2, 2018 may not be reflected in the Fourth 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 to cause the result.

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

(b) KNOWLEDGE DEFINED.

(1) A person acts knowingly with respect to a result when that person is aware that 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.

(c) INTENT DEFINED.

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

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

(d) RECKLESSNESS DEFINED.

(1) A person acts recklessly with respect to a result when:

(A) That person is aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts recklessly with respect to a circumstance when:

(A) That person is aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(3) A person's reckless conduct occurs "under circumstances manifesting extreme indifference" to the interests protected by an offense when the conduct constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person's situation.

(e) NEGLIGENCE DEFINED.

(1) A person acts negligently with respect to a result when:

(A) That person should be aware of a substantial risk that conduct will cause the result; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

(2) A person acts negligently with respect to a circumstance when:

(A) That person should be aware of a substantial risk that the circumstance exists; and

(B) The person's conduct grossly deviates from the standard of care that a reasonable person would observe in the person's situation.

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

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

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

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

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

COMMENTARY

1. §§ 206(a), (b) & (c)—Purpose, 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 (c)(1) and (c)(2) 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 subsections (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]

[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

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 subsections (c)(1) and (c)(2), 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.

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), (b) and (c) 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 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.[6]

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.[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[]"

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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.

[3] Note, however, that under RCC § 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 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 RCC § 206(c) 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).

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 reflected in subsections (a), (b) and (c) 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 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

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[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*).
[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).

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 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

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[15] 640 A.2d 1047, 1055-56 (D.C. 1994).
[16] *Id.*
[17] 568 A.2d 1074, 1075 (D.C. 1990).
[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)).

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 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. 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, 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 subsection (c)(2), 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 the property be stolen."

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[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:

> (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.

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

"The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness."[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 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.
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> 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.

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

"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."

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

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[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).

[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).

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

First, the definitions of purpose and knowledge contained in the Revised Criminal Code collectively differ from the Model Penal Code with respect to their treatment of conduct elements. The Model Penal Code definitions of purpose and knowledge separately address result, circumstance, and conduct elements.[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 RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to substantially simplify the task of element analysis, and to enhance the clarity of District law.

Second, the element-sensitive definitions of purpose with respect to results and circumstances contained in the Revised Criminal Code revise the comparable Model Penal Code definitions in a few important ways. Both definitions of purpose in the Revised Criminal Code reference a "conscious desire," and, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code's definition of purpose as to a result in subsection (a)(1), this constitutes a minor terminological revision to the comparable Model Penal Code definition, which references an actor's "conscious object" to cause a particular consequence.[42] The language of "conscious desire" seems to

[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).

[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.*,

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 subsection (a)(2) constitutes a more substantive revision to the comparable Model Penal Code definition.

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

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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.

[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.

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 subsection (a)(2). When viewed in light of the definition of purpose as to a result subsection (a)(1), this produces a simpler culpable mental state hierarchy that allows legislators to draft more proportionate offenses.[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, therefore, are broadly symmetrical to one another. With respect to the Revised Criminal Code's definition of knowledge as to a result in subsection (b)(1), this does not reflect any meaningful change to the comparable Model Penal Code definition. With respect to the Revised Criminal Code's definition of knowledge as to a circumstance in subsection (b)(2), however, use of the phrase "aware[ness]" as to a "practical[] certain[ty]" departs from the comparable Model Penal Code definition.

Consider that the Model Penal Code definition of knowledge as to a circumstance in § 2.02(2)(c)(ii) generally references an actor's "aware[ness] that such circumstances exist."[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]

Wesson, *supra* note 46, at 174.
[48] Wesson, *supra* note 46, at 174.
[49] *See* sources cited *supra* note 47.
[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*.

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

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

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.

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[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 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).

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 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

[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."

[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

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]

To better address the above issues, the Revised Criminal Code provides an alternative to knowledge, the term intent, specifically crafted to facilitate the clear expression of a knowledge-like core culpable mental state requirement in the context of inchoate crimes. The phrase "with intent," in conjunction with RCC §§ 206(c)(1) and (2), communicates that a subjective belief (as to a practical certainty) concerning the likelihood that a given result will occur or that a circumstance exists may provide the basis for liability, without misleadingly suggesting that the relevant results and/or circumstances it modifies need to occur or exist (as would otherwise be the case under the phrase "with knowledge").[66]

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

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

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

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

acts recklessly with respect to a circumstance when that person is aware of a substantial risk that the prohibited circumstance exists (e.g., as when a person purchases a stolen luxury car for a fraction of its market value, aware of a meaningful likelihood that the vehicle was stolen).

