BORDEN, J., concurring. I agree with and join the well reasoned opinion of the majority. I write separately, however, to point out what I regard as an anomaly in our Supreme Court's interpretation of the conspiracy section of the Penal Code that our Supreme Court may wish to revisit.

I agree that we are constrained by the decision of our Supreme Court in *State* v. *Padua*, 273 Conn. 138, 869 A.2d 192 (2005), to conclude that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those elements that do not by themselves carry a specific intent with them. For me, however, that should not end the discussion. I am also constrained to discuss what may well be regarded as an anomaly in our Supreme Court's interpretation of the conspiracy section of the Penal Code. I begin with the case law that has produced that anomaly.

The competing legal contentions of the defendant, Terrell Williams Pond, and the state raise a fundamental question about the scienter requirement under General Statutes § 53a-48 (a), the conspiracy statute, as applied to General Statutes § 53a-135 (a) (2), robbery in the second degree by the display or threat of use of what is represented to be a deadly weapon or dangerous instrument. That question is: must the state prove that the conspirators specifically agreed that such a weapon or instrument would be displayed or threatened to be used, as the defendant contends; or, as the state contends, is it sufficient for the state to prove that the conspirators agreed to commit a robbery and that, irrespective of any specific scienter requirement on the part of any one conspirator, one of the participants did display or threaten the use of such a weapon or instrument?

The pertinent language of the conspiracy statute, § 53a-48 (a), provides in relevant part that a "person is guilty of conspiracy when, *with intent that conduct constituting a crime be performed*, he agrees with one or more persons to engage in or cause the performance of such conduct . . . ." (Emphasis added.) The language of the conspiracy statute does not, by its terms, answer the question posed by this case, namely, whether the specific intent provided by the statute—the "intent that conduct constituting a crime be performed"—requires proof of a specific intent to perform all of the elements of the crime conspired, including any aggravating elements.

The Supreme Court first addressed this question in *State* v. *Beccia*, 199 Conn. 1, 505 A.2d 683 (1986). In that case, in which the defendant had been convicted

of conspiracy to commit arson in the third degree, the court stated: "Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they *intended to commit the elements of the offense*." (Emphasis in original; internal quotation marks omitted.) Id., 3–4. "[P]roof of a conspiracy to commit a specific offense requires proof that the conspirators *intended* to bring about the elements of the conspired offense." (Emphasis in original; internal quotation marks omitted.) Id., 5. The court therefore vacated the conviction because one of the elements of the crime was the reckless damage to or destruction of a building and, the court concluded, "conspirators cannot agree to accomplish a result recklessly when that result is an essential element of the crime . . . ." Id. Thus, *Beccia* stands for the proposition that a conspiracy charge requires proof of intent to commit all of the elements of the conspired offense. *Beccia* does not answer the question posed by the present case, however, because, unlike the present case, in which the questioned element—namely, the display of what is represented to be a deadly weapon—does not carry any specific mens rea with it, in *Beccia* the questioned element—recklessly causing damage to property—does carry a specific mens rea with it, namely, recklessness. See General Statutes § 53a-5.[1]

In *State* v. *Crosswell*, 223 Conn. 243, 256, 612 A.2d 1174 (1992), the court posed the question in the following terms: "If two or more persons conspire to take particular property from someone who has a superior right of possession, and agree to do so peacefully, do subsequent changes in the modus operandi to accomplish the taking operate to discharge a willing participant from culpability?" The court did not need to answer that question, however, because there was sufficient evidence "from which the jury might reasonably have inferred the defendant's acquiescence in this enlarged criminal enterprise." Id.

