First Draft of Report #18: Solicitation and Renunciation

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

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 First Draft of Report No. 18, *Solicitation and Renunciation*, is May 11, 2018 (eight weeks from the date of issue). Oral comments and written comments received after May 11, 2018 will not be reflected in the Second Draft of Report No. 18. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

§ 22A-302 SOLICITATION

(a) DEFINITION OF SOLICITATION. A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person:

(1) Purposely commands, requests, or tries to persuade another person;

(2) To engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and

(3) The offense solicited is, in fact, [a crime of violence].

(b) PRINCIPLES OF CULPABLE MENTAL STATE ELEVATION APPLICABLE TO RESULTS AND CIRCUMSTANCES OF TARGET OFFENSE. Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, the defendant must intend to bring about any results and circumstances required by that offense.

(c) UNCOMMUNICATED SOLICITATION. It is immaterial under subsection (a) that the intended recipient of the defendant's command, request, or efforts at persuasion fails to receive the communication provided that the defendant does everything he or she plans to do to effect the communication.

(__) PENALTY. [Reserved].

COMMENTARY

1. §§ 22A-303(a), (b), & (c)—Definition of Solicitation, Elevation of Culpable Mental States Applicable to Results and Circumstances of Target Offense, & Uncommunicated Solicitation

Explanatory Notes. Subsections (a), (b), and (c) establish the elements of the general inchoate offense of solicitation under the Revised Criminal Code (RCC). Collectively, these provisions provide a comprehensive statement of the conduct requirement and culpable mental state requirement of a criminal solicitation, in addition to specifying the target offenses subject to a solicitation charge.

The prefatory clause of subsection (a) establishes that a criminal solicitation necessarily incorporates "the culpability required by [the target] offense."[1] Pursuant to this principle, a defendant may not be convicted of a criminal solicitation absent proof that he or she acted with, at minimum, the culpable mental state(s)[2]—in addition to any

[1] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). For additional principles governing the culpable mental state requirement of a criminal solicitation, see RCC § 303(b) (discussed *infra* notes 12-14 and accompanying text).

[2] For example, if the target offense is comprised of a result or circumstance subject to a culpable mental state of purpose, the government is still required to prove purpose as to that result or circumstance to secure a solicitation conviction.

other broader aspect of culpability[3]—required to establish that offense.[4] There is, however, one exception to this principle: although causation may be part of the culpability requirement for a target offense that requires proof of a result element, a solicitation to commit that offense does not require proof that the requisite result occurred, and, therefore, does not require proof of causation.[5]

Subsection (a)(1) establishes the nature of the act required for solicitation liability. It recognizes three types of attempted influence. The first, and strongest, is a "command," which implies an order or direction, commonly by one with some authority over the other. Less strong, but just as direct, is a "request," which occurs when one person explicitly asks another person to engage in specified conduct. The third form of attempted influence contemplated is "tr[ying] to persuade," which covers less direct means of communication.[6]

Subsection (a)(1) also clarifies that the requisite command, request, or efforts at persuasion must be purposeful. There are two aspects of this "purposive attitude"[7] that bear comment. First, the defendant must act with the *conscious desire* to command, request, or persuade. Second, the defendant must also act with a *conscious desire* to bring about criminally prohibited conduct. Mere awareness that a solicitation is likely to promote or facilitate criminally prohibited conduct is, therefore, insufficient to establish solicitation liability under subsection (a)(1).[8] Note, however, that this purpose requirement *does not* extend to whether the requisite conduct is, in fact, illegal or otherwise constitutes an offense.

Subsection (a)(2) addresses two corollary issues relevant to understanding the scope of solicitation liability. The first relates to the relationship between solicitation and complicity, namely, whether soliciting another person to assist with or otherwise facilitate the planning or commission of a crime, no less than soliciting another person to directly engage in the requisite criminal conduct, can provide an adequate basis for a solicitation conviction. The first clause in subsection (a)(2) resolves this issue in the affirmative, providing that criminal liability is appropriate where the defendant solicits another person to "engage in or aid the planning or commission" of a criminal offense.

The second issue addressed by subsection (a)(2) is the relationship between solicitation liability and impossibility—i.e., the fact that the solicitation could not have

[3] For example, if the target offense requires proof of premeditation, deliberation, or the absence of any mitigating circumstances, the government it still required to prove these broader aspects of culpability to secure a solicitation conviction.

[4] A criminal solicitation, just like any other crime in the RCC, is subject to the voluntariness requirement set forth in RCC § 203(a). *See* RCC § 201(d)(1) (noting that the voluntariness requirement is part of an offense's culpability requirement).

[5] *See* RCC § 204(a) ("No person may be convicted of an offense that contains a result element unless the person's conduct was the factual cause and legal cause of the result.")

[6] For example, if D1 sends D2 a letter containing a comprehensive and detailed list of reasons of why D2 should kill V with the conscious desire—unarticulated in the letter—that it will persuade D2 to kill V, the fact that D1 has neither expressly requested nor commanded D2 to do so would not preclude a solicitation conviction.

[7] *Wilson-Bey v. United States*, 903 A.2d 818, 831 (D.C. 2006) (*en banc*).

[8] For example, a car salesman who persuades another to purchase a vehicle aware that the vehicle will be used to rob a bank is not guilty of soliciting another to commit a robbery under the RCC unless the car salesman also consciously desires to promote or facilitate that bank robbery. Mere knowledge of probable or actual illegal use is not sufficient to satisfy RCC § 302(a)(1).

resulted in the target offense under the circumstances. Subsection (a)(2) generally renders impossibility of completion immaterial by clarifying that requests to directly engage in or provide accessorial support to conduct that, if carried out, would merely constitute an "*attempt* to commit an offense" constitute a sufficient basis for solicitation liability. The reference to attempts is intended to import the broad abolition of impossibility claims adopted by the RCC's general definition of attempt, § 301(a)(3)(B), into the solicitation context.[9] Under this approach, it is generally immaterial that the solicitor asked the solicitee to engage in or provide accessorial support to a plan of action that could not have succeeded under the circumstances.[10] So long as the solicited conduct would have culminated in an offense if "the situation was as the [solicitee] perceived it" then criminal liability may attach, provided that the requested plan of action was at least "reasonably adapted" to commission of the target offense.[11]

Subsection (a)(3) addresses the target offenses to which general solicitation liability applies. It establishes that only "[crimes of violence]," as defined elsewhere in the RCC, may provide the basis for general solicitation liability. Solicitations that involve other forms of prohibited conduct (e.g., prostitution) may be criminalized under specific provisions in the RCC. But the general inchoate crime of solicitation codified in RCC § 302 only applies to [crimes of violence]. It should be noted, however, that whether the conduct solicited actually qualifies as a [crime of violence] under the RCC is a matter of fact for which defendants are strictly liable (i.e., without regard to their awareness).

Subsection (b) provides additional clarity concerning the relationship between the culpable mental state requirement applicable to a solicitation and the culpable mental

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[9] Under RCC § 301(a)(3)(B), a person commits an attempt if, *inter alia*, he or she "[w]ould be dangerously close to committing that offense if the situation was as the person perceived it, provided that the person's conduct is reasonably adapted to commission of that offense."

[10] The impossibility may be a product of circumstances beyond the parties' control. For example, if D1 asks D2 to cause significant bodily injury to V at a particular place/time, but the police are aware of the plan, the fact that D1's requested plan fails because of police intervention is irrelevant to a charge of solicitation to assault. The same would also be the case if the basis of the impossibility is the solicitee's *inability* to carry out the plan (e.g., D1 sends D2 a written request to commit an assault, unaware that D2 is in a coma), or *unwillingness* to carry out the plan (e.g., D1 asks D2 to commit an assault, unaware that D2 is an undercover officer). Alternatively, the impossibility may also be a product of a factual mistake regarding the legal status of some circumstance that constitutes an element of the target offense. For example, if D1 asks D2 to cause significant bodily injury to V, a person that D1 mistakenly believes to be an on-duty police officer, the fact that V is not, in fact, an on-duty police officer is irrelevant to a charge of solicitation to commit assault of a police officer.

[11] As explained in the commentary to RCC § 301(a)(3)(B), this language:

> [A]uthorizes an attempt conviction under circumstances in which the person's conduct would have been dangerously c)lose to committing an offense had the person's view of the situation had been accurate. Where the defendant's perspective is relied upon, however, § 301(a)(3)(B) also requires the government to prove that the defendant's conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts.

RCC § 301(a): Explanatory Note.

state requirement governing the target offense.[12] Whereas the prefatory clause of subsection (a) generally clarifies that a solicitation conviction entails proof that the defendant acted with a level of culpability that is no less demanding than that required by the target offense, subsection (b) specifically establishes that the "person must intend to bring about the results and circumstances required by that offense." The latter requirement incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a solicitation is comprised of a result or circumstance that may be satisfied by proof of a non-intentional mental state (i.e., recklessness or negligence), or none at all (i.e., strict liability).[13]

Under the first principle, the solicitor must, in making the communication, intend to cause any result required by the target offense. To satisfy this threshold culpable mental state requirement, the government must prove that the defendant acted with either a belief that it was practically certain that the solicited conduct would cause any results of the target offense, see RCC § 206(b)(3), or, alternatively, that the defendant consciously desired for the solicited conduct to cause any results of the target offense, see RCC § 206(e).

Under the second principle, the solicitor must, in making the communication, have acted with intent as to the circumstances required by the requisite target offense. To satisfy this threshold culpable mental state requirement, the government must prove that the defendant acted with either a belief that it was practically certain that the circumstances of the target offense would be satisfied, see RCC § 206(b)(4), or, alternatively, that the defendant consciously desired for these circumstances to be satisfied, see RCC § 206(e).[14]

Subsection (c) addresses the issue of an uncommunicated solicitation. This issue arises where the intended recipient of the defendant's command, request, or efforts at persuasion never receives the communication due to external factors (e.g., police interference[15] or carrier malfeasance[16]). Under subsection (c), the fact that the communication is never received is generally "immaterial" for purposes of solicitation liability. There is, however, one important limitation placed on this principle: the person must have "done everything he or she plans to do to effect the communication." The latter proviso requires proof that, where an uncommunicated solicitation is at issue, the defendant engaged in the last proximate act necessary to effect such communication.[17]

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[12] *See supra* notes 1-5 and accompanying text (discussing prefatory clause of RCC § 302(a)).

[13] For those target offenses that already require proof of intent, knowledge, or purpose as to any result or circumstance, subsection (b) does not elevate the applicable culpable mental state for a solicitation charge.

[14] When formulating jury instructions for a solicitation to commit a target offense subject to a culpable mental state of knowledge (whether as to a result or circumstance), the term "intent," as defined in RCC § 206(b), should instead be substituted for the term knowledge. This substitution is appropriate given that the term "knowledge" can be misleading in the context of inchoate offenses—whereas the substantively identical term "intent" is not. *See* Commentary on RCC § 206(b): Explanatory Note.

[15] For example, the issue of an uncommunicated solicitation is presented when D1 places a written request for murder to D2 in the mail, but where the letter is then immediately intercepted by the police before D2 ever has an opportunity to read it.

[16] For example, the issue of an uncommunicated solicitation is presented where D1 mails a written request for murder to D2, but where the letter is then lost by the mail carrier (and thereafter handed over to the police) before D2 ever has an opportunity to read it.

[17] Consistent with this principle of liability, solicitation convictions would be appropriate in the examples discussed *supra* footnotes 15-16 since D1 has done everything he plans to do to effect the communication.

RCC § 302 has been drafted in light of, and should be construed in accordance with, prevailing free speech principles.[18] Given the centrality of speech to criminal solicitations, this offense directly implicates a criminal defendant's First Amendment rights. And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[19] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[20] RCC § 302 respects this distinction by requiring that the defendant's request, command, or efforts at persuasion be directed towards bringing about "conduct, which, if carried out, will constitute [a specific] offense or an attempt to commit that offense." To meet this requirement, it is not necessary that the defendant have gone into great detail as to the manner in which the crime solicited is to be committed. At the very least, though, it must be proven that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[21]

Relation to Current District Law. Subsections (a), (b), and (c) codify, clarify, and fills in gaps reflected in District law concerning the elements of the general inchoate offense of solicitation.

The District's general solicitation statute is codified by D.C. Code § 22-2107.[22] Subsection (a) of this solicitation statute broadly prohibits "soliciting a murder," while

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If, however, D1, intending to mail a written request for murder to D2, is arrested by the police *on his way to the post office* with the letter in hand, a conviction under subsection (c) would be inappropriate given that D1 has not engaged in the last proximate act necessary to effect such communication (e.g., placing the letter in the mail).

[18] *See generally* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016).

[19] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

[20] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

[21] So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to constitute criminal solicitation. Nor would a general exhortation to "go out and revolt." *See generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[22] Enacted as part of the *Omnibus Public Safety Act of 2006*, the relevant provisions reads:

> (a) Whoever is guilty of soliciting a murder, whether or not such murder occurs, shall be sentenced to a period of imprisonment not exceeding 20 years, a fine not more than the amount set forth in § 22-3571.01, or both.
>
> (b) Whoever is guilty of soliciting a crime of violence as defined by § 23-1331(4), whether or not such crime occurs, shall be sentenced to a period of imprisonment not exceeding 10 years, a fine not more than the amount set forth in § 22-3571.01, or both.