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

In many cases where a person consciously disregarded a substantial risk of prohibited harm, it is likely to be obvious whether the person's conduct constituted a "gross deviation" from a reasonable standard of care under subsection (d). In these situations, further elucidation of this broad phrase to the factfinder is unnecessary. Where, however, it is a closer call, the discretionary determination reflected in RCC §§ (d)(1)(b) and (d)(2)(B) is intended to be guided by the following framework.

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

Subsection (d)(3) provides for an enhanced form of recklessness, which is indicated by the phrase "recklessly, under circumstances manifesting extreme indifference" in an offense definition. This form of enhanced recklessness requires proof that the person's conduct—above and beyond implicating the requisite awareness of a substantial risk at issue in recklessness—constituted an extreme deviation from the standard of care that a reasonable person would observe in the person's situation. The requirement of an extreme deviation is to be contrasted with that of a gross deviation, which is required for recklessness under RCC §§ (d)(1)(b) and (d)(2)(B). The difference between enhanced recklessness and normal recklessness is, therefore, one of degree. It should be assessed by applying, where necessary, the same framework applicable to recklessness.

Subsection (e) provides a comprehensive definition of negligence, sensitive to the kind of objective element to which the term applies. Under this definition, a person acts negligently with respect to a result when that person fails to perceive, but should have been aware of, a substantial risk that a prohibited result will be caused by that person's

conduct (e.g., as when a person speeds through a red light unaware that there is a meaningful likelihood that the person's vehicle will hit a pedestrian stepping into the crosswalk). Likewise, a person acts negligently with respect to a circumstance when that person fails to perceive, but should have been aware of, a substantial risk that the prohibited circumstance exists (e.g., as when a person purchases a stolen luxury car for a fraction of the market price, unaware of a meaningful likelihood that the vehicle was stolen). Under both RCC §§ 206(e)(1)(A) and (e)(2)(A), therefore, negligence—unlike purpose, knowledge, or recklessness—constitutes a purely objective form of culpability; it is concerned with the substantial risks of which the person should have been aware, and for which the person can appropriately be held criminally liable.

To aid in the latter task, RCC §§ (e)(1)(B) and (e)(2)(B) establish that the person's conduct must, in order to rise to the level of negligence, grossly deviate from the standard of care that a reasonable person would observe in the person's situation. As with recklessness, the discretionary determination reflected in these provisions is intended to be guided by a basic framework for assessing the unjustifiability of a person's conduct and the blameworthiness of an actor for having engaged in it.

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

Relation to Current District Law. Subsections (d) and (e) fill a gap in, but generally accord with, District law. The culpable mental states of "recklessness" and "negligence" appear in a variety of District statutes, though no statute defines either term.[67] 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 §§ 206(d) and (e). That being 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 and consistency of the Revised Criminal Code.

The modern genesis of District law on recklessness is the District's cruelty to children statute, D.C. Code § 22-1101, which prohibits, *inter alia*, "recklessly . . . [m]altreat[ing] a child."[68] Notably, the statute does not define this key culpable mental

[67] *See, e.g.*, D.C. Code § 22-1101; D.C. Code § 22-404; D.C. Code § 5-1307.
[68] D.C. Code § 22-1101(b)(1). For earlier District authority on recklessness, *see, e.g, Thompson v. United States*, 690 A.2d 479, 483 (D.C. 1997).

state. The D.C. Criminal Jury Instructions originally recommended that the term "recklessly" be interpreted in accordance with the Model Penal Code's definition of recklessness.[69] Thereafter, 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"[70]— a definition the *Jones* court deemed consistent with the Model Penal Code definition of "recklessly."[71]

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.[72] 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*.[73] More specifically, the DCCA held that "the trier of fact," to prove reckless indifference, "must show not only that the actor did not care about the consequences of his or her action, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action."[74]

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

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

[69] D.C. Crim. Jur. Instr. § 4.120 cmt. (quoting Model Penal Code § 2.02(2)(c)).
[70] 813 A.2d 220, 225 (D.C. 2002).
[71] *Id.* (quoting Model Penal Code § 2.02(2)(c)).
[72] 62 A.3d 1266, 1270 (D.C. 2013).
[73] *Id.*
[74] *Id.*

> Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person . . . [75]

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

For example, in *Johnson v. United States*, the court explained that this provision of the District's aggravated assault statute incorporates the mental state of "'[g]ross recklessness' . . . coupled with 'extreme indifference to human life.'"[76] This elevated culpable mental state requirement, as the court went on to explain, not only entails proof that the accused was "aware that his conduct created an extreme risk of serious bodily injury," but also that this conduct have "take[n] place 'under circumstances manifesting extreme indifference to human life.'"[77]