The question has been answered, however, at least implicitly, by our Supreme Court in *State* v. *Padua*, supra, 273 Conn. 138. In that case, the defendants were convicted of conspiracy to sell marijuana within 1500 feet of a public housing project. Id., 145. The court stated that it was an essential element of the conspiracy charge that the conspirators agreed to sell marijuana specifically within 1500 feet of a public housing project. Id., 166. The Supreme Court held, in accord with the state's concession, that the trial court's instruction, which had omitted this element, was improper but that the impropriety was harmless beyond a reasonable doubt. Id. In doing so, the court again reaffirmed the

notion that "[p]roof of a conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) Id., 167. This must be read to establish the notion that the specific intent required by the conspiracy statute requires specific intent to bring about *all* of the elements of the conspired offense, even those that do not by themselves carry a specific intent with them, because it was already settled law that in a prosecution for sale of drugs within 1000 feet of a school, the state need not prove that the defendant knew that his sale was within 1000 feet of a school. See *State* v. *Denby*, 235 Conn. 477, 482, 668 A.2d 682 (1995) ("[T]he plain language of [General Statutes] § 21a-278a [b] requires as an element of the offense an intent to sell or dispense the narcotics at a location that is within 1000 feet of a school. The state is not, however, required to prove that the defendant knew that this location was within the zone.").

This court's case law, however, is somewhat in conflict on this issue. In *State* v. *Leggett*, 94 Conn. App. 392, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899 A.2d 39 (2006), the defendant was convicted of the same offense as that involved in the present case, namely, conspiracy to commit robbery in the second degree in violation of § 53a-135 (a) (2). In rejecting the defendant's argument that "the state must prove separately his intent to use or threaten the use of physical force," this court held that "[t]he larceny component of robbery, as described in General Statutes § 53a-119, is an intent crime. The use or threatened use of force described in General Statutes § 53a-133, however, has no additional intent element. The state, therefore, need only prove that the defendant intended the larceny and carried it out through the use or threatened use of physical force." Id., 402–403 n.14. A fortiori, in such a case the state need not prove the additional aggravating circumstance of the use or threat of the use of what is represented to be a deadly weapon or dangerous instrument.

Leggett, however, has been essentially overtaken by subsequent case law in this court. In *State* v. *Haywood*, 109 Conn. App. 460, 952 A.2d 84, cert. denied, 289 Conn. 928, 958 A.2d 161 (2008), this court read *Padua* as answering the question posed by the Supreme Court in *Crosswell*. We stated: "We believe, moreover, that the question posed in *Crosswell* was later answered in *Padua*, which, as noted, held that, for culpability, one must conspire to commit the particular crime and not merely to perform an undefined criminal act." Id., 476 n.13.

Furthermore, in *State* v. *Palangio*, 115 Conn. App. 355, 973 A.2d 110 (2009), the defendant was charged with conspiracy to commit robbery in the first degree in violation of General Statutes §§ 53a-48 (a) and 53a-

134 (a) (4).[2] Robbery in the first degree under that section is defined as robbery during the course of which the robber or another participant "displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver . . . or other firearm . . . ." General Statutes § 53a-134 (a) (4). The state in *Palangio* contended that it was not necessary to prove that the defendant knew that his coconspirator would use a firearm during the robbery. *State* v. *Palangio*, supra, 362. This court disagreed, relying on *State* v. *Padua*, supra, 273 Conn. 138, for the proposition that "[p]roof of conspiracy to commit a specific offense requires proof that the conspirators intended to bring about the elements of the conspired offense." (Internal quotation marks omitted.) *State* v. *Palangio*, supra, 362. Thus, the court in *Palangio* concluded that the state was required to prove that the defendant and his coconspirator agreed to commit robbery, and that he "intended to commit robbery with a firearm . . . ." Id.

With this background in mind, I now turn to the anomaly that it has produced. It is fundamental in our criminal law that there is no legal difference between liability as an accessory and liability as a principal. *State* v. *Gonzalez*, 300 Conn. 490, 507, 15 A.3d 1049 (2011). Liability as an accessory is "legally indistinguishable" from liability as a principal because the accessory statute specifically provides that an accessory may be "prosecuted and punished as if he were the principal offender." (Internal quotation marks omitted.) Id. Put another way: "Under [General Statutes] § 53a-8, accessorial liability is not a distinct crime, but only an alternative means by which a substantive crime may be committed . . . ." (Internal quotation marks omitted.) Id., 500. It is also well established, under the Supreme Court's holding in *State* v. *Crosswell*, supra, 223 Conn. 261 n.14, "that when a defendant is charged with robbery in the first degree on the basis that he or another participant . . . is armed with a deadly weapon; General Statutes § 53a-134 (a) (2); the defendant need not be proven to have intended to possess a deadly weapon." (Internal quotation marks omitted.) Under our Supreme Court's similar holding in *State* v. *Avila*, 223 Conn. 595, 609, 613 A.2d 731 (1992), it is also well recognized that a defendant charged as an accessory to robbery in the first degree under the same section need not be proven to have intended to possess a deadly weapon.