2006 DISTRICT OF COLUMBIA LAWS 16-306 (Act 16–482), as added Apr. 24, 2007, D.C. Law 16-306, § 209, 53 DCR 8610.

subsection (b) of this statute broadly prohibits "soliciting a crime of violence."[23] Aside from clarifying that general solicitation liability applies to crimes of violence/murder without regard to whether the crime of violence/murder actually "occurs," however, D.C. Code § 22-2107 provides no further information concerning the contours of general solicitation liability under District law. Nor, for that matter, does the legislative history underling these code provisions, which is essentially non-existent.[24] And the same is also true of DCCA case law, which, as the commentary to the District's criminal jury instructions observes, does not appear to contain a single reported decision "involving this statute."[25]

The D.C. Code also contains a variety of more narrowly tailored solicitation statutes, which individually provide for solicitation liability in particular contexts by incorporating the term "solicits" as an element of the offense. However, these kinds of context-specific solicitation statutes provide little, if any, clarity on the contours of general solicitation liability under current District law.

For example, the District's contributing to the delinquency of a minor offense, D.C. Code § 22-811, prohibits, among other acts, "an adult, being 4 or more years older than a minor" from "solicit[ing]" that minor to commit a crime.[26] Likewise, D.C. Code § 22-2701 makes it "unlawful for any person to . . . solicit for prostitution," while D.C. Code § 22-951 makes it "unlawful for a person to solicit . . . another individual to become a member of, remain in, or actively participate in what the person knows to be a criminal street gang."[27]

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[23] The phrase "crime of violence," in turn, is defined in D.C. Code § 23-1331(4) to encompass the following offenses:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

[24] *See generally* COUNCIL OF THE DISTRICT OF COLUMBIA, *Judiciary Committee Report on Bill 16-247, "Omnibus Public Safety Act of 2006"* (April 28, 2006).

[25] Commentary on D.C. Crim. Jur. Instr. § 4.500.

[26] *See also* D.C. Code § 22-3010(b)(1) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child, attempts . . . to seduce, entice, allure, convince, or persuade any person who represents himself or herself to be a child to engage in a sexual act or contact . . . .")

[27] Relatedly, D.C. Code § 22-1312 criminalizes an "indecent sexual proposal," which, as the DCCA has explained, "connotes virtually the same conduct or speech-conduct as a sexual solicitation." *Pinckney v. United States*, 906 A.2d 301, 307 (D.C. 2006) (quoting *D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975)); *see D.C. v. Garcia*, 335 A.2d 217, 221 (D.C. 1975) (noting that a "sexual proposal," as used in the statute, "connotes virtually the same conduct or speech-conduct as a sexual solicitation; the term clearly implies a personal importunity addressed to a particular individual to do some sexual act.").

Most of these specific solicitation statutes, like D.C. Code § 22-2107, are completely silent on the meaning of solicitation in the relevant contexts.[28] And case law interpreting these statutes is sparse, though that which does exist establishes that solicitation liability is constitutional, at least insofar as it entails proof of a criminal intent.[29]

In practice, it appears that the elements of the general solicitation liability, as codified by D.C. Code § 22-2107, are determined in the District by reference to the criminal jury instructions.[30] The relevant instruction states, in its entirety, that:

> The elements of solicitation of [insert crime of violence], each of which the government must prove beyond a reasonable doubt, are that:
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> 1. [Name of defendant] solicited [another person] [insert name of other person] to commit [insert crime of violence]; and,
>
> 2. [Name of defendant] did so voluntarily, on purpose, and not by mistake or accident.

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[28] There is, however, one exception: the District's statute criminalizing solicitation of prostitution, D.C. Code § 22-2701. That statute is accompanied by a general definition of "[s]olicit for prostitution," which, pursuant to D.C. Code § 22-2701.01, "means to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution." *See* SAFE STREETS FORFEITURE AMENDMENT ACT OF 1992, 1992 District of Columbia Laws 9-267 (Act 9–250).

[29] More specifically, the DCCA, in *Ford v. United States*, upheld the constitutionality of the District's solicitation of prostitution statute on the basis that it "prohibits specified conduct for the purpose of prostitution," thereby "clearly" affording District residents "notice of the illegality" of such conduct. 498 A.2d 1135, 1139–40 (D.C. 1985) ("Such a 'scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed") (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). Likewise, in *D.C. v. Garcia*, the DCCA upheld the constitutionality of D.C. Code § 22-1312, which criminalizes an "indecent sexual proposal," observing that

> It is important to emphasize the precise nature of the speech which the sexual proposal clause . . . proscribes. The principle is well established that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. However, there is a significant distinction between advocacy and solicitation of law violation in the context of freedom of expression. Advocacy is the act of pleading for, supporting, or recommending; active espousal and, as an act of public expression, is not readily disassociated from the arena of ideas and causes, whether political or academic. Solicitation, on the other hand, implies no ideological motivation but rather is the act of enticing or importuning on a personal basis for personal benefit or gain. Thus advocacy of sodomy as socially beneficial and solicitation to commit sodomy present entirely distinguishable threshold questions in terms of the First Amendment freedom of speech. The latter, we hold, is not protected speech.

335 A.2d 217, 224 (D.C. 1975).

[30] *Cf.* Commentary on D.C. Crim. Jur. Instr. § 4.500 (failing to reference any of the District's specific solicitation statutes as relevant legal authority for the elements of the general inchoate crime of solicitation).

> "Solicit" means to request, command, or attempt to persuade.
>
> It is not necessary that [insert crime of violence] actually occur in order to find [name of defendant] guilty of solicitation.[31]

Three aspects of above statement of the elements of a criminal solicitation provided by this instruction bear notice. First, it leaves ambiguous the culpable mental state requirement governing the offense. This is because the jury instruction fails to respect the admonition that, as the DCCA observed in *Ortberg v. United States*, "clear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime."[32] To say, for example, that a person must solicit another person "voluntarily, on purpose, and not by mistake or accident" does not specify whether the requisite culpability requirement applies to the (1) the *conduct* planned to culminate in that offense; (2) the *circumstances* surrounding that conduct; or (3) the *results*, if any, that conduct would cause if carried out.[33]

Second, it is unclear what the third prong of the conduct requirement, described as "attempt[ing] to persuade," actually entails given the various meanings of the term attempts. Generally speaking, for example, there are two main categories of attempts: (1) complete attempts, which are attempts that fail to achieve the actor's criminal objectives notwithstanding the fact that he or she carried out the entirety of his or her criminal plans (i.e., shoot and miss); and (2) incomplete attempts, which are attempts that fail to achieve the actor's criminal objectives because he or she is frustrated by outside forces (e.g., police interception). Incomplete attempts, in turn, can be further differentiated according to the extent of the progress an actor makes before his or her plans are disrupted (e.g., taking a substantial step towards completion vs. being dangerously close to completion). With these variances in mind, it is unclear just how far along an actor must be in his efforts to convince another to commit a crime to be deemed to have engaged in "attempt[ed] persua[sion]."[34]

Third, and more generally, the criminal jury instruction is silent on a variety of corollary issues relevant to understanding the scope of general solicitation liability. To take just one example, consider that of impossibility. In the solicitation context, impossibility issues arise where one party asks another to engage in or facilitate conduct that would culminate in a consummate criminal offense if—but only if—the conditions

[31] D.C. Crim. Jur. Instr. § 4.500.

[32] *Ortberg v. United States*, 81 A.3d 303, 307 (D.C. 2013) (citations, quotations, and alterations omitted).

[33] For example, to secure a conviction for solicitation to commit robbery against a senior citizen, must the government (merely) prove that the solicitor consciously desired to bring about conduct planned to culminate in the offense (e.g., knocking down and taking the wallet of victim X, who is over the age of 65)? Or, alternatively, must the government also prove that the solicitor consciously desired the relevant circumstance to exist (e.g., that victim X actually be over the age of 65)?

[34] For example, it seems clear that where D1 mails a written request for murder to D2, but where the letter is intercepted by the police (or lost by the mail carrier and thereafter handed over to the policy) before D2 ever has an opportunity to read it, this constitutes attempted persuasion. But what about where D1, intending to mail a written request for murder to D2, is arrested by the police on his way to the post office with the letter in hand?

were as the solicitor perceived them. In this kind of situation, the solicitor might argue that criminal liability should not attach due to the fact that, by virtue of a mistake concerning the surrounding conditions, completion of the target offense was impossible. If presented with such a claim, District judges would have to determine whether the particular kind of mistake rendering the criminal objective at the heart of a solicitation prosecution impossible constitutes a defense. On this issue, among others, the District's jury instruction (and accompanying commentary) is silent.

Consistent with the interests of clarity, consistency, and comprehensiveness, subsections (a), (b), and (c) provide a full description of the elements of a general criminal solicitation. This statement addresses the four primary topics relevant to understanding the contours of general solicitation liability: (1) conduct requirement, (2) culpable mental state requirement, (3) impossibility, and (4) the target offenses to which solicitation liability attaches. It is comprised of policies that accord with persuasive District authority pertaining to general solicitation liability (i.e., the criminal jury instructions), as well as with other general inchoate provisions in the RCC, which are themselves rooted in District law.

With respect to the conduct requirement of solicitation, RCC § 302(a)(1) provides for three alternative bases of liability, each of which is reflected in the current criminal jury instruction: (1) commanding, (2) requesting, or (3) trying to persuade another person to commit an offense.[35] Thereafter, RCC § 302(a)(2) clarifies that solicitations to aid (i.e., assist[36]), no less than solicitations to directly commit, an offense constitute a sufficient basis for liability. The RCC solicitation statute's acceptance of requested accessorial participation as a legitimate basis for solicitation liability dovetails with the RCC general provision on conspiracy—itself a codification of current District law.[37] Finally, RCC § 302(c) establishes that actual communication is not necessary to satisfy the conduct requirement of solicitation, but that, at the very least, proof that the person has done everything he or she plans to do to effect the communication (i.e., a complete attempt) is necessary.

RCC §§ 302(a) and (b) address the culpable mental state requirement of solicitation by importing the same element analysis-based policies applied by the RCC general provision on conspiracy—itself a codification of current District law.[38] The prefatory clause of RCC § 302(a) clarifies that the general inchoate offense of solicitation necessarily requires proof of "the culpability required by [the target] offense." Subsection (a)(1) thereafter establishes that a purpose requirement is applicable to both the communication itself and the conduct sought to be brought about by that communication. Finally, RCC § 303(b) incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a solicitation is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). Proof of intent on behalf of the solicitor is required.

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[35] D.C. Crim. Jur. Instr. § 4.500.

[36] *See generally Tann v. United States*, 127 A.3d 400 (D.C. 2015); *Johnson v. United States*, 883 A.2d 135 (D.C. 2005); *Prophet v. United States*, 602 A.2d 1087 (D.C. 1992).

[37] *See* Commentary on RCC § 303(a)(1): Relation to Current District Law on Agreement Requirement.

[38] *See* Commentary on RCC §§ 303(a) & (b): Relation to Current District Law on Culpable Mental State Requirement.

RCC § 302(a) addresses the relationship between impossibility and solicitation by applying the same approach to dealing with impossibility in the context of attempts—itself a codification of current District law.[39] This outcome is achieved by means of incorporation: RCC § 302(a)(1) makes solicitations to engage in or aid in the planning or commission of conduct that, if carried out, would constitute "an attempt" to commit that offense an adequate alternative basis for solicitation liability.[40] When read in light of the definition of attempt under RCC § 301(a), this combination dictates the following approach to impossibility in the solicitation context: so long as the solicitor asks the solicitee to engage in conduct that would have culminated in an offense if "the situation was as the [solicitor] perceived it" then criminal liability may attach, provided that the requested plan of action was at least "reasonably adapted" to commission of the target offense.[41]

Lastly, RCC § 302 addresses the target offenses to which general solicitation liability attaches by codifying the same approach reflected in current District law.[42] More specifically, RCC § 302(a)(3), like D.C. Code § 22-2107, states that only crimes of violence may provide the basis for a solicitation conviction. The RCC provision also clarifies, however, that whether the conduct solicited actually qualifies as a crime of violence is a matter of fact (i.e., strict liability) to which no culpable mental state requirement applies.

Relation to National Legal Trends. RCC §§ 302(a), (b), and (c) are in part consistent with, and in part depart from, national legal trends.

Many of the substantive policies incorporated into RCC §§ 302(a), (b) and (c)—for example, those governing the conduct requirement, the requirement of purpose as to conduct, and the general rejection of an impossibility defense—reflect majority or prevailing national trends governing the law of solicitation. The most notable exception is limiting general solicitation liability to crimes of violence under RCC § 302(a)(3), which reflects a minority trend. Other policy recommendations—for example, the principle of intent elevation applicable to results and circumstances—address issues upon which American criminal law has largely been silent in the solicitation context.