The DCCA has likewise determined that the foregoing *mens rea* applicable to aggravated assault is substantively indistinguishable from the minimum state of mind required for conviction of second-degree murder,[78] which also requires proof of "'extreme recklessness' regarding risk of [harm]."[79] This is a product of the DCCA's interpretation of the phrase "malice aforethought" employed in the District's second-degree murder statute, D.C. Code § 22-2103.[80] One of the "distinct mental states" that comprise this common law phrase is that of a "depraved heart" which has been said to exist where the "perpetrator was subjectively aware that his or her conduct created an extreme risk of death," but nevertheless disregarded that risk.[81] Notably, however, the DCCA has made a variety of additional statements regarding the culpable mental state governing depraved heart murder, such as, for example, that the actor's conduct must "manifest a wanton disregard of human life."[82]

Whatever the precise meaning of extreme recklessness is in theory, it is relatively clear what it looks like in practice. Illustrative is the depraved heart murder case of *Powell v. United States*,[83] which the DCCA's *en banc* decision in *Comber v. United States* identifies as a classic example of extreme recklessness.[84] The defendant in *Powell* "disregarded a police officer's signal to stop his car and pull over" and "led police on a harrowing high speed chase" that included speeding through a tunnel at speeds in excess of ninety miles per hour and turning onto a congested exit ramp blocked by vehicles.[85] The chase concluded with the defendant's killing of an innocent victim, for which the defendant was convicted of depraved heart murder.[86]

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[75] D.C. Code § 22-404.01.
[76] 118 A.3d 199, 206 (D.C. 2015).
[77] *Id.* at 205.
[78] *Perry*, 36 A.3d at 823 (Farrell, J. concurring).
[79] *Id.* at n.3 (quoting *Comber v. United States*, 584 A.2d 26, 39 n.11 (D.C.1990) (en banc)).
[80] *Comber*, 584 A.2d at 38.
[81] *Id.* at 39. *See, e.g.*, *Jennings v. United States*, 993 A.2d 1077, 1080 (D.C. 2010); *Williams v. United States*, 858 A.2d 984, 998 (D.C. 2004).
[82] *Id.* (quoting *United States v. Dixon*, 419 F.2d 288, 293 n.8 (D.C. Cir. 1969)); *Powell v. United States*, 485 A.2d 596, 603 (D.C. 1984).
[83] 485 A.2d at 603.
[84] *Comber*, 584 A.2d at 39 n.13.
[85] *Powell*, 485 A.2d at 603.
[86] *Id.*

On appeal, the defendant's conviction was upheld on the theory, reaffirmed by the *Comber* court, that the defendant's conduct "showed a wanton, reckless disregard for life."[87] In accordance with the foregoing reasoning, the *Comber* court highlights the following additional fact patterns as paradigmatic examples of depraved heart murder: (1) "firing a bullet into a room occupied, as the defendant knows, by several people"; (2) starting a fire at the front door of an occupied dwelling"; (3) "shooting into . . . a moving automobile, necessarily occupied by human beings"; and (4) "playing a game of 'Russian roulette' with another person."[88]

The definition of enhanced recklessness reflected in RCC § 206(d)(3) is intended to generally capture the foregoing District authorities on aggravated assault and depraved heart murder. At the same time, however, it is also intended to provide future factfinders with a basis for identifying enhanced recklessness—and distinguishing between normal recklessness and enhanced recklessness—in a clearer and more consistent fashion.

For example, although District authorities tend to focus on the conscious disregard of an "extreme risk" as the core of enhanced recklessness, it is unclear what extreme means in this context—or how it is different than the grave or substantial risk required for other normal recklessness offenses. The most obvious reading of the term is that it is probabilistic, that is, that the result of death or serious bodily injury must be extremely likely to occur. If true, however, then this definition "fails to account for cases where a conviction for unintended murder [or aggravated assault] is clearly in order regardless of the probability that death [or serious bodily injury] will occur."[89] Indeed, the illustrative examples cited to in *Comber* reflect "a wanton, reckless disregard for life" not (only) because of how probable the risk of death was, but because they were "imposed for insufficient or misanthropic reasons."[90] The extreme deviation standard stated in § 206(d)(3), when viewed in light of the evaluative framework specified in the explanatory note, appropriately accounts for these implicit considerations.