These principles of interpretation were recently reaffirmed and explained—as I will discuss in more detail—by our Supreme Court in *State* v. *Gonzalez*, supra, 300 Conn. 502. In *Gonzalez*, the defendant was charged as an accessory to manslaughter in the first degree with a firearm under General Statutes §§ 53a-8 and 53a-55a, which requires proof that "in the commission of [the offense of manslaughter in the first degree] he uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses,

a firearm.[3] General Statutes § 53a-55a (a). The court held that the language referred to previously—namely, that the perpetrator "uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses," a firearm—is simply an aggravating circumstance of the underlying crime for which no specific mental state is required and which, therefore, "drops out of the calculation" insofar as proof of a mental state is required. (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 505. Thus, in *Gonzalez*, our Supreme Court affirmed the defendant's conviction of manslaughter in the first degree with a firearm as an accessory, concluding that the state did not have to prove that the defendant specifically intended that a firearm be used in the commission of the offense. Id., 506.

Consequently, if a defendant is charged either *as a principal or an accessory* to robbery in the second degree in violation of § 53a-135 (a) (2), under *Crosswell*, *Avila* and *Gonzalez* the state *would not be required* to prove that he, or another participant, specifically intended to possess or display a deadly weapon or dangerous instrument. Yet, if the defendant is charged with *conspiring* to commit robbery in the second degree, the offense involved in the present case, under the same Penal Code provision, according to *Padua*, *Haywood* and *Palangio* the state *is required* to prove that he or another participant specifically intended to possess or display a deadly weapon or dangerous instrument.

The anomaly in these lines of precedent is this: it means that, in charging the *inchoate*[4]—or *incompleted*—crime of conspiracy to commit a particular offense, the state is required to prove *more*, by way of mens rea, than it is required to prove when it charges the *completed crime* itself. It is difficult, if not impossible, to see why the legislature would put that anomalous burden on the state. Our statutes are to be read, where possible, with common sense; see *State* v. *Courchesne*, 296 Conn. 622, 710, 998 A.2d 1 (2010); and as forming a coherent, rational whole, rather than as forming an anomalous, inconsistent scheme. See *Aspetuck Valley Country Club*, *Inc.* v. *Weston*, 292 Conn. 817, 829, 975 A.2d 1241 (2009) ("we read related statutes to form a consistent, rational whole, rather than to create irrational distinctions" [internal quotation marks omitted]). That principle is particularly appropriate for interpretation of the Penal Code, which was enacted to rationalize our state's former patchwork quilt of criminal laws. It is simply anomalous that the state would be required to prove a greater mens rea for an *inchoate crime*—conspiracy—than for the *completed crime* itself.

Furthermore, the conspiracy section of our Penal Code, § 53a-48, is based on the New York Revised Penal Law. Commission to Revise the Criminal Statutes, Penal Code Comments, Conn. Gen. Stat. Ann. § 53a-48 (West