Comprehensively codifying the culpable mental state requirement and conduct requirement applicable to criminal solicitations is in accordance with widespread, modern

[39] *See* Commentary on RCC § 301(a): Relation to Current District Law on Impossibility.

[40] For further discussion of this statutory incorporation approach, see *infra*, RCC § 302(a): Relation to National Legal Trends on Impossibility.

[41] The RCC's general definition of attempt, § 301(a)(3), provides an alternative formulation of the dangerous proximity standard, which authorizes the fact-finder to evaluate whether the dangerous proximity standard has been met in light of "the situation . . . as the person perceived it." RCC § 301(a): Explanatory Note. Reliance on the defendant's perspective renders the vast majority of impossibility claims immaterial by authorizing an attempt conviction under circumstances in which the person's conduct *would have been* dangerously close to committing an offense *had* the person's view of the situation had been accurate. *Id.* Where the defendant's perspective is relied upon, however, RCC § 301(a)(3)(B) also requires the government to prove that the defendant's conduct was "reasonably adapted to commission of the [target] offense." *Id.* By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement both limits the risk that innocent conduct will be misconstrued as criminal and precludes convictions for inherently impossible attempts. *Id.*

[42] *See* D.C. Code § 22-2107.

legislative practice. However, the manner in which RCC §§ 302(a), (b), and (c) codify these requirements departs from modern legislative practice in a few notable ways.

A more detailed analysis of national legal trends and their relationship to RCC §§ 302(a), (b), and (c) is provided below. It is organized according to five main topics: (1) the conduct requirement; (2) the culpable mental state requirement; (3) impossibility; (4) target offenses; and (5) codification practices.

RCC § 302(a): Relation to National Legal Trends on Conduct Requirement. The "essence" of the general inchoate offense of solicitation is asking another person to commit a crime.[43] Over the years, however, "[c]ourts, legislatures and commentators have utilized a great variety of words to describe the required acts for solicitation."[44] Variances aside, though, all American legal authorities seem to agree that commanding, [45] requesting,[46] or, more broadly, attempting to persuade[47] another to commit a crime will suffice for purposes of general solicitation liability.[48]

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[43] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.1 (Westlaw 2018) ("[T]he essence of the crime of solicitation is asking a person to commit a crime"); *People v. Nelson*, 240 Cal. App. 4th 488, 496 (2015) ("The essence of criminal solicitation is an attempt to induce another to commit a criminal offense."); Ira P. Robbins, *Double Inchoate Crimes*, 26 HARV. J. ON LEGIS. 1, 29 (1989); ("Solicitation . . . is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.").

[44] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[45] *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 28.01 (6th ed. 2012); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Colo. Rev. Stat. Ann. § 18-2-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; N.D. Cent. Code § 12.1-06-03; Or. Rev. Stat. § 161.435; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.

[46] *See, e.g.*, DRESSLER, *supra* note 45, at § 28.01; LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-7; Haw. Rev. Stat. § 705-510; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Kan. Stat. Ann. § 21-5303; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03.

[47] *See, e.g.*, *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015) (quoting Robbins, *supra* note 43, at 29); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Va. § 18.2-29; Colo. Rev. Stat. § 18-2-301(1); Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; *see also* Me. tit. 17-A, § 153(1) (causing another to commit crime); Ore. § 161.435(1) (same).

[48] More controversial is whether merely "encouraging" another to commit an offense provides an adequate basis for solicitation liability. *See generally* Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 343 (1985) ("Encourage suggests giving support to a course of action to which another is already inclined."). The drafters of the Model Penal Code endorsed this approach; under Model Penal Code § 5.02(1) an actor who "commands, *encourages*, or requests" another person to commit a crime may be convicted of solicitation. As the commentary accompanying the Model Penal Code explains:

> "Encourages" is the most expansive of these terms and encompasses actors who bolster the fortitude of those who have already decided to commit crimes, so long as the encouragement is done with the requisite criminal purpose. Encouragement also covers forms of communication designed to lead the recipient to act criminally, even if the message is not as direct as a command or request.

One important corollary to this understanding of the conduct requirement of a criminal solicitation is that a solicitation is complete the instant the actor utters the communication—proof that the target of a solicitation was completed is not necessary.[49] In this sense, a criminal solicitation is like the other general inchoate offenses of attempt and conspiracy, neither of which require proof of completion either. Unlike a criminal attempt or conspiracy, however, a criminal solicitation does not require proof that any of the relevant parties (i.e., solicitor or solicitee) performed any conduct (i.e., substantial step/overt act) in furtherance of the proposal.[50]

Another important corollary to this understanding of the conduct requirement of a criminal solicitation is that agreement or acceptance by the solicitee is immaterial for purposes of liability. In contrast to a bilateral understanding of conspiracy, for example, it does not matter that the solicitee rejects the proposal, or verbally agrees but does not actually intend to commit the crime—such as, for example, where the solicitee is an undercover police officer feigning intent.[51] (Note, however, that a "solicitee's acquiescence to a solicitation, even if lawfully made by an undercover agent, does not make the *solicitee* guilty of solicitation."[52]) In this sense, a criminal solicitation constitutes an "attempted conspiracy,"[53] and, as such, is "the most inchoate of the anticipatory offenses."[54]

Model Penal Code § 5.02(1) cmt. at 372. In contrast, the drafters of the proposed Federal Criminal Code "rejected" the term "encourages," instead recommending use of the phrase "otherwise attempts to persuade," on the basis that the former could provide for criminal liability in "equivocal situations too close to casual remarks or even to free speech." *See* 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 371 (1970). As a matter of legislative practice, there is support for both positions. *See* Model Penal Code § 5.02(1) cmt. at 372 (collecting authorities).

[49] DRESSLER, *supra* note 45, at § 28.01 (citing *People v. Ruppenthal*, 771 N.E.2d 1002, 1008 (Ill. App. Ct. 2002)). Relatedly, "[a] solicitation that is made subject to a condition is criminal, even if the condition is never fulfilled." *People v. Nelson*, 240 Cal. App. 4th 488, 496–99 (2015) ("Asking a hit man if you can have a two-for-one deal is, in essence, offering to pay him to commit murder, on the condition that he agree to do so for a discount price. The hit man may decline, but the crime of solicitation has nevertheless been committed.").

[50] *See, e.g.*, *People v. Cheathem*, 658 N.Y.S.2d 84, 85 (1997); *People v. Burt*, 288 P.2d 503, 505 (Cal. 1955).

[51] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; DRESSLER, *supra* note 45, at § 28.01. Note that if the party solicited acts on the solicitor's suggestion and goes far enough to incur guilt for a more serious offense, then the solicitor is also guilty of the more serious offense, rather than the solicitation. *See State v. Jones*, 83 N.C. 605, 607 (1881). And if the party solicited goes far enough to incur liability for attempt, then the solicitor is also guilty of attempt. *Id.* at 606-07; *Uhl v. Commonwealth*, 47 Va. 706, 709-11 (1849). And if the solicited party consummates the object crime, then both the and the solicitor are guilty of the completed crime. *People v. Harper*, 25 Cal. 2d 862, 877 (1945); *State v. Primus*, 226 N.C. 671, 674-75 (1946).

[52] *Allen v. State*, 91 Md.App. 705, 605 A.2d 960 (1992) (collecting cases from other jurisdictions).

[53] *See, e.g.*, *State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66. For example, if X asks Y to agree to engage in or aid the planning or commission of criminal conduct, and Y agrees, then a criminal conspiracy has been formed. But if Y doesn't agree, then there's no conspiracy between X and Y. Nevertheless, X has solicited Y to commit a criminal offense. DRESSLER, *supra* note 45, at § 28.01.

[54] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, *State v. Jensen*, 195 P.3d 512, 517 (Wash. 2008); *State v. Carr*, 110 A.3d 829, 835 (N.H. 2015); Model Penal Code § 5.02 cmt. at 365-66; *Gervin v. State*, 371 S.W.2d 449, 451 (Tenn. 1963). Here's a useful practical illustration:

One important issue relevant to the conduct requirement of a criminal solicitation relates to the nature of the communication implicated by the defendant's attempted influence. Generally speaking, it is well-established that "solicitation c[an] be committed by speech, writing, or nonverbal conduct," while proof of a "quid pro quo" between the solicitor and the party solicited is not necessary.[55] Less clear, however, is just how specific that communication must be given the free speech interests implicated by solicitation liability.[56]

As a constitutional matter, the U.S. Supreme Court case law surrounding the relationship between the First Amendment and criminalization of solicitation has historically been murky.[57] Most recently, in *United States v. Williams*, the U.S. Supreme Court clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection."[58] But it also reaffirmed the crucial yet nevertheless ambiguous distinction "between a proposal to engage in illegal activity and the abstract advocacy of illegality," the latter of which is entitled to constitutional protection.[59]

> Assume that *A* wishes to have his enemy *B* killed, and thus—perhaps because he lacks the nerve to do the deed himself—*A* asks *C* to kill *B.* If *C* acts upon *A*'s request and fatally shoots *B*, then both *A* and *C* are guilty of murder. If, again, *C* proceeds with the plan to kill *B*, but he is unsuccessful, then both *A* and *C* are guilty of attempted murder. If *C* agrees to *A*'s plan to kill *B* but the killing is not accomplished or even attempted, *A* and *C* are nonetheless guilty of the crime of conspiracy. But what if *C* immediately rejects *A*'s homicidal scheme, so that there is never even any agreement between *A* and *C* with respect to the intended crime? Quite obviously, *C* has committed no crime at all. *A*, however, because of his bad state of mind in intending that *B* be killed and his bad conduct in importuning *C* to do the killing, is guilty of the crime of solicitation.
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> LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[55] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, *State v. Johnson*, 202 Or. App. 478, 483–84 (2005) (rejecting "the proposition that the state must produce the actual words used by the solicitor (or, for that matter, that words must be used)," and "the proposition that the state must prove that the solicitor offered the solicitee a quid pro quo.") (citing *In State ex rel Juv. Dept. v. Krieger*, 177 Or. App. 156, 158–59 (2001)).

[56] DRESSLER, *supra* note 45, at § 28.01 (citing Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645).

[57] *See, e.g., Yates v. United States*, 354 U.S. 298, 318 (1957) (holding that, with respect to violations of the Smith Act, there must be advocacy of action to accomplish the overthrow of the government by force and violence rather than advocacy of the abstract doctrine of violent overthrow), *overruled on other grounds by Burks v. United States*, 437 U.S. 1 (1978); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). For discussion of these cases and their progeny, see, for example, Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277 (2005); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005); Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Model Penal Code § 5.02 cmt. at 378-79; *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 248 (4th Cir. 1997).

[58] *United States v. Williams*, 553 U.S. 285, 297 (2008) (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388 (1973); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)).

[59] *Williams*, 553 U.S. at 298-99 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969) (*per curiam*); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928–929 (1982)).

Constitutional considerations aside, there "remains a legislative question" concerning whether and to what extent solicitation liability should be curtailed to avoid chilling speech."[60] "The main problem," as the drafters of the Model Penal Code phrase it, is how to prevent

> [L]egitimate agitation of an extreme or inflammatory nature from being misinterpreted as solicitation to crime. It would not be difficult to convince a jury that inflammatory rhetoric on behalf of an unpopular cause is in reality an invitation to violate the law rather than an effort to seek its change through legitimate criticism. Minority criticism has to be extreme in order to be politically audible, and if it employs the typical device of lauding a martyr, who is likely to have been a lawbreaker, the eulogy runs the risk of being characterized as a request for emulation.[61]

In light of these constitutional and policy considerations, the contemporary approach to solicitation liability, reflected in both case law and legislation, is to require proof of the utterance of a communication that, when viewed "in the context of the knowledge and position of the intended recipient, [carries] meaning in terms of some concrete course of conduct that it is the actor's object to incite."[62]

This standard is relatively broad. For example, it does not require specificity as to "the details (time, place, manner) of the conduct that is the subject of the solicitation."[63] Nor does it require that "the act of solicitation be a personal communication to a particular individual."[64] But it does bring with it a few limitations. For example, "general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently specific . . . to constitute criminal solicitation."[65] Nor does criminal liability extend to "a situation where the defendant makes a general solicitation (however reprehensible) to a large indefinable group to commit a crime."[66] Even still, there can be little question that the conduct requirement of solicitation is broad indeed.

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[60] Model Penal Code § 5.02 cmt. at 375-76.

[61] *Id.*

[62] *Id.*; *see, e.g.*, *Johnson*, 202 Or. App. at 483. This standard is articulated by modern criminal codes in a variety of ways. For example, the Model Penal Code requires that the defendant have solicited "specific conduct." Model Penal Code § 5.02(1). This "specific conduct" approach has been adopted by a number of reform jurisdictions; however, many other modern criminal codes express the same kind of specificity requirement through language requiring the solicitation of conduct constituting a "particular felony" or a "particular crime." *See* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting authorities). Yet another set of statutory formulations adopted by reform jurisdictions require the solicitation of "conduct constituting" a crime, which, in practical effect, "require as great a degree of specificity of the conduct solicited as does the [other approaches]." *Id.*

[63] *Johnson*, 202 Or. App. at 483; *see* Model Penal Code § 5.02 cmt. at 376 ("It is, of course, unnecessary for the actor to go into great detail as to the manner in which the crime solicited is to be committed.").