The DCCA's approach to negligence appears to be similar to that of its approach to recklessness, with one exception: awareness of the risk is not necessary. Few District statutes require this particular culpable mental state; however, the DCCA has interpreted the District's broadly worded manslaughter statute to incorporate the offense of involuntary manslaughter, which is governed by the mental state of "culpable (criminal) negligence."[91] 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."[92] 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

[87] *Id*. *See Comber*, 584 A.2d at 39 n.13 (quoting *Powell*, 485 A.2d at 603).
[88] *Comber*, 584 A.2d at 39 n.13 (quotations and citation omitted).
[89] Alan C. Michaels, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 798 (1985). It also questionable, given recent empirical work on *mens rea*, that jurors would be able to differentiate between the substantial or grave risk at issue in normal recklessness and the extreme risk at issue in enhanced recklessness. *See* Francis X. Shen et al., *Sorting Guilty Minds*, 86 N.Y.U. L. REV. 1306, 1353 (2011).
[90] Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 934-35 (2000).
[91] *Faunteroy v. United States*, 413 A.2d 1294, 1298–99 (D.C. 1980).
[92] *Comber*, 584 A.2d at 48.

prudence in the same situation and with equal experience would not have omitted."[93] (Note, however, that the District's vehicular homicide statute, § 50-2203.01, appears to incorporate this civil negligence standard.[94])

The definition of negligence reflected in subsection (e) is broadly consistent with the foregoing District authority on involuntary manslaughter.[95] Consistent with the analysis of recklessness and enhanced recklessness *supra*, however, this definition—when viewed in light of the factors specified in the explanatory note—is also intended to provide future factfinders with the basis for identifying it in a clearer and more consistent fashion.

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

The idea that non-intentional conduct can appropriately serve as the basis for criminal liability under certain circumstances has been long recognized by the common law.[96] However, while courts agreed "that something more was required for criminal liability than the ordinary negligence which is sufficient for tort liability,"[97] the nature of this "something extra"—above and beyond the basic unreasonableness at the heart of civil negligence—was nevertheless the source of much confusion.[98]

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

(c) Recklessly.

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[93] *Faunteroy*, 413 A.2d at 1298-99.

[94] 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).

[95] Note, however, that the reference to "*extreme* danger to life or of serious bodily injury" in the DCCA's definition of the negligence governing involuntary manslaughter is likely distinct from the mere "substantial risk" referenced in the Revised Criminal Code's definition of negligence under RCC §§ 206(e)(1)-(2).

[96] LAFAVE, *supra* note 14, at § 5.4.

[97] *Id.*

[98] *Id.*

> A person acts recklessly with respect to a material element of an offense when the person consciously disregards a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) Negligently.

> A person acts negligently with respect to a material element of an offense when the person should be aware of a substantial and unjustifiable risk that the material element exists or will result from the person's conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of the person's conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

These definitions provide for criminal liability in two different kinds of situations involving non-intentional conduct. The first, captured by the term recklessness, "involves conscious risk creation."[99] By requiring awareness of a risk, recklessness "resembles acting knowingly," though importantly "the awareness is of [a] risk [that falls] short of [a] practical certainty."[100] The second situation, captured by the term negligence, also implicates risk creation, but here liability is assigned based upon the actor's failure to perceive the risk. Negligence can therefore be "distinguished from acting purposely, knowingly, or recklessly in that it does not involve a[ny] state of awareness."[101]

Setting aside the key distinction between conscious and inadvertent risk creation (or risk taking), recklessness and negligence, as defined by the Model Penal Code, share many important similarities. For example, the first clause of each definition establishes that both culpable mental states involve the disregard of a risk that is "substantial and unjustifiable." Such language was intended to exclude a wide range of activities that involve risk creation or risk taking from falling within the scope of criminal liability.[102] For example, opening an umbrella in a crowded public space, hitting a golf ball on a driving range, performing open-heart surgery, or building a skyscraper all entail some level of risk. In the typical case, however, these risks will be beyond the reach of the criminal law either because they are insubstantial—for example, in the case of opening an umbrella in a crowded public space—or because even if they are substantial, they are

[99] Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1438-39 (1968)
[100] *Id.*
[101] *Id*.
[102] Model Penal Code § 2.02 cmt. at 237, 241.

justified under the circumstances—for example, in the case of a surgeon performing open-heart surgery.[103]

Likewise, the second clauses of the Model Penal Code definitions of recklessness and negligence both require that the person's conduct have been sufficiently unjustifiable and blameworthy to justify a criminal conviction.[104] The specific standard provided is that of a "gross deviation" from a reasonable standard of care, which, under both definitions, entails a consideration of the "nature and degree" of the risk, "the nature and purpose of the actor's conduct and the circumstances known to him," and "the standard of conduct" that a reasonable person "would observe in the actor's situation."[105] The Model Penal Code drafters believed that such language, when viewed as a whole, would appropriately require "the jury [to comprehensively] evaluate the actor's conduct and determine whether it should be condemned."[106]