2007). Thus, decisions by the New York courts construing the same language as that in our Penal Code have long been held to be instructive in construing our Penal Code language. See *State* v. *Courchesne*, supra, 296 Conn. 671 ("this court may turn to the parallel statutory provisions set forth in the Model Penal Code and the [revised] New York . . . Penal Law . . . for guidance" [internal quotation marks omitted]); see also *State* v. *Henry*, 253 Conn. 354, 363, 752 A.2d 40 (2000) ("[w]e note that our Penal Code is modeled after the New York Penal [Law]"). In this regard, the Appellate Division of the Supreme Court of New York has characterized Penal Law § 105.00, which is the basic conspiracy statute in New York and which contains precisely the same language as our § 53a-48,[5] as "a general conspiracy statute."[6] *People* v. *Joyce*, 100 App. Div. 2d 343, 347, 474 N.Y.S.2d 337, leave to appeal denied, 62 N.Y.2d 807 (1984). Thus, the court in *Joyce* contrasted New York's § 105.00, which, in its view, did not require a specific intent to commit aggravating circumstances, with Penal Law § 105.10,[7] which had more specific mens rea language and did, therefore, require proof of intent to commit the aggravating circumstance. Id.

It may well be that this anomaly can be explained by the fact that our courts, in interpreting the language of the conspiracy statute, lost sight of the difference between the criminal law concepts of general intent and specific intent, and assumed that the mens rea language of § 53a-48 referred to general as well as specific intent.[8] That difference has recently been illuminatingly discussed by our Supreme Court in *State* v. *Gonzalez*, supra, 300 Conn. 490. In that case, as I noted previously, the defendant was charged, as an accessory, with manslaughter in the first degree with a firearm, and the issue was whether the court was required to instruct the jury that he specifically intended to use or display what was represented to be a firearm. Id., 498–99. In answering that question in the negative, the court explained the difference between general and specific intent.

The term "general intent" refers, in criminal law parlance, to the fact that "the perpetrator act volitionally in some way"; id., 502; as opposed to the perpetrator acting inadvertently. It requires no more than "an intention to make the bodily movement which constitutes the act which the crime requires. . . . Such an intent, to perform certain acts proscribed by a statute, we have referred to as the general intent ordinarily required for crimes of commission rather than omission." (Internal quotation marks omitted.) Id. In such crimes, that general intent is always "implicitly a part of the state's burden of proof and, in that sense, an element of the crime." (Internal quotation marks omitted.) Id., 502 n.14. Furthermore, unless there is some evidence in the case indicating that the perpetrator's conduct may not have been voluntary in this sense—may have been inad-

vertent or accidental, for example—there is ordinarily no need for a jury charge on that aspect of the case. Id. The term "specific intent," by contrast, requires more; it refers to the specific criminal mental state provided by the statute defining the crime charged.[9] See id., 501–502; see also *State* v. *Nixon*, 32 Conn. App. 224, 249, 630 A.2d 74 (1993) ("[w]hen the elements of a crime include a defendant's intent to achieve some result additional to the act, the additional language distinguishes the crime from those of general intent and makes it one requiring a specific intent"), aff'd, 231 Conn. 545, 651 A.2d 1264 (1995).

Therefore, the court concluded in *Gonzalez*, the language, "in the commission of such offense [the perpetrator] uses, or is armed with and threatens the use of or displays or represents by his words or conduct that he possesses" a firearm, "[l]ack[s] a specifically enumerated mental state . . . clearly indicat[ing] . . . that the firearm element is one of general intent, requiring only that the perpetrator act volitionally in some way to use, possess or threaten to use a firearm in the commission of the offense." (Internal quotation marks omitted.) *State* v. *Gonzalez*, supra, 300 Conn. 501–502; accord *State* v. *Miller*, 95 Conn. App. 362, 896 A.2d 844, cert. denied, 279 Conn. 907, 901 A.2d 1228 (2006). Our Supreme Court made clear in this context that the element of the use or threat of a firearm was one of general intent, and not specific intent, and, therefore, the state was not required to prove it and the court was not required to instruct on that element. *State* v. *Gonzalez*, supra, 503. Significantly, the court stated that, in such a prosecution, "the state must prove only that the perpetrator acted voluntarily to use, possess or threaten to use a firearm in the commission of the offense, *with no obligation to prove any mental state beyond that required by the underlying manslaughter statute*." (Emphasis added.) Id. Thus, the court drew a parallel between the specific intent required for the underlying substantive crime and the specific intent required for committing it as an accessory; an accessory perpetrator need have no more of a specific mental state than the specific mental state required for the crime to which he is an accessory.