[64] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, *State v. Schleifer*, 99 Conn. 432, 121 A. 805 (Dist. Ct. 1923) (information charging one with soliciting from a public platform a number of persons to commit the crimes of murder and robbery is sufficient).

[65] Commentary on Haw. Rev. Stat. Ann. § 705-510.

[66] *People v. Quentin*, 296 N.Y.S.2d 443, 448 (Dist. Ct. 1968); *see Johnson*, 202 Or. App. at 484 (observing that a "general exhortation to 'go out and revolt' does not constitute solicitation).

This breadth of coverage is bolstered by two additional principles of liability. First, and perhaps most important, is that "solicit[ing] another to aid and abet the commission of a crime," no less than soliciting that person to directly commit a crime, can provide the basis for solicitation liability.[67] Under this accessorial approach to solicitation, reflected in both contemporary national legislation and case law, it is "sufficient that A requested B to get involved in the scheme to kill C in any way which would establish B's complicity in the killing of C were that to occur."[68]

The second principle of liability addresses the issue of an uncommunicated solicitation, which arises where "the solicitor's message never reaches the person intended to be solicited, as where an intermediary fails to pass on the communication or the solicitor's letter is intercepted before it reaches the addressee."[69] In these kinds of situations, the general rule, reflected in both contemporary national legislation and case law, is that "[t]he act is nonetheless criminal, although it may be that the solicitor must be prosecuted for an attempt to solicit on such facts."[70]

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[67] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In this sense, solicitation liability runs parallel with conspiracy liability, in which context agreements to aid in the planning or commission of a crime provide a basis for a conspiracy conviction. *See, e.g.*, *Salinas v. United States*, 522 U.S. 52, 65 (1997); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1134 (1975); Model Penal Code § 5.03(1)(b).

[68] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(1) that "[a] person is guilty of solicitation to commit a crime if . . . he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or *would establish his complicity in its commission or attempted commission*." A plurality of modern codes have adopted this "complicity in its commission" approach or something like it. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030; Kan. Stat. Ann. § 21-5303; N.D. Cent. Code § 12.1-06-03. For relevant case law, see, for example, *Meyer v. State*, 47 Md.App. 679 (1981); *People v. Nelson*, 240 Cal.App.4th 488 (2015); *Commonwealth v. Wolcott*, 77 Mass.App. 457 (2010); *People v. Bloom*, 133 N.Y.S. 708 (1912); *State v. Furr*, 292 N.C. 711 (1977); *Moss v. State*, 888 P.2d 509 (Okl. Cr. App. 1994); *State v. Yee*, 160 Wis.2d 15 (1990); *Ganesan v. State*, 45 S.W.3d 197, 201 (Tex. App. 2001).

[69] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[70] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. The Model Penal Code explicitly addresses this point, clarifying in § 5.02(4) that "[i]t is immaterial . . . that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." A few codes have adopted this language. *See, e.g.*, Haw. Rev. Stat. § 705-510; Kan. Stat. Ann. § 21-5303; Utah Code Ann. §§ 76-4-203. More common, though, is the adoption of statutory language that would seem to permit a conviction under such circumstances by prohibiting a defendant's "attempt" to engage in one or more forms of influence—e.g., attempts to cause, persuade, induce, promote, or request another to commit a crime. *See, e.g.*, Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.Y. Penal Law § 100.00; Iowa Code Ann. § 705.1; N.D. Cent. Code § 12.1-06-03; Va. Code Ann. § 18.2-29; Me. Rev. Stat. Ann. tit. 17-A, § 153 Tex. Penal Code Ann. § 15.03; N.M. Stat. Ann. § 30-28-3; Tenn. Code Ann. § 39-12-102. For relevant case law interpreting these kinds of statutes, compare *People v. Lubow*, 29 N.Y.2d 58, 66–67 (1971) (reference to "attempts" embraces uncommunicated solicitations); *with State v. Cotton*, 1990-NMCA-025, ¶ 23, 109 N.M. 769, 773 (reference to "attempts" does not embrace uncommunicated solicitations). And for case law indicating that attempted solicitation is the appropriate charge where an uncommunicated solicitation is at issue, see, for example, *Cotton*, 109 N.M. at 773; *People v. Boyce*, 339 Ill.Dec. 585 (2015); *State v. Andujar*, 899 A.2d 1209 (R.I. 2006); *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002); *Ford v. State*, 127 Nev. 608 (2011).

Consistent with national legal trends outlined above, RCC § 302 codifies the following policies relevant to the conduct requirement of solicitation. Subsection (a)(1) requires proof of one of three alternative forms of attempted influence: (1) commanding, (2) requesting, or (3) trying to persuade another person to commit an offense. Thereafter, RCC § 302(a)(2) clarifies that solicitations to aid (i.e., assist), no less than solicitations to directly commit, an offense constitute a sufficient basis for general solicitation liability. And it also establishes that the request, command, or persuasion be to engage in or facilitate "conduct, which, if carried out, will constitute" a criminal offense. Finally, RCC § 302(c) clarifies that actual communication is not necessary to satisfy the conduct requirement of solicitation, provided that the person has done everything he or she plans to do to effect the communication.

RCC §§ 302(a) & (b): Relation to National Legal Trends on Culpable Mental State Requirement. It is often said that the *mens rea* of a criminal solicitation is the intent to cause another to commit a crime.[71] Upon closer analysis, however, this kind of general statement fails to "adequately reflect the mental element" of solicitation[72]—a topic that is "particularly challenging" by any standard.[73] The relevant complexities follow the same pattern as those surrounding the general inchoate offense of conspiracy.

Ordinarily, a clear element analysis of a consummated crime entails consideration of "the actor's state of mind—whether he must act purposely, knowingly, recklessly, or negligently—with respect to" the results and circumstances of an offense.[74] The same is also true of solicitation and conspiracy, which criminalize steps towards completion of a particular crime. At the same time, the inchoate and multi-participant nature of both solicitation and conspiracy raises its own set of culpable mental state considerations, namely, the relationship between the actor's mental state and future conduct (committed by someone else) that, if carried out, would consummate the target offense.[75] For this reason, it is often said that offenses such as solicitation and conspiracy incorporate "dual intent" requirements.[76]

In the context of solicitation, the first intent requirement relates to the solicitor's culpable mental state with respect to future conduct: generally speaking, the solicitor must "intend," by his or her request, to promote or facilitate conduct planned to culminate in an offense.[77] The second intent requirement, in contrast, relates to the solicitor's culpable mental state with respect to the results and/or circumstance elements of the target offense: generally speaking, the solicitor must "intend," by his or her request, to bring them about.[78]

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[71] *See, e.g., Kimbrough v. State*, 544 So. 2d 177, 179 (Ala. Crim. App. 1989); *Mizrahi v. Gonzales*, 492 F.3d 156 (2d Cir. 2007).
[72] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.
[73] Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 957, 967 (1961).
[74] *Id.*
[75] *See, e.g.*, Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 864 (1994).
[76] For discussion of the dual intent requirement in the context of solicitation, see, for example, DRESSLER, *supra* note 45, at § 28.01; *State v. Garrison*, 40 S.W.3d 426 (Tenn. 2000). For discussion of the dual intent requirement in the context of conspiracy, see, for example, *State v. Maldonado*, 2005-NMCA-072, ¶ 10, 137 N.M. 699, 702; *United States v. Piper*, 35 F.3d 611, 614-15 (1st Cir. 1994).
[77] Robinson, *supra* note 75, at 864.
[78] *Id.*

Upon closer consideration, each component of this double-barreled recitation of solicitation's culpable mental state requirement encompasses key policy issues. With respect to the first intent requirement, for example, the central policy question is this: may a solicitor be held criminally liable if he or she is *merely aware* (i.e., knows) that, by making a request, he or she is promoting or facilitating conduct planned to culminate in an offense? Or, alternatively, must it proven that the solicitor *desires* (i.e., has the purpose) to promote or facilitate such conduct?

Resolution of these questions is crucial to determining whether and to what extent merchants who sell legal goods in the ordinary course of business which facilitate criminal acts may be subjected to criminal liability.[79] For example, imagine a car dealer who tries to convince a prospective purchaser to buy a car knowing that the vehicle will be used in a bank robbery. Or consider a motel operator who tries to sell a room to a man who is with an underage woman, knowing that it'll be used for sex. In these kinds of situations, "the person furnishing goods or services is aware of the customer's criminal intentions, but may not care whether the crime is committed."[80] What remains to be determined is whether this kind of culpable mental state as to the solicitee's future conduct constitutes a sufficient basis for a solicitation conviction.

There are, generally speaking, two different approaches one could take to the issue. From the perspective of a "true purpose" view, solicitation liability is only appropriate upon proof that the solicitor acted with a *conscious desire* to promote or facilitate criminal conduct by another. From the perspective of a knowledge view, in contrast, *mere awareness* that the solicitor is promoting or facilitating the commission of a crime by another is considered to be sufficient, even absent a true purpose to advance the criminal end. The choice between these two approaches raises conflicting policy considerations, namely, "that of the vendors in freedom to engage in gainful and otherwise lawful activities without policing their vendees, and that of the community in preventing behavior that facilitates the commission of crimes."[81]

Solicitation's second intent requirement, in contrast, revolves around a broader set of policy issues, which are a product of the various possibilities presented by an element analysis of the results and/or circumstances of the target of a solicitation. Consider first the relationship between a solicitor's state of mind and the result elements of the target offense. A solicitor may purposely request another to cause a result, as would be the case where D1, a passenger, solicits D2, a driver, to kill V, a nearby driver, by ramming D2's car into V's while on the highway. At the same time, a solicitor may also knowingly, recklessly, or even negligently request another to cause a result.

For example, D1 ask D2 to drive extremely fast through a school zone for the purpose of getting to a sports event on time. If D1 is practically certain that a teacher in the crosswalk will be killed, then D1 has knowingly solicited D2 to kill that teacher. If, in contrast, D1 is merely aware of a substantial risk that the teacher will be killed, then D1 has recklessly solicited D2 to kill that teacher. And if D1 is not aware of a substantial risk that asking D2 to speed will result in the death of the teacher, but nevertheless should

[79] *See* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138, 1192 (1997).
[80] DRESSLER, *supra* note 45, at § 28.01.
[81] Model Penal Code § 5.03 cmt. at 403.

have been aware of this possibility, then D1 has negligently solicited D2 to kill that teacher.

An identical analysis applies to circumstances. Imagine, for example, that D1 asks D2, an adult male, to engage in a sexual encounter with V, a minor. If D1 desires D2 to have sex with V *because of V's young age*, then D1 has purposely solicited sex with a minor. If, in contrast, D1 is practically certain that V is underage, then D1 has knowingly solicited D2 to have sex with a minor. And if D1 is aware of a substantial risk that V is underage, then D1 has recklessly solicited D2 to have sex with a minor. Finally, if D1 is not aware, yet should have been aware, of a substantial risk that V is underage then D1 has negligently solicited D2 to have sex with a minor.

That a solicitor can act purposely, knowingly, recklessly, or negligently as to results and circumstances is not to say that all of these culpable mental states provide a justifiable basis for a criminal conviction. Given that solicitation is a general inchoate offense that applies to particular crimes, there is little doubt that the solicitor must possess, at minimum, the culpable mental state requirement applicable to the results and circumstances of the target offense.[82] But what about where the culpable mental state requirement applicable to the results and circumstances of the target offense is comprised of a non-intentional mental state (e.g., recklessness or negligence), or none at all (i.e., strict liability)? In that case, one can ask: is proof of the culpable mental state required by the target offense enough, or, alternatively, must a more demanding, intentional culpable mental state nevertheless be proven?

There are, generally speaking, two different approaches one might take to the issue. The first is one of culpable mental state equivocation, which dictates that whatever culpable mental state requirement applies to the results and circumstances of the target offense will also suffice to establish a criminal solicitation. The second, and contrasting approach, is one of culpable mental state elevation, under which proof of either a practically certain belief or conscious desire as to the results and circumstances of the target offense is necessary—even if proof of a non-intentional mental state will suffice to secure a conviction for the completed offense.

Resolution of the above policy issues is unclear under the common law approach to solicitation, which simply viewed the *mens rea* of the offense as one of "specific intent."[83] This kind of monolithic conceptualization, rooted in "offense analysis," is fundamentally ambiguous given that it fails to take "account of both the policy of the inchoate crime and the policies, varying elements, and culpability requirements of all substantive crimes."[84] In contrast, the more recent "element analysis" developed by the drafters of the Model Penal Code provides the basis for applying a clearer and more conceptually sound approach to addressing the culpable mental state requirement of

[82] *See, e.g.*, *Mizrahi v. Gonzales*, 492 F.3d 156, 160–61 (2d Cir. 2007) ("T]he specific intent element of solicitation cannot be determined . . . except by reference to the statutory definition of the object crime."); LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 ("[W]here the prohibited result involves special circumstances as to which a mens rea requirement is imposed, the solicitor cannot be said to have intended that result unless he personally had this added mental state.").