The Model Penal Code definitions of recklessness and negligence, like those of purpose and knowledge, have been quite influential. Insofar as legislative practice is concerned, for example, "[a]t least 24 state statutes follow the Model Penal Code's definitions of recklessness and negligence."[107] Likewise, many courts in jurisdictions that never modernized their codes have opted to adopt Model Penal Code-based definitions of recklessness and negligence through case law.[108] (The U.S. Sentencing Commission also opted to incorporate the Model Penal Code definitions of recklessness and negligence into the U.S. Sentencing Guidelines.[109])

It's important to highlight, however, that state legislatures and courts rarely seem to adopt the Model Penal Code definitions of recklessness and negligence wholesale. Instead, they typically revise the definitions in one or more ways in the course of enactment. To take just a few examples: (1) some reform jurisdictions omit reference to the requirement of justifiability in their definitions of recklessness and/or negligence[110]; (2) some reform jurisdictions omit reference to the magnitude of the risk in their definitions of recklessness and/or negligence[111]; and (3) a majority of reform jurisdictions

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[103] *Id*.
[104] *Id*.
[105] *See id.*
[106] *Id.*
[107] *United States v. Dominguez-Ochoa*, 386 F.3d 639, 646 (5th Cir. 2004). *See* Ala. Code § 13A-2-2; Alaska Stat. Ann. § 11.81.900; Ariz. Rev. Stat. Ann. § 13-105; Ark. Code Ann. § 5-2-202; Colo. Rev. Stat. Ann. § 18-1-501; Conn. Gen. Stat. Ann. § 53a-3; Del. Code Ann. tit. 11, § 231; Haw. Rev. Stat. Ann. § 702-206; 720 Ill. Comp. Stat. Ann. 5/4-4 et seq.; Me. Rev. Stat. tit. 17-A, § 35; Mo. Ann. Stat. § 562.016; Mont. Code Ann. § 45-2-101; N.H. Rev. Stat. Ann. § 626:2; N.Y. Penal Law § 15.05; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.085; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tenn. Code Ann. § 39-11-302; Tex. Penal Code Ann. § 6.03; Utah Code Ann. § 76-2-103; Wash. Rev. Code Ann. § 9A.08.010; Wyo. Stat. Ann. § 6-1-104.
[108] *See, e.g., Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 422 (1997); *Lockett v. Ohio*, 438 U.S. 621, 628 (1978); *Elonis v. United States*, 135 S. Ct. 2001, 2015 (2015); *Albrecht v. State*, 658 A.2d 1122, 1140 (Md. Ct. Spec. App. 1995); *Commonwealth v. Feigenbaum*, 536 N.E.2d 325, 328 (Mass. 1989).
[109] *See, e.g.*, U.S.S.G. § 2A1.4.
[110] *See* Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Wash. Rev. Code Ann. § 9A.08.010; Mont. Code Ann. § 45-2-10.
[111] Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Mont. Code Ann. § 45-2-10.

omit one or more terms and phrases from the gross deviation analysis employed in their definitions of recklessness and/or negligence.[112]

Modifications aside, it is nevertheless clear that the Model Penal Code definitions of recklessness and negligence today constitute the general standards for risk-based fault in the criminal law.[113] The definitions of recklessness and negligence incorporated into the Revised Criminal Code reflect these general standards. For example, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), implicate the disregard of a substantial risk, while recklessness, but not negligence, requires proof that the person was aware of the substantial risk being disregarded. Likewise, both recklessness and negligence, as provided in RCC §§ 206(d) and (e), employ a situation-specific gross deviation standard. There are, however, a few important ways in which the definitions of recklessness and negligence incorporated into the Revised Criminal Code depart from the Model Penal Code approach.

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

The Model Penal Code approach is to define acting recklessly or negligently, as the case may be, "with respect to a material element of an offense."[114] Not only does this fail to clearly distinguish between reckless/negligent risk creation (for results) and reckless/negligent risk taking (for circumstances)—a distinction that is otherwise evident in the Model Penal Code's two-part definition of purpose and knowledge—but it implies that recklessness and negligence potentially apply to conduct elements as well. To enhance the precision of the law, therefore, the Revised Criminal Code provides element-sensitive definitions of recklessness and negligence that clearly distinguish between results and circumstances. Notably absent from these definitions, however, is any reference to conduct elements. This reflects the Revised Criminal Code's broader approach of excluding conduct elements from the culpable mental state analysis, which, as discussed in the commentary on RCC §§ 201(b), 203(b), and 206(a), is intended to avoid unnecessary confusion surrounding the culpability requirement governing conduct elements, to simplify the task of element analysis, and to enhance the clarity of District law.