This discussion may illuminate where our precedents on conspiracy may have gone off the track, so to speak. Viewing the present case through this prism, the element of use or threat of the use of, or display of, what is represented to be a deadly weapon or dangerous instrument, under § 53a-135 (a) (2), would be an element of general, not specific, intent, and would simply be viewed as an aggravating circumstance of the crime that does not carry with it a specific intent. See id., 502. As applied to the conspiracy statute, this would mean that the mens rea element of § 53a-48, namely, that the defendant, acting "with intent that conduct constituting a crime be performed . . . agrees with one or more

persons to engage in or cause the performance of such conduct," refers, not to the general intent aspects of the crime conspired to be committed, but only to the specific intent aspects thereof. It would also mean that when a conspiracy is charged, the state would be required to prove that the defendant had the same *specific* intent required for the underlying crime, but not the *general* intent attached to that crime. Under that analysis, a conspiracy charge would carry the same mens rea burden as the substantive crime—no less, but no more. And this analysis would eliminate the anomaly that I have identified.

This analysis would also be consistent with that part of the official commentary to § 53a-48 of the Penal Code that refers to the mens rea for conspiracy. That commentary provides: "A second change is the requirement that the defendant must have a specific intent to agree in the performance or causation of criminal conduct. A general intent to promote or facilitate the criminal object or means is not sufficient to establish guilt." Commission to Revise the Criminal Statutes, Penal Code Comments, supra, commission comment, § 53a-48. The reference to "performance or causation of criminal conduct" refers simply to the underlying crime conspired to be committed, including, however, only its specific intent elements. Thus, it means that the conspiracy charge requires the same specific intent as is required for the underlying crime—no less, but no more.

Although it is a legitimate function of a judge of an intermediate appellate court to point out, where appropriate, an anomaly in governing Supreme Court precedent and possible reasons and solutions, as I have done here, it is not my function to do anything more. See *State* v. *Robinson*, 105 Conn. App. 179, 201, 937 A.2d 717 (2008) ("as an intermediate appellate court, it is beyond our function to overrule controlling Connecticut Supreme Court precedent"), aff'd, 290 Conn. 381, 963 A.2d 59 (2009). If anything is to be done to correct such an anomaly, it is for our Supreme Court to do so.

[1] General Statutes § 53a-5 provides: "When the commission of an offense defined in this title, or some element of an offense, requires a particular mental state, such mental state is ordinarily designated in the statute defining the offense by use of the terms 'intentionally', 'knowingly', 'recklessly' or 'criminal negligence', or by use of terms, such as 'with intent to defraud' and 'knowing it to be false', describing a specific kind of intent or knowledge. When one and only one of such terms appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears."

[2] General Statutes § 53a-134 (a) provides in relevant part: "A person is guilty of robbery in the first degree when, in the course of the commission of the crime of robbery as defined in section 53a-133 or of immediate flight therefrom, he or another participant in the crime . . . (4) displays or threatens the use of what he represents by his words or conduct to be a pistol, revolver, rifle, shotgun, machine gun or other firearm . . . ."

[3] I note the singular similarity of this statutory language to that in the present case.

[4] See part III of the Penal Code, titled "Inchoate Offenses," the very first of which is the conspiracy statute, § 53a-48.

[5] New York Penal Law § 105.00 (McKinney 2009) provides: "A person is

guilty of conspiracy in the sixth degree when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct."

[6] I have not found any decision of the New York Court of Appeals construing Penal Law § 105.00.

[7] New York Penal Law § 105.10 (McKinney 2009) provides in relevant part: "A person is guilty of conspiracy in the fourth degree when, with intent that conduct constituting . . . a class B or class C felony be performed, he or she agrees with one or more persons to engage in or cause the performance of such conduct . . . ."

[8] I acknowledge that I was part of the Supreme Court panel that decided *State* v. *Padua*, supra, 273 Conn. 138.

[9] This is the type of intent to which the Penal Code refers in § 53a-5, namely, such states of mind as intentionally, knowingly, recklessly or criminal negligence.