[83] *See, e.g.*, *People v. Cortez*, 18 Cal. 4th 1223, 1232 (1998) ("The mens rea of solicitation is a specific intent to have someone commit a completed crime."); DRESSLER, *supra* note 45, at § 28.01 ("Common law solicitation is a specific-intent crime.").

[84] Wechsler et al., *supra* note 73, at 967.

solicitation. Surprisingly, however, the general solicitation provision the Model Penal Code's drafters developed fails to utilize these tools.

More specifically, the Model Penal Code's general solicitation provision, § 5.02(1), codifies a broad purpose requirement—similarly employed in the Code's general definitions of conspiracy[85] and complicity[86]—under which the requisite request must be accompanied by "the purpose of promoting or facilitating the commission of the crime."[87] When viewed in light of the accompanying explanatory note and commentary, it is clear that the drafters intended for this purpose requirement to apply to the "specific conduct that would constitute the crime."[88] Which is to say, the Model Penal Code endorses the purpose approach to the first *mens rea* policy issue, discussed above. Less clear, however, is how the Model Penal Code's undifferentiated reference to a "purpose of promoting or facilitating the commission of the *crime*" was intended to translate into culpability principles applicable to the results and circumstances of the target offense. Indeed, the commentary accompanying the relevant provision of the Model Penal Code explicitly states that this "matter"—i.e., whether to apply a principle of culpable mental state equivocation or elevation—"is deliberately left open."[89]

The Model Penal Code's endorsement of a true purpose view with respect to conduct has been widely adopted in reform jurisdictions. Since publication of the Model Penal Code in 1962, "[v]irtually all of the more recently enacted solicitation statutes" appear to have endorsed the position that a conscious desire to promote or facilitate

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[85] Model Penal Code § 5.03.

[86] Model Penal Code § 2.06.

[87] Model Penal Code § 5.02(1).

[88] Model Penal Code § 5.02(1): Explanatory Note (stating that "[a] purpose to promote or facilitate the commission of a crime is required, together with a command, encouragement or request to another person that he engage in specific conduct that would constitute the crime . . . "). The accompanying commentary to Model Penal Code § 5.02 states, in relevant part:

> It is not enough for a person to be aware that his words may lead to a criminal act or even to be quite sure they will do so; it must be the actor's purpose that the crime be committed. The language of the section may bar conviction even in some situations in which an actor does hope that his words will lead to commission of a crime. Suppose a young man seeks out a pacifist and asks for advice whether he should violate his registration obligation under the selective service laws. This particular pacifist believes all cooperation with the selective service system to be immoral and he so advises the young man. Although he may hope that the young man will refuse to register, his honest response to a request for advice might not be thought to constitute a purpose of promoting or facilitating commission of the offense. If he were tried it would be a question of fact whether his advice evidenced purpose.

Model Penal Code § 5.02 cmt. at 371.

[89] Model Penal Code § 5.03(1) cmt. at 371 n.23. As the drafters observed:

> Note should be made of a question that can arise as to the need for the defendant to have contemplated all of the elements of the crime that he solicits. If, for example, strict liability or negligence will suffice for a circumstance element of the offense being solicited, will the same culpability on the part of the defendant suffice for his conviction of solicitation, or must he actually know of the existence of the circumstance? The point arises also in charges of conspiracy, where it is treated in some detail.

Id. at 371.

criminal conduct is necessary.[90] At the same time, however, none of these statutes appear to clarify whether and to what extent the results and circumstances of the target offense must be elevated when charged as a solicitation. The underlying policy issues likewise remain unresolved in the courts, where "[c]ase law is almost nonexistent."[91] Legal commentary on these issues is also sparse, though, to the extent it exists, it appears to favor application of a principle of culpable mental state elevation with respect to both results and circumstances.[92]

In the absence of much legal authority on these issues in the context of solicitation, perhaps the best indicator of national legal trends is the more ample legal authority on these issues in the context of conspiracy liability. There is, after all, very

[90] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Modern criminal codes express this point in varying ways. For example, some state that "the solicitor must intend that an offense be committed." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Cal. Penal Code § 653f; Colo. Rev. Stat. Ann. § 18-2-301; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Iowa Code Ann. § 705.1; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mont. Code Ann. § 45-4-101; Tenn. Code Ann. § 39-12-102; Tex. Penal Code Ann. § 15.03; Utah Code Ann. § 76-4-203; Wis. Stat. Ann. § 939.30; Wyo. Stat. § 6-1-302). Others state that "the solicitor must intend to promote or facilitate [the target offense's] commission." LAFAVE, SUPRA NOTE 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Haw. Rev. Stat. § 705-510; Idaho Code § 18-2001; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.030; N.D. Cent. Code § 12.1-06-03; Pa. Cons. Stat. Ann. tit. 18, § 902; Wash. Rev. Code § 9A.28.030)). Yet another approach is to state that the solicitor "must intend that the person solicited engage in criminal conduct." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (citing Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435). Although there's little case law interpreting these statutes, "the acts of commanding or requesting another to engage in conduct which is criminal would seem of necessity to require an accompanying intent that such conduct occur." LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.

[91] Alexander & Kessler, *supra* note 79, at 1166; *see, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. In what is perhaps the only published case directly addressing the relationship between the culpable mental state requirement of a solicitation and that governing the target offense, *Com. v. Hacker*, the Pennsylvania Supreme Court held that solicitation of sex with a minor, like the target offense of sex with a minor, is a matter of strict liability with respect to the circumstance of age—at least where the victim is in the physical presence of the solicitor. 609 Pa. 108, 113, 15 A.3d 333, 336 (2011). This effective principle of culpable mental state equivocation as to circumstances is to be contrasted, however, with the decisions of at least two other state courts applying a principle of culpable mental state elevation to the circumstance of age in statutory rape where the government proceeds on a complicity theory. *See State v. Bowman*, 188 N.C. App. 635, 650 (2008) ("[W]hen the government proceeds on a complicity theory of liability, it must prove that the defendant "acted with knowledge that the [victims] were under the age of [consent.]") (citing *People v. Wood*, 56 Cal.App. 431 (1922); *see also Robinson v. United States*, 100 A.3d 95, 105 (D.C. 2014) (to hold someone criminally responsible as an accomplice the government must prove "a state of mind extending to the entire crime," i.e., "the intent must go to the specific and entire crime charged") (quoting *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014)). These cases are particularly relevant because solicitation provides one of two bases (abetting) for holding someone criminally responsible as an accomplice. *See, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on N.Y. Penal Law § 100.00.

[92] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. ("[A]s to those crimes which are defined in terms of certain prohibited results, it is necessary that the solicitor intend to achieve that result through the participation of another. If he does not intend such a result, then the crime has not been solicited, and this is true even though the person solicited will have committed the crime if he proceeds with the requested conduct and thereby causes the prohibited result."); Alexander & Kessler, *supra* note 79, at 1166 (arguing that, with respect to circumstances, "there are strong reasons in favor of asymmetry between the target crime and its solicitation," including that: (1) "D1 may lack D2's knowledge base"; and (2) D1 may be "removed in time and space from the target crime").

little (if any) difference between the *mens rea* of these two offenses. And the question of whether and to what extent the results and circumstances of the target of a conspiracy should be elevated raises the same policy issues as those raised when the question is asked in the solicitation context. Therefore, these legal authorities can provide meaningful direction.[93] And, as the commentary to the CCRC's general conspiracy provision, RCC § 303(1), explores in significant detail, relevant legislation, case law, and commentary in the conspiracy context support applying dual principles of intent elevation to the results and circumstances.[94]

Consistent with the above analysis of national legal trends, the RCC approach to the culpable mental state requirement governing a criminal solicitation incorporates the same four substantive policies applicable to the RCC approach governing the culpable mental state requirement of a criminal conspiracy.

First, the prefatory clause of RCC § 302(a) establishes that the culpability required for the general inchoate offense of criminal solicitation is, at minimum, that required by the target offense. Second, RCC § 302(a)(1) endorses the purpose view of solicitation, under which proof that the solicitor consciously desired to bring about conduct planned to culminate in the target offense is a necessary component of solicitation liability. Both of these policies are consistent with national legal trends applicable to the general inchoate crime of solicitation (in addition to those applicable in the context of conspiracy liability).

Third, RCC § 302(b) applies a principle of intent elevation to the results of a solicitation, under which the solicitor must, in making the request, intend to cause any result required by the target offense. Similarly, and fourth, RCC § 302(b) applies the same principle of intent elevation to the circumstances of a solicitation, under which the solicitor must, in making the request, intend to bring about any circumstance required by the target offense. Both of these policies are consistent with national legal trends applicable to the general inchoate crime of conspiracy.

RCC § 302(a)(1): Relation to National Legal Trends on Impossibility. The topic of impossibility revolves around the following question: what is the relevance of the fact that, by virtue of some mistake concerning the conditions the actor believed to exist, the target of the general inchoate offense for which the defendant is being prosecuted could not have been completed?[95] The defendant in this kind of situation may admit that he or she possessed the requisite intent to commit that target offense, but nevertheless argue that impossibility of completion should by itself preclude the imposition of criminal liability.[96]

The problem of impossibility is most commonly discussed in the context of attempt prosecutions. Illustrative issues include whether the following actors have committed a criminal attempt: (1) a pickpocket who puts her hand in the victim's pocket,

[93] *See, e.g.,* Marianne Wesson, *Mens Rea and the Colorado Criminal Code*, 52 U. COLO. L. REV. 167, 210 (1981) ("Because of its similarities to conspiracy, solicitation should require the same mental state as conspiracy.").

[94] *See* First Draft of Report No. 12: Recommendations for Chapter 3 of the Revised Criminal Code—Definition of a Criminal Conspiracy, at 32-40 (December 11, 2017).

[95] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.

[96] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; DRESSLER, *supra* note 45, at § 27.07.

believing it to contain valuable items, only to discover that it is empty;[97] (2) an assailant shooting into the bed where the intended victim customarily sleeps, believing the victim to be there, only to discover that he isn't;[98] (3) a participant in a sting operation who receives property believing it to be stolen, only to discover that it isn't;[99] and (4) an actor who believes that he or she is selling a controlled substance, only to discover that the substance is not contraband.[100]

In principle, the precise same issues of impossibility can also arise in the context of prosecutions for any other general inchoate crime, including solicitation.[101] Consider, for example, how slight tweaks to the above fact patterns present the same questions of impossibility for solicitation prosecutions: (1) D1 asks D2 to pickpocket V's jacket, believing it to contain valuable items, when it is actually empty; (2) D1 asks D2 to shoot into the bedroom where V customarily sleeps, believing V to be there, when V is, in fact, on vacation; (3) D1 asks D2 to purchase property on the black market, believing it to be stolen, when, in fact, it isn't stolen but part of a sting operation; and (4) D1 asks D2 to sell what he believes to be a controlled substance, when in fact that substance is innocent.

In addition, solicitation prosecutions also raise the possibility of distinctive forms of impossibility beyond those that arise in the context of attempt prosecutions given the involvement of another party. In one relevant situation, the impossibility is a product of the fact that the solicitee is *unable* to engage in the target of the solicitation—such as, for example, when D1 sends a letter to a well-regarded hit man, D2, soliciting the murder of V, only to discover that D2 is in a coma due to a near-fatal car accident. In another situation, the impossibility is a product of the fact that the solicitee is *unwilling* to commit the target offense—such as, for example, when D1 asks D2 to commit a murder for hire, only to discover that D2 is an undercover officer merely posing as a willing participant in a criminal offense.

Conceptually speaking, impossibility issues arising in the solicitation context can be divided into the same four categories that exist in the attempt context.[102] The first is *pure factual impossibility*, which arises when the object of a solicitation cannot be consummated because of circumstances beyond the parties' control (e.g., police interference).[103] The second category of impossibility is *pure legal impossibility*, which arises where the solicitor acts under a mistaken belief that the law criminalizes his or her intended objective (e.g., solicitation of a lawful act).[104] The third category is *hybrid impossibility*, which arises where the object of a solicitation is illegal, but commission of the target offense is impossible due to a *factual mistake* regarding the *legal status* of some attendant circumstance that constitutes an element of the target offense (e.g., soliciting an undercover officer posing as a child to engage in sexual acts).[105] And the fourth category of impossibility is *inherent impossibility*, which arises when "any reasonable person would have known from the outset that the means being employed

[97] *See People v. Twiggs*, 223 Cal. App. 2d 455 (Ct. App. 1963).
[98] *See State v. Mitchell*, 71 S.W. 175 (Mo. 1902).
[99] *See People v. Rojas*, 358 P.2d 921 (Cal. 1961).
[100] *See United States v. Quijada*, 588 F.2d 1253 (9th Cir. 1978).
[101] *See* LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1
[102] This general framework and breakdown is drawn from DRESSLER, *supra* note 45, at § 27.07.
[103] *Id.*
[104] *Id.*
[105] *Id.*

could not accomplish the ends sought" to be achieved by a solicitation (e.g., soliciting a murder by means of witchraft).[106]

Notwithstanding the factual and conceptual symmetries between impossible attempts and impossible solicitations, the law of impossibility is relatively underdeveloped in the context of solicitation liability.[107] Courts rarely seem to publish opinions addressing impossibility issues outside the attempt context, and, even when they do, those opinions shy away from the "lengthy explorations of the distinction between [different kinds of] impossibility" that characterizes attempt jurisprudence.[108] Rather, courts are more likely to generally state—as the U.S. Supreme Court recently observed in *United States v. Williams*—that "impossibility of completing the crime because the facts were not as the defendant believed is not a defense [to solicitation]" and move on.[109]

The Model Penal Code, in contrast, applies a more nuanced approach to dealing with such issues. By viewing a solicitation to attempt the commission of a crime as a solicitation to commit that crime, it effectively carries over Code's general abolition of impossibility claims in the attempt context to the solicitation context.[110] Here's how this incorporation-based approach operates.