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

The first ambiguity relates to the phrase "substantial and justifiable" utilized in the Model Penal Code definition of recklessness. Model Penal Code § 2.02(2)(c) provides that "[a] person acts recklessly . . . when the person *consciously disregards a*

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

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

[114] *See* Model Penal Code § 2.02(2)(c)-(d).

substantial and unjustifiable risk that the material element exists or will result from the person's conduct." Left unspecified is what, precisely, the defendant must have been aware of. For example, potential interpretations of the foregoing language include awareness that: (1) *any* risk existed (which risk was, in fact, substantial and unjustifiable); (2) a *substantial* risk existed (which risk was, in fact, unjustifiable); or (3) that a *substantial and unjustifiable* risk existed.[115] Though the text of the Model Penal Code weakly suggests the third interpretation, no jurisdiction appears to apply this approach, which would require proof that the defendant was aware of the unjustifiable nature of his conduct, in practice.[116] Nor does it appear to have been intended by the Model Penal Code drafters.[117] Rather, as highlighted by a wide range of legal authorities, the second interpretation—that the awareness must encompass a risk's substantiality but not its unjustifiability—seems to be the most appropriate reading.[118]

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

The second significant textual ambiguity reflected in the Model Penal Code definitions of recklessness and negligence concerns "the relationship between the requirement that the risk be "[]unjustifiable" and that which requires the risk to be such that its disregard involves a "gross deviation" from the "standard of conduct that a law-abiding person would observe in the actor's situation."[119] On the one hand, the text of the Model Penal Code separates these two requirements into distinct clauses, which seems to indicate that the justifiability analysis and the gross deviation analysis are independent from one another. On the other hand, the manner in which the Model Penal Code commentary discusses these requirements strongly suggests that the justifiability analysis merely comprises part of, and is therefore necessarily included within, the gross deviation analysis.[120] The latter position also finds support in a wide range of legal authorities, including the various reform codes that omit any reference to justifiability from the definitions of recklessness and negligence.[121]

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[115] *See* Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1379 n.130 (1992).
[116] *See* LAFAVE, *supra* note 14, at § 5.4.
[117] *See* Model Penal Code § 2.02 cmt. at 238.
[118] *See* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. L. 281, 362 (1981); Claire Finkelstein, *Responsibility for Unintended Consequences*, 2 OHIO ST. J. CRIM. L. 579, 594-95 (2005); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 383 n.48 (1994); Kenneth W. Simons, *Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character?"*, 6 BUFF. CRIM. L. REV. 219, 226 n.11 (2002).
[119] Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 TEX. L. REV. 333, 341-42 (2006).
[120] Model Penal Code § 2.02 cmt. at 237, 241.
[121] *See, e.g.*, Del. Code Ann. tit. 11, § 231; Me. Rev. Stat. tit. 17-A, § 35; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; S.D. Codified Laws § 22-1-2; Wash. Rev. Code Ann. § 9A.08.010; Mont. Code Ann. § 45-2-10; Wechsler, *supra* note 99, at 1438; Joshua Dressler, *Does One Mens Rea Fit*

Consistent with the foregoing authorities, the definitions of recklessness and negligence incorporated into the Revised Criminal Code similarly omit any reference to justifiability. In practical effect, this means that the requirement of a gross deviation constitutes the sole basis for evaluating whether the disregard of a substantial risk is culpable enough to be criminalized under the Revised Criminal Code.[122] Which raises the following question: how, precisely, does the gross deviation analysis operate in practice?

This is perhaps the most important ambiguity contained in the Model Penal Code definitions of recklessness and negligence given the key role that the gross deviation analysis plays in distinguishing civil liability from criminal liability.[123] With respect to the gross deviation analysis, both Model Penal Code definitions generally reference a consideration of the "nature and degree" of the risk, "the nature and purpose of the actor's conduct," and that the evaluation should account for "the circumstances known to [the actor]" as well as the actor's "situation." How all of this is ultimately to be put together by the factfinder is less than clear, however.[124] The commentary at times gestures towards answers, noting, for example, that "less substantial risks might suffice for liability if there is no pretense of any justification for running the risk,"[125] as well as the fact that "moral defects can [only] properly be imputed to instances where the defendant acts out of insensitivity to the interests of other people, and not merely out of an intellectual failure to grasp them."[126] But the drafters of the Model Penal Code did not reduce the relevant insights to a formula that can easily be applied by the fact-finder in a particular case.

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

The language of the Revised Criminal Code is intended to redress the above ambiguity surrounding the gross deviation analysis. Under RCC §§ 206(d) and (e), the

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All?: Thoughts on Alexander's Unified Conception of Criminal Culpability, 88 CAL. L. REV. 955, 958 (2000).

[122] Note, however, that the explanatory note on recklessness and negligence generally clarifies that the justifiability calculus is part of the gross deviation analysis, while the factors bearing on the gross deviation analysis highlighted in the explanatory note explicitly incorporate the standard justifiability considerations. *See, e.g,* Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 10 (2009); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006).