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[106] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, Lawrence Crocker, *Justice in Criminal Liability: Decriminalizing Harmless Attempts*, 53 OHIO ST. L.J. 1057, 1099 (1992); Kyle S. Brodie, *The Obviously Impossible Attempt: A Proposed Revision to the Model Penal Code*, 15 N. ILL. U. L. REV. 237 (1995).

[107] *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 85 (Westlaw 2017).

[108] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.5.

[109] *United States v. Williams*, 553 U.S. 285, 300 (2008). Or, as it is sometimes phrased by courts, "[i]t is not a defense" to solicitation that "the person solicited *could not commit the crime*, or . . . *would [not] have* committed the crime solicited." *United States v. Devorkin*, 159 F.3d 465, 468 (9th Cir. 1998) (quoting LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1); *see Com. v. Jacobs*, 91 Mass. 274, 275 (1864) (no defense that defendant solicited another, who was physically unfit for military service, to leave state for purpose of entering military service elsewhere); *Benson v. Superior Court of Los Angeles Cty.*, 57 Cal. 2d 240, 243–44 (1962) (no defense that defendant solicited undercover agent to commit perjury in anticipated child custody proceedings). For relevant case law, see *Wright v. Gates*, 240 Ariz. 525 (2016); *Ford v. State*, 127 Nev. 608 (2011); *Saienni v. State*, 346 A.2d 152 (Del. 1975); *Luzarraga v. State*, 575 So.2d 731 (Fla. App. 1991); *People v. Breton*, 237 Ill.App.3d 355 (1992); *Meyer v. State*, 47 Md.App. 679 (1981); *Colbert v. Commonwealth*, 47 Va.App. 390 (2006). *See also People v. Thousand*, 465 Mich. 149, 168 (2001) ("[W]e are unable to locate any authority, and defendant has provided none, for the proposition that "impossibility" is a recognized defense to a charge of solicitation in other jurisdictions.").

[110] Model Penal Code § 5.03 cmt. at 421. Note that the Model Penal Code similarly extends the same treatment of inherent impossibility afforded in attempt prosecutions to solicitation prosecutions by authorizing the court to account for the relevant issues at sentencing. Model Penal Code § 5.01 cmt. at 318. The relevant provision, Model Penal Code § 5.05(2), establishes that "[i]f the particular conduct charged to constitute a criminal attempt, solicitation, or conspiracy, is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense," then the court has two alternatives at its disposal. Model Penal Code § 5.05(2). First, the court may "impose sentence for a crime of lower grade or degree." *Id.* Second, and alternatively, the court may, "in extreme cases, [simply] dismiss the prosecution." *Id.*

Generally speaking, this kind of "safety valve is extremely desirable in the inchoate crime area, which, by definition, involves threats of infinitely varying intensity." Buscemi, *supra* note 67, at 1187. In the solicitation context, however, such a provision will specifically "help avoid the injustice which might be created by the MPC's non-recognition of impossibility as a defense to a [solicitation] indictment." *Id.* at 1187; *see also* Alexander & Kessler, *supra* note 79, at 1193 ("Currently, garden-variety criminal solicitation is arguably subject to the requirement of *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), that the soliciting speech be directed to inciting and likely to incite the audience to imminent lawless acts").

The Model Penal Code's formulation of a criminal attempt, § 5.01(1)(c), establishes that: "[A] person is guilty of an attempt to commit a crime if," *inter alia*, the person "purposely does or omits to do anything that, *under the circumstances as he believes them to be*, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."[111] By broadly recognizing that an "actor can be held liable for an attempt to commit the offense he *believed* he was committing, without regard to whether or why the commission of the offense is impossible," the Model Penal Code approach renders most impossibility claims immaterial in the attempt context.[112]

The Model Penal Code drafters intended to apply the same approach to dealing with impossibility in the solicitation context. "It would be awkward, however, to incorporate the impossibility language of attempt into other inchoate offenses."[113] With that in mind, the Model Penal Code instead "treats [solicitation] to attempt the commission of a crime as a [solicitation] to commit that crime."[114]

More specifically, Model Penal Code § 5.02(1) states that a person is guilty of an offense if he "commands, encourages or requests another person to engage in specific conduct that would constitute such crime *or an attempt to commit such crime* . . . ." Inclusion of the term "attempt" in this formulation addresses the fact that

> in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct by the person solicited would constitute an attempt under Section 5.01, and the actor would therefore be liable under Section 5.02 for having solicited conduct that would constitute an attempt if performed.[115]

In practical effect, then, the Model Penal Code's general solicitation provision, like its general attempt provision, broadly prohibits impossibility claims by "focus[ing] upon the circumstances as the actor believes them to be rather than as they actually exist."[116]

Since completion of the Model Penal Code, a handful of modern criminal codes have imported this legislative solution to impossibility.[117] But while many reform

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[111] Model Penal Code § 5.01(1)(c).

[112] PAUL H. ROBINSON & MICHAEL CAHILL, CRIMINAL LAW 514 (2d. 2012). Model Penal Code § 5.01(c) could also be read to abolish the defense of pure legal impossibility. *See id.* However, the Model Penal Code commentary indicates that the drafters intended that pure legal impossibility remain a defense:

> It is of course necessary that the result desired or intended by the actor constitute a crime. If . . . the result desired or intended is not a crime, the actor will not be guilty of an attempt, even though he firmly believes that his goal is criminal.

Model Penal Code § 5.01 cmt. at 318; *see* Wechsler et al., *supra* note 73, at 579.

[113] ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85.

[114] Model Penal Code § 5.03 cmt. at 421.

[115] Model Penal Code § 5.02 cmt. at 373-74.

[116] Model Penal Code § 5.01 cmt. at 297.

[117] *See, e.g.*, Ark. Code § 5-3-301; Or. Rev. Stat. § 161.435; Del. Code Ann. tit. 11, § 501; Ky. Rev. Stat. § 506.030; *see also* Model Penal Code § 5.02 cmt. at 374 n. 31 (collecting citations).

solicitation statutes "do not deal with the point explicitly," most "would undoubtedly be interpreted to reach the same result."[118] Which is to say, they can be read to

> cover one who solicits another to engage in conduct that, because of factors unknown to the defendant or the actor, is factually or legally impossible of being criminal, since it is the ultimate goal of the solicitation that determines the solicitor's liability.[119]

Consistent with the above analysis of national legal trends, the RCC broadly renders impossibility claims irrelevant in the context of solicitation prosecutions. RCC § 302(a)(2) accomplishes this by establishing that a request to bring about conduct that, if carried out, would constitute an "attempt" will also suffice for solicitation liability. The reference to an attempt is intended to incorporate the same approach applicable to impossibility in the latter context, which, pursuant to RCC § 301(a)(1), necessarily abolishes factual impossibility and hybrid impossibility defenses by focusing on the situation as the defendant viewed it.[120]

RCC §§ 303(a) & (b) (Generally): Relation to National Legal Trends on Target Offenses. The general inchoate offense of solicitation is a relatively recent development in American criminal law, subject to significant variance insofar as its breadth of coverage is concerned.[121]

Solicitation was first recognized as a common law offense in the United States during the early nineteenth century.[122] In the ensuing years, some, but not all, American

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[118] Model Penal Code § 5.02 cmt. at 374 n.31.

[119] *Id.*; *see also* Model Penal Code § 5.04(a)-(b) ("[I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that . . . he or the person whom he solicits or with whom he conspires does not occupy a particular position or have a particular characteristic that is an element of such crime, if he believes that one of them does; or . . . the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime.").

[120] RCC § 302(a) likewise imports the same approach to recognizing inherent impossibility employed in RCC § 301(a). More specifically, where the solicitor's perspective of the situation is relied upon, the government must prove that the requested course of conduct was "reasonably adapted to commission of the [target] offense." By requiring a basic correspondence between the defendant's conduct and the criminal objective sought to be achieved, this reasonable adaptation requirement precludes convictions for inherently impossible solicitations.

One other kind of impossibility addressed by RCC § 302 is "what might be called an impossible solicitation or conspiracy of a possible offense." ROBINSON, *supra* note 107, at 1 CRIM. L. DEF. § 85. In this situation, the impossibility does not arise not from the nature of the ultimate object offense, but rather, from the particular defendant's actions constituting the solicitation. *Id.* For example, the defendant's scheme for the planned killing of the intended victim may be entirely feasible, but nevertheless impossible because he whispers it through a door with no one behind it. *Id.* In such a situation, liability clearly attaches under RCC § 302(a)(1) because the defendant "tr[ied]" to persuade another person to commit a crime. And it also clearly attaches under RCC § 302(c) because the "defendant does everything he or she plans to do to effect the communication."

[121] Robbins, *supra* note 43, at 116.

[122] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. Prior to the nineteenth century, the English common-law courts held indictable two specific forms of solicitation: importuning another to commit either a forgery for use in a trial or perjury, *Rex v. Johnson*, 89 Eng. Rep. 753, 753, 756, 2 Show. K.B. 1, 1, 3-4 (1679), and offering a bribe to a public official. *Rex v. Vaughan*, 98 Eng. Rep. 308, 310-11, 4 Burr. 2494,

judiciaries endorsed general solicitation liability by way of common law.[123] And, among those courts that did opt to judicially recognize the offense, there existed disagreement concerning the target offenses to which general solicitation liability ought to apply.[124] For example, some courts held that general solicitation liability appropriately applies to all forms of criminal conduct, without regard to the nature of the offense solicited.[125] Others, in contrast, resisted this conclusion, curtailing the scope of criminal liability on the basis that the solicitation of some forms of criminal conduct was simply "unworthy of serious censure."[126] Then, during the first half of the twentieth century, some legislatures abrogated general solicitation liability altogether in the course of abolishing common law crimes.[127]

It was with this backdrop in mind that the drafters of the Model Penal Code developed the Code's general solicitation provision, § 5.02, which unequivocally establishes that a person may be held criminally liable for "solicit[ing] to commit a crime."[128] This language serves two basic goals. First, it provides clear legislative recognition that the general inchoate offense of solicitation exists, "thereby remedying the omission that exist[ed] in those jurisdictions where common law crimes have been abolished."[129] Second, it "makes criminal the solicitation to commit *any offense*, thereby closing the gaps in common law coverage."[130]

As it relates to the first goal, general legislative recognition of solicitation liability, Model Penal Code § 5.02 has been quite influential. The contemporary legislative approach, reflected in a strong majority of American criminal codes, is to adopt a general solicitation statute that clearly specifies the target offenses to which solicitation liability applies.[131] Legislative adoption of general solicitation statutes of this nature is also a standard practice in states that have undertaken comprehensive code reform projects,[132] though it should be noted that "[e]ven in those jurisdictions with modern recodifications it is not uncommon for there to be no statute making solicitation a

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2499 (1769). Not until the case of *Rex v. Higgins*, 102 Eng. Rep. 269, 2 East 5 (1801), did the English courts recognize solicitation as a distinct substantive offense. Robbins, *supra* note 43, at 116.

[123] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g.*, Commentary on Ala. Code § 13A-4-1 ("In Alabama, until 1967, there was doubt as to whether the crime of solicitation even existed, as there was no statute nor case law on the subject.").

[124] *See, e.g.*, Robbins, *supra* note 43, at 116; *Meyer v. State*, 425 A.2d 664, 668 n.5 (Md. 1981); Commentary on Ala. Code § 13A-4-1.

[125] Model Penal Code § 5.02 cmt. at 367.

[126] *Id.*; *see, e.g., Com. v. Barsell*, 424 Mass. 737, 738-42 (1997); Robbins, *supra* note 43, at 116.

[127] Model Penal Code § 5.02 cmt. at 367.

[128] Model Penal Code § 5.02(1); *see* Model Penal Code § 5.02 cmt. at 367 ("General statutory provisions punishing solicitations were not common before the Model Penal Code.").

[129] Model Penal Code § 5.02 cmt. at 367.

[130] *Id.*

[131] *See* Robbins, *supra* note 43, at 116 ("Thirty-three states and the United States currently catalogue solicitation as a general substantive crime.").