[123] *See, e.g., Williams v. State*, 235 S.W.3d 742, 752-53 (Tex. Crim. App. 2007); *Pagotto v. State*, 732 A.2d 920, 922-26 (Md. Ct. App. 1999), aff'd, 361 Md. 528 (2000).

[124] *See, e.g.*, Treiman, *supra* note 118, at 358; Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393 (1988).

[125] Model Penal Code § 2.02 cmt. at 243.

[126] *Id.*

factfinder is asked to simply consider whether the person's conduct *viewed as a whole* amounted to a gross deviation from a reasonable standard of care given the person's situation. In many cases, mere recitation of this simple statement should be satisfactory. Where, however, further precision is necessary, the explanatory note provides a more precise formula culled from a wide range of legal authorities, which clarifies the relevant considerations that should be brought to bear on whether the actor's conduct constitutes a gross deviation.[127]

It's worth noting that this formula also provides the basis—as reflected in RCC § 206(d)(3)—for more clearly distinguishing between normal recklessness and the special form of enhanced recklessness that is sometimes applied in murder and aggravated assault offenses employed across the country.[128] In reform jurisdictions, this enhanced recklessness is most frequently articulated through the requirement of acting "recklessly under circumstances manifesting extreme indifference to the value of human life."[129] The foregoing language is directly drawn from the Model Penal Code definitions of murder and aggravated assault.[130] It is premised on the view—endorsed by the Model Penal Code drafters—that reckless conduct can, under certain circumstances, be so extreme that it as culpable as knowing or purposeful conduct.[131]

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

> Whether recklessness is so extreme that it demonstrates similar indifference [to human life] is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be

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[127] For example, in Alaska:

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

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

[128] *See, e.g.*, Michaels, *supra* note 89; LAFAVE, *supra* note 14, at § 14.4.

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

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

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

> assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter.[132]

There are two problems with this "'I know it when I see it approach" to *mens rea*.[133] First, "[i]n the absence of a legal framework that provides an intelligible basis for making the critical distinctions in *mens rea*, it seems highly likely that arbitrary and discriminatory factors could be used by decisionmakers—whether consciously or unconsciously—to fill in the gap."[134] Second, case law and scholarly commentary indicate that the contours of enhanced recklessness can be fleshed out in a more coherent fashion.[135] The relevant factors courts apply, and which have been proposed by commentators, tend to be no different than those applicable to normal recklessness—and which are reflected in the explanatory note.[136] (Indeed, at least one jurisdiction appears to have successfully asked jurors to apply a comparable four-factor test to distinguish between normal recklessness and enhanced recklessness in the context of homicide for over three decades.[137])

Consistent with the foregoing authorities, the Revised Criminal Code addresses the culpable mental state of enhanced recklessness as follows. Subsection (d)(3) establishes that "[a] person's reckless conduct occurs 'under circumstances manifesting extreme indifference' to the interests protected by an offense when such conduct constitutes an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." This clarifies that enhanced recklessness, whenever it is employed in the Revised Criminal Code, entails proof of normal recklessness plus an extreme (rather than gross) deviation. The factors elucidated in the underlying explanatory note, in turn, provide an intelligible basis for identifying an extreme deviation, and distinguishing it, where necessary, from a gross deviation.

Admittedly, the foregoing framework requires the exercise of a significant amount of discretion. But so does any other approach to enhanced recklessness. There simply are limits on the precision of any formulation of a normative judgment, such as that entailed by enhanced recklessness.[138] Still, providing courts and juries with a standard—guided by an explanation of the relevant factors to be considered—seems more likely to lead to consistent and fair outcomes than providing no guidance at all.[139]

3. § 206(f)—Proof of Greater Culpable Mental State Satisfies Requirement for Lower

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[132] *See id.*
[133] John C. Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, 57 DUKE L.J. 425, 444 (2007).
[134] Michael Serota, *Mens Rea, Criminal Responsibility, and the Death of Freddie Gray*, 114 MICH. L. REV. FIRST IMPRESSIONS 31, 39 (2015); *see, e.g.*, Michaels, *supra* note 89, at 794; John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 214 (1985); *Smith v. Goguen*, 415 U.S. 566, 575 (1974).
[135] *See* sources cited *supra* note 127.
[136] *See* sources cited *supra* note 127.
[137] *See Jeffries*, 169 P.3d at 916; *Neitzel v. State*, 655 P.2d at 336.
[138] Robinson, *supra* note 95, at 451-52.
[139] *Id.*

Explanatory Note. 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) intent can be satisfied by proof of knowledge or purpose; and (4) knowledge 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, which is more culpable than 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.