[132] *See, e.g.*, Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030; Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; Utah Code Ann. § 76-4-203; Wyo. Stat. § 6-1-302

crime."[133] And, in those reform jurisdictions that have declined to adopt a general solicitation statute but abolished all common law crimes, general solicitation liability does not exist at all.[134]

As it relates to the second goal of the Code's drafters, extending general solicitation liability to all crimes, the Model Penal Code approach has been less influential. Generally speaking, there exists "considerable variation" concerning the breadth of coverage reflected in modern solicitation statutes.[135] A slim majority are consistent with Model Penal Code § 5.02(1) in that they criminalize solicitations to commit *any* crime.[136] But a strong plurality are materially narrower. Some state statutes, for example, cover only the solicitation of felonies,[137] or all felonies plus particular classes of misdemeanors.[138] And others only apply to particular classes of felonies,[139] such as, for example, the federal solicitation statute, which limits the scope of general solicitation liability to crimes of violence.[140]

The above disparities in the prevalence and scope of general solicitation liability reflect the controversial nature of the offense.[141] It has been asserted, for example, that "a mere solicitation to commit a crime, not accompanied by agreement or action by the person solicited, presents no significant social danger."[142] The reason? "By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself."[143] On an even more basic level, however, concerns with general solicitation liability revolve around the "extremely inchoate nature of the crime," namely, it allows the penal system to punish conduct far back on the continuum of acts

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[133] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (listing Conn., Ind., Minn., Mo., Neb., N.J., Ohio and S.D.).
[134] *Id.*
[135] *Id.*
[136] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Ariz. Rev. Stat. Ann. § 13-1002; Ark. Code Ann. § 5-3-301; Del. Code Ann. tit. 11, § 501; Fla. Stat. Ann. § 777.04; Haw. Rev .Stat. § 705-510; Idaho Code § 18-2001; Ill. Comp. Stat. Ann. ch. 720, § 5/8-1; Ky. Rev. Stat. Ann. § 506.030; Mont. Code Ann. § 45-4-101; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 100.00; Pa. Cons. Stat. Ann. tit. 18, § 902; Tenn. Code Ann. § 39-12-102; Wash. Rev. Code § 9A.28.030.
[137] *See* Colo. Rev. Stat. Ann. § 18-2-301; Ga. Code Ann. § 16-4-7; Kan. Stat. Ann. § 21-5303; La. Rev. Stat. Ann. § 14:28; N.M. Stat. Ann. § 30-28-3; N.D. Cent. Code § 12.1-06-03; R.I. Gen. Laws Ann. § 11-1-9; Utah Code Ann. § 76-4-203; Va. Code Ann. § 18.2-29; Wyo. Stat. § 6-1-302.
[138] Iowa Code Ann. § 705.1; Or. Rev. Stat. § 161.435.
[139] Me. Rev. Stat. tit. 17-A, § 153; Tex. Penal Code Ann. § 15.03; Cal. Penal Code § 653f.
[140] 18 U.S.C.A. § 373 ("Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States . . . ."); *see* S. Rep. No. 98–225, 98th Cong., 2d Sess. 308 (1984), *reprinted in*, 1984 U.S. Code Cong. & Admin. News 3182, 3487 ("The Committee believes that a person who makes a serious effort to induce another person to commit a crime of violence is a clearly dangerous person and that his act deserves criminal sanctions whether or not the crime of violence is actually committed."); *United States v. Korab*, 893 F.2d 212, 215 (9th Cir. 1989).
[141] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1 (noting that these variances reflect the absence of "a uniformity of opinion on the necessity of declaring criminal the soliciting of others to commit offenses").
[142] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1; *see, e.g., State v. Davis*, 319 Mo. 1222, 1236 (1928) (White, J., concurring); Robbins, *supra* note 43, at 116; WORKING PAPERS, *supra* note 48, at 370.
[143] Robbins, *supra* note 43, at 116; *see, e.g.*, LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11; Commentary on Haw. Rev. Stat. Ann. § 705-510; *People v. Werblow*, 241 N.Y. 55, 64-65 (1925).

leading to a completed crime (i.e., "mere preparation" by attempt standards).[144] "Viewed solely as an inchoate offense," then, it has been argued that solicitation essentially "punish[es] evil intent alone."[145]

None of which is to say that there aren't sound justifications supporting general solicitation liability. It has been argued, for example, that solicitation liability appropriately accounts for the "special hazards posed by potential concerted criminal activity."[146] Indeed, few take issue with the existence of attempt liability, and "a solicitation is, if anything, more dangerous than a direct attempt, because it may give rise to the special hazard of cooperation among criminals."[147] Furthermore, "the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling."[148] And, as a matter of practice, "the imposition of liability for criminal solicitation has proved to be an important means by which the leadership of criminal movements may be suppressed."[149]

Efficacy aside, though, even those who support general solicitation liability admit that the basic "risk[s] inherent in the punishment of almost all inchoate crimes"—namely the possibility "that false charges may readily be brought, either out of a misunderstanding as to what the defendant said or for purposes of harassment"—are more pronounced in the solicitation context given that "the crime may be committed merely by speaking."[150] This problem, alongside the other issues raised above, perhaps explains why both the common law and contemporary legislative practice reflect a range of approaches to addressing the target offenses to which general solicitation liability attaches.

In sum, American legal authority supports recognition of general solicitation liability, but it does not provide clear direction concerning appropriate scope of coverage. At the very least, however, it does indicate that the District's current approach, of subjecting only crimes of violence to general solicitation liability, is a reasonable one, which effectively balances the competing policy considerations implicated by the topic. It is, therefore, the approach incorporated into the RCC pursuant to § 302(a)(3), which clarifies that only crimes of violence provide the basis for general solicitation liability.

RCC §§ 302(a), (b), & (c): Relation to National Trends on Codification. There is wide variance between jurisdictions insofar as the codification of a general definition of solicitation is concerned.[151] Generally speaking, though, the Model Penal Code's general

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[144] Robbins, *supra* note 43, at 116; *see, e.g.,* LAFAVE, *supra* NOTE 43, at 2 SUBST. CRIM. L. § 11.1; Commentary on Haw. Rev. Stat. Ann. § 705-510.
[145] Robbins, *supra* note 43, at 116.
[146] Model Penal Code § 5.02 cmt. at 365-66.
[147] *Id.*
[148] *Id.*; *see People v. Kauten*, 324 Ill. App. 3d 588, 592 (2001) (relying on similar reasoning to reject claim that punishment of solicitation more severely than conspiracy is unconstitutionally disproportionate).
[149] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1.
[150] LAFAVE, *supra* note 43, at 2 SUBST. CRIM. L. § 11.1. *See also* WORKING PAPERS, *supra* note 48, at 372 ("[E]ven for persons trained in the art of speech, words do not always perfectly express what is in a man's mind. Thus in cold print or even through misplaced emphasis, a rhetorical question may appear to be a solicitation. The erroneous omission of a word could turn an innocent statement into a criminal one.").
[151] *See, e.g., Com. v. Barsell*, 424 Mass. 737, 740 (1997) ("As increasing numbers of States have chosen to codify their law on solicitation, a great variety of approaches to criminal solicitation have emerged.")

provision, § 5.02,[152] provides the basis for most contemporary reform efforts. The general definition of solicitation incorporated into RCC §§ 303(a), (b), and (c) incorporates drafting techniques from the Model Penal Code while, at the same time, utilizing a few techniques, which depart from it. These departures are consistent with the interests of clarity, consistency, and accessibility.

The most noteworthy drafting decision reflected in the Model Penal Code's general definition of solicitation is the manner in which the culpable mental state requirement of solicitation is codified. Notwithstanding the Model Penal Code drafters' general commitment to element analysis, the culpability language utilized in § 5.02(1) reflects offense analysis, and, therefore, leaves the culpable mental state requirements applicable to solicitation ambiguous.[153]

Illustrative is the prefatory clause of Model Penal Code § 5.02(1), which entails proof that the defendant make the requisite request "with the purpose of promoting or facilitating" the commission of the offense that is the object of the solicitation. Viewed from the perspective of element analysis, the import of this language is less than clear. On the one hand, the purpose requirement is framed in terms of commission of the *target offense*. On the other hand, all (target) offenses are comprised of different elements (namely, conduct, results, and circumstances). It is, therefore, unclear to which of the elements of the target offense this purpose requirement should be understood to apply.[154]

That the Model Penal Code fails to clarify the culpable mental state requirement (if any) applicable to each element of a solicitation appears, at least in part, to have been intentional. More specifically, the commentary to Model Penal Code § 5.02 explicitly states that the "matter" of whether the results and circumstances are subject to a principle of culpable mental state equivocation or elevation "is deliberately left open."[155] And this silence is consistent with the Code's approach to conspiracy, reflected in Model Penal Code § 5.03(1), which "does not attempt to [address the culpable mental state

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[152] The entirety of this provision reads as follows:

> (1) Definition of Solicitation. A person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission.
>
> (2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.
>
> (3) Renunciation of Criminal Purpose. It is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.

Model Penal Code § 5.02.

[153] *See also* Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 756 (1983) (setting forth similar critique of Model Penal Code approach to codifying conspiracy).

[154] *See id.*

[155] Model Penal Code § 5.02(1) cmt. at 371 n.23.

requirement of conspiracy] by explicit formulation . . . but affords sufficient flexibility for satisfactory decision as such cases may arise."[156]

While consistent with the Model Penal Code's conspiracy provisions, however, this grant of policy discretion to the courts is no less problematic. The codification virtues of clarity, consistency, and fair notice all point towards providing comprehensive legislative guidance concerning the culpable mental state requirement of solicitation.[157] Indeed, at least one court has observed that the law of solicitation "is an area that *must* be left to comprehensive legislation, rather than the type of ad hoc, fact-specific, case-by-case development that would result from an attempt to solve [related policy issues through] continued reliance on common law."[158] Comprehensive solicitation legislation also serves the interests of due process, however: "[c]riminal statutes are," after all, "constitutionally required to be clear in their designation of the elements of crimes, including mental elements."[159]

Since publication of the Model Penal Code, state legislatures have modestly improved upon the Code's treatment of solicitation's culpable mental state requirement. For example, a handful of jurisdictions helpfully clarify by statute that solicitation's purpose requirement (or its substantive equivalent) specifically applies to "conduct constituting a crime."[160] While helpful, however, no state statute has attempted to deal comprehensively with the state of mind required for the circumstance or result elements that comprise the target of a solicitation. Which is to say: there is no American criminal code that fully implements a statutory element analysis of solicitation's culpable mental state requirement.

The RCC approach to codifying the culpable mental state of solicitation, in contrast, strives to provide that clarification, while at the same time avoiding unnecessary complexity to the extent feasible. This is accomplished in three steps.

To start, the prefatory clause of RCC § 302(a) establishes that the culpability requirement applicable to a criminal solicitation necessarily incorporates "the culpability required by [the target] offense." This language is modeled on the prefatory clauses

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[156] Model Penal Code § 5.03(1) cmt. at 113.

[157] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 332-366 (2005).

[158] *Barsell*, 424 Mass. 737 at 741; *see also* Robinson & Grall, *supra* note 153, at 754 ("The ambiguous language of the conspiracy provision coupled with the ambivalent language of the commentary indicates a need for clarification."). As one commentator frames the issue:

> Although the MPC writers apparently believed that the resolution of the question was best left open to subsequent judicial developments, I believe that statutory language should clearly and unequivocally resolve the question. Criminal statutes are constitutionally required to be clear in their designation of the elements of crimes, including mental elements.

Wesson, *supra* note 93, at 209.

[159] Wesson, *supra* note 93, at 209.

[160] *See* Ala. Code § 13A-4-1; Alaska Stat. § 11.31.110; Del. Code Ann. tit. 11, § 501; Ga. Code Ann. § 16-4-7; N.H. Rev. Stat. Ann. § 629:2; N.M. Stat. Ann. § 30-28-3; N.Y. Penal Law § 100.00; Or. Rev. Stat. § 161.435.

employed in various modern attempt statutes.[161] It effectively communicates that solicitation liability requires, at minimum, proof of the culpable mental states (if any) governing the results and circumstances of the target offense.[162]

Next, RCC § 302(a)(1) clearly and directly articulates that solicitation's distinctive purpose requirement governs the conduct which constitutes the object of the command, request, or efforts at persuasion. This is achieved by expressly applying a culpable mental state of purpose to the conduct requirement of solicitation. More specifically, RCC § 302(a)(1) states that the solicitor must, *"[p]urposely" command, request, or try to persuade another to . . .* engage in or aid the planning or commission of [criminal] conduct."

A handful of states have followed a similar approach to codification in the sense that they clarify, by statute, that a purpose requirement applies to the conduct that constitutes the object of the solicitation.[163] Notably, however, these jurisdictions do so through a different clause that, like the Model Penal Code approach to codifying the culpable mental state requirement of solicitation, separates the purpose requirement from the conduct requirement.[164] The latter approach is unnecessarily verbose—whereas the drafting technique employed in the RCC allows for a more succinct general statement of the culpable mental state requirement governing solicitation.