Relation to Current District Law. Subsection (f) generally accords with District law. 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 practice of noting hierarchically superior mental states alongside the lowest mental state.[140] Under the Revised Criminal Code, in contrast, the legislature need not state alternative mental states in the definition of an offense; rather, a statement of the lowest culpable mental state sufficient to establish a given objective element is sufficient.

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

Courts have long recognized that "the kaleidoscopic nature of the varying degrees of mental culpability"[141] specified by legislatures ultimately amount to little more than "fine gradations along but a single spectrum of culpability."[142] It is well-established among common law authorities, for example, that criminal intent and criminal recklessness lie on a *mens rea* continuum, with the latter representing a subset of the former, [143] such that "it is impossible to commit a crime intentionally without concomitantly committing that crime recklessly."[144]

The hierarchical relationship between the culpable mental states employed in the Model Penal Code is addressed by § 2.02(5), which serves two separate functions.[145]

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[140] 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).

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

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

[143] *United States v. Shaid*, 916 F.2d 984, 990 (5th Cir. 1990) (citing *United States v. Welliver*, 601 F.2d 203, 209–10 (5th Cir. 1979) *United States v. Reynolds*, 573 F.2d 242, 244-45 (5th Cir. 1978); *United States v. Wilson*, 500 F.2d 715, 720 (5th Cir. 1974)).

[144] *Green*, 56 N.Y.2d at 433 (quoting *People v. Stanfield*, 36 N.Y.2d 467 (1975)). LaFave believes this to be a "quite logical" outcome that is consistent with the case law. LAFAVE, *supra* note 14, at § 5.4 (citing *State v. Stewart*, 122 P.3d 1269 (N.M. 2005); *Simmons v. State*, 72 P.3d 803 (Wyo. 2003)).

[145] The relevant provision reads:

Substantively speaking, it clarifies that purpose is more culpable than knowledge, which is more culpable the recklessness, which is more culpable than negligence.[146] So, for example, "if [a] crime can be committed recklessly, it is no less committed if the actor acted purposely."[147] As a drafting matter, however, this provision "makes it unnecessary to state in the definition of an offense that the defendant can be convicted if it is proved that he was more culpable than the definition of the offense requires."[148]

Codification of a general provision based on Model Penal Code § 2.02(5) is a standard part of modern code reform efforts. Most reform jurisdictions—as well as all of the major model codes and recent code reform projects—codify a general provision comparable to Model Penal Code § 2.02(5).[149] Several courts in jurisdictions that have not modernized their criminal codes have also recognized the virtues of this "common legal notion"[150] and similarly apply it through case law.[151] Consistent with the foregoing trends, RCC § 206(f) incorporates a substantively identical provision into the Revised Criminal Code.

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

Model Penal Code § 2.02(5).

[146] *See id.*

[147] Explanatory Note on Model Penal Code § 2.02(5).

[148] *Id.*

[149] For reform jurisdictions, *see* Ala. Code § 13A-2-4; Alaska Stat. Ann. § 11.81.610; Ariz. Rev. Stat. Ann. § 13-202; Ark. Code Ann. § 5-2-203; Colo. Rev. Stat. Ann. § 18-1-503; Del. Code Ann. tit. 11, § 253; Haw. Rev. Stat. Ann. § 702-208; Kan. Stat. Ann. § 21-5202; Me. Rev. Stat. tit. 17-A, § 34; Mo. Ann. Stat. § 562.021; Mont. Code Ann. § 45-2-102; N.H. Rev. Stat. Ann. § 626:2; N.J. Stat. Ann. § 2C:2-2; N.D. Cent. Code Ann. § 12.1-02-02; Ohio Rev. Code Ann. § 2901.22; Or. Rev. Stat. Ann. § 161.115; 18 Pa. Stat. and Cons. Stat. Ann. § 302; S.D. Codified Laws § 22-1-2; Tex. Penal Code Ann. § 6.02; Utah Code Ann. § 76-2-104; Wash. Rev. Code Ann. § 9A.08.010. For model codes, *see* Proposed Federal Criminal Code § 302(4). For recent reform projects, *see* Kentucky Revision Project § 501.206; Illinois Reform Project § 205.

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

[151] *See, e.g., United States v. Nguyen*, CRIM.A. 99-210, 1999 WL 1220761 (E.D. La. Dec. 15, 1999); *State v. Stewart*, 122 P.3d 1269, 1278 (N.M. 2005); *O'Brien v. State*, 45 P.3d 225, 232 (Wyo. 2002); *State v. Smith*, 441 A.2d 84, 92 (Conn. 1981); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 56 (2010) (Breyer, J., dissenting).