Finally, RCC § 302(b) provides explicit statutory detail, not otherwise afforded by any other American criminal code, concerning the extent to which principles of culpable mental state elevation govern the results and circumstances of the target offense.[165] More specifically, RCC § 302(b) establishes that: "Notwithstanding subsection (a), to be guilty of a solicitation to commit an offense, that person must intend to bring about the results and circumstances required by that offense." This language incorporates two parallel principles of culpable mental state elevation applicable whenever the target of a solicitation is comprised of a result or circumstance that may be satisfied by proof of recklessness, negligence, or no mental state at all (i.e., strict liability). For these offenses, proof of intent on behalf of the solicitor is required as to the requisite elements under RCC § 302(b).

When viewed collectively, the RCC approach to codification provides a comprehensive but accessible statement of the culpable mental state requirement governing a solicitation, which avoids the flaws and ambiguities reflected in Model Penal Code § 5.02(1).

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[161] For example, Model Penal Code § 5.01(1) reads: "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime . . . ." For state statutes employing this language, see, for example, Ky. Rev. Stat. Ann. § 506.010; Tenn. Code Ann. § 39-12-101.

[162] The term "culpability" includes, but also goes beyond, the culpable mental state requirement governing an offense. *See* RCC § 201(d) (culpability requirement defined). This clause also addresses broader aspects of culpability such as, for example, premeditation, deliberation, or the absence of any mitigating circumstances, which the target of a conspiracy might likewise require. A conspiracy to commit such an offense would, pursuant to the prefatory clause of § 303(a), require proof of the same.

[163] *See supra* note 90 (collecting statutory authorities).

[164] For example, Model Penal Code § 5.02(1) states, first, that a person must act "with the purpose of promoting or facilitating [] commission" of a crime, and, second, that he must "command[], encourage[] or request[] another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime or would establish his complicity in its commission or attempted commission."

[165] *See* RCC § 302(b) ("Notwithstanding subsection (a), to be liable for solicitation, the person must at least intend to bring about any results and circumstances required by the target offense.")

One other drafting flaw reflected in the Model Penal Code approach to codifying solicitation liability, which is likewise addressed by the RCC, is the disposition of uncommunicated solicitations. The relevant general provision, Model Penal Code § 5.02(2), establishes that "[i]t is immaterial under Subsection (1) of this Section that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication." Generally speaking, this provision clarifies that the intended recipient of a solicitor's communication need not receive it. Left unclear, however, is just how far along the defendant must be in actually effecting the requisite communication.

Consider, for example, that a solicitor may fail to communicate with another person because the intended recipient never receives the message—e.g., the police intercept a murder for hire letter already placed in the mail by the defendant. Alternatively, a solicitor may fail to communicate with the intended recipient because the message is never sent—e.g., the police intercept the solicitor holding a murder for hire letter while making his way to the post office. In the first situation, the person has engaged in what might be considered a "complete attempt" at communication, which is to say the person failed to achieve his criminal objective notwithstanding the fact that he was able to carry out the entirety of his criminal plans (i.e., placing the letter in the mail). In the second situation, in contrast, the person has only engaged in what might be considered an "incomplete attempt" at communication since he was unable to carry out the entirety of his criminal plans due to external interference.

With this distinction in mind, the requirement of "conduct [] designed to effect [] communication" stated in Model Penal Code's § 5.02(2) is ambiguous as to whether *only* complete attempts at communication provide the basis for general solicitation liability, or, alternatively, whether incomplete attempts will *also* suffice. (Assuming incomplete attempts suffice, moreover, the Code is furthermore silent on *just how much progress*—e.g., dangerous proximity versus substantial step—must be made in the development of criminal communications.)

Fortunately, the Model Penal Code commentary explicitly addresses this issue, explaining that proof of "the last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground."[166] Pursuant to this clarification, it is clear that the drafters only intended to extend general solicitation liability to *complete* attempts under Model Penal Code § 5.02(2). If true, however, then the preferable approach to doing so would be to explicitly communicate this point by statute, rather than through commentary, particularly given that this statutory language is subject to multiple readings.[167]

This is the approach reflected in the RCC. More specifically, RCC § 302(c) states that "[i]t is immaterial under subsection (a) that the intended recipient of a person's

[166] Model Penal Code § 5.02 cmt. at 381.

[167] Many state solicitation statutes that omit a provision such as Model Penal Code § 5.02(2) instead provide that "attempts" to communicate provide a viable basis for solicitation liability. *See supra* note 70 (collecting statutory citations). Such an approach is equally, if not more, ambiguous, however, for the same reasons just noted. RCC § 302(c) avoids such problems by referencing "trying" to communicate rather than "attempting" to communicate.

command, request, or efforts at persuasion never received such communication provided that the person has done everything he or she plans to do to effect the communication."[168]

[168] Three additional departures from the Model Penal Code approach to codification bear notice. First, RCC § 302(a) references "trying to persuade" in lieu of "encouragement" as utilized in Model Penal Code § 5.02(1). The rationale and legislative authorities in support of this revision are provided *supra* note 48. Second, RCC § 302(a)(3) references "aid[ing] [in] the planning or commission of conduct" to address the relationship between solicitation and accomplice liability in lieu of the Model Penal Code's reference to "complicity in its commission" in § 5.02(1). This revision more clearly expresses the relevant principle of accessorial liability, while also ensuring that the RCC's general definition of solicitation runs parallel with the RCC's general definition of conspiracy, which utilizes the same language. *See* RCC § 303(a) ("Purposely agree to *engage in or aid the planning or commission of conduct* which, if carried out, will constitute that offense or an attempt to commit that offense . . . ."). Third, RCC § 302(a)(3) references "conduct, which, if carried out, will constitute that offense" in lieu of the phrase "*specific* conduct" as utilized in Model Penal Code § 5.02(1). This revision, it is submitted, more clearly describes the nature of the communication necessary to support solicitation liability. *See also* Model Penal Code § 5.02 cmt. at 376 n.48 (collecting legislative authorities in support).

§ 22A-304 RENUNCIATION DEFENSE TO ATTEMPT, CONSPIRACY, AND SOLICITATION

(a) DEFENSE FOR RENUNCIATION PREVENTING COMMISSION OF THE OFFENSE. In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that:

(1) The defendant engaged in conduct sufficient to prevent commission of the target offense;

(2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

(b) VOLUNTARY AND COMPLETE RENUNCIATION DEFINED. A renunciation is not "voluntary and complete" within the meaning of subsection (a) when it is motivated in whole or in part by:

(1) A belief that circumstances exist which:

(A) Increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or

(B) Render accomplishment of the criminal plans more difficult; or

(2) A decision to:

(A) Postpone the criminal conduct until another time; or

(B) Transfer the criminal effort to another victim or similar objective.

(c) BURDEN OF PROOF FOR RENUNCIATION. The defendant has the burden of proof for this affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

COMMENTARY

Explanatory Note. RCC § 304 establishes a renunciation defense to the general inchoate crimes of attempt, solicitation, and conspiracy.[1] Subsection (a) sets forth the scope of this affirmative defense, which is comprised of three key components. First, the renunciation defense is only available where the target of an attempt, solicitation, or conspiracy was not, in fact, committed. Second, the defendant must have engaged in

[1] The renunciation defense set forth in this provision is to be distinguished from, and is not intended to alter, the withdrawal defense to a conspiracy as recognized under District law. *See, e.g., Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977). The withdrawal defense is broader in scope, but narrower in application; it addresses when a criminal defendant may avoid the *collateral consequences* of a conspiracy. The renunciation defense, in contrast, addresses when a criminal defendant may avoid *liability* for a general inchoate crime.

conduct sufficient to prevent commission of the target offense. Third, the defendant's efforts at preventing commission of the target offense must have occurred under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.[2]

The requirement that the defendant have engaged in conduct sufficient to prevent commission of the target offense may be satisfied in a variety of ways, depending upon the nature of the general inchoate offense at issue. For example, in most attempt prosecutions, mere abandonment of the defendant's criminal enterprise will be sufficient to prevent completion of the target offense.[3] Where, however, a solicitation or conspiracy charge is at issue, and the defendant facilitated or promoted a criminal scheme that involves the participation of others, mere abandonment of the criminal scheme is not, by itself, sufficient to prevent commission of the target offense. Instead, affirmative efforts designed to prevent the other participants from carrying the criminal scheme to completion will be necessary. This includes, among other possibilities, trying to persuade those involved to desist (more likely to be sufficient where the participants are few) or providing law enforcement with a notification timely enough to afford a reasonable opportunity at prevention.[4]

Generally speaking, the requirement of a voluntary and complete renunciation envisions that the defendant's preventative conduct have been motivated by a genuine repudiation of his or her criminal plans, rather than by external influences.[5] Consistent with this understanding, subsection (b)(1) establishes that renunciation is not "voluntary" when it is motivated (to any extent) by a belief in the existence of circumstances which either: (1) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or (2) render accomplishment of the

[2] The voluntariness component of this renunciation *defense* is to be distinguished from the voluntariness requirement applicable to all criminal *offenses* under RCC § 203(a) (establishing, as a basic ingredient of criminal liability, that "a person voluntarily commit[] the conduct element necessary to establish liability for the offense"). With respect to the latter voluntariness requirement, the question presented is relatively narrow: was the act (or omission) "the product of conscious effort or determination, or [] otherwise subject to the person's control." RCC § 203(b). Where, in contrast, the voluntariness of a defendant's renunciation is concerned, the focus is on the individual's reasons for action in a broader moral sense (i.e., whether the defendant's desistance was motivated by a concern for the legally protected interests of others).

[3] The exception is where a defendant has set in motion forces that will culminate in a crime independent of his or her subsequent abandonment, such as, for example, where D, intending to destroy a building, starts the timer on an explosive device placed in the basement and then later—but prior to the explosion—thinks better of the criminal scheme. In this situation, D's abandonment would not, by itself, qualify as "conduct sufficient to prevent commission of the target offense."

[4] That the defendant's conduct need only be "sufficient" to prevent completion of the target offense means that a renunciation defense is still available in impossibility situations. Consider, for example, where D1 asks D2, an undercover officer, to assault V, but soon thereafter regrets having made the request and tries to persuade D2 not to carry out the assault (unaware that D2 is, in fact, a police officer). Under these circumstances, D1 cannot *actually* prevent the assault since D2 never intended to go through with it in the first place. Nevertheless, D1 would still be eligible for a renunciation defense under § 304(a)(1) since such an entreaty is "sufficient" to prevent commission of the target offense.

[5] Note that the defendant's renunciation can be motivated by external influences in a way that is nevertheless consistent with this kind of genuine repudiation, such as, for example, where D, a participant in a nascent drug conspiracy, is persuaded by his parents to renounce because carrying out a criminal scheme would be the "wrong thing to do."

criminal plans more difficult.[6] Likewise, under subsection (b)(2), a renunciation is not "complete" when it is motivated (to any extent) by a decision to: (1) postpone the criminal conduct until another time; or (2) transfer the criminal effort to another victim or a different but similar objective.[7]

Subsection (c) establishes that the burden of proof for a renunciation defense lies with the defendant, and is subject to a preponderance of the evidence standard. This means that the defendant possesses the burden of raising this affirmative defense at trial. Once appropriately raised, the defendant then bears the burden of persuading the factfinder that the elements of a renunciation defense have been met beyond a preponderance of the evidence.

Relation to Current District Law. Subsections (a), (b), and (c) fill gaps in District law concerning the availability and burden of proof governing a renunciation defense.

The current state of District law concerning the renunciation defense is unclear. There does not appear to be any District legal authority directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists, providing modest support for its recognition.

In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime."[8] As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention."[9] Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal.[10] Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be

[6] For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that it is too risky to go ahead or because she lacks something essential to the completion of the crime, D's abandonment is not voluntary.

[7] For example, if D arrives at a bank, intending to rob the bank, but ultimately decides against it based upon a determination that waiting another day or robbing a different bank would be preferable, D's subsequent abandonment is not complete.

[8] *E.g.*, *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt").

[9] R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.*, Model Penal Code § 5.01 cmt. at 357-58; WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.5 (3d ed. Westlaw 2018).

[10] There does not appear to be *any* DCCA case law on the general inchoate crime of solicitation. *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500 (observing that does not appear to contain a single reported decision "involving [the District's general solicitation] statute.")

relieved from the *collateral consequences* of a conspiracy.[11] For example, "a defendant may attempt to establish his withdrawal as a defense in a prosecution for substantive crimes subsequently committed by the other conspirators."[12] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[13] On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[14] And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[15]

In the solicitation context, there does not appear to be *any* DCCA case law on the contours of this form of general inchoate liability—let alone any case law on renunciation.[16]

In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that the same withdrawal defense applicable in the conspiracy context is also available to those being prosecuted as aiders and abettors.[17] In this context, however, withdrawal provides the basis for a *complete defense*. Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[18]

Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed, soliciting or conspiring with another person to

[11] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities).

[12] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 12.4; *see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 (6th ed. 2012) ("If a person withdraws from a conspiracy, she may avoid liability for subsequent crimes committed in furtherance of the conspiracy by her former co-conspirators.")

[13] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 12, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor.").

[14] *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005).

[15] COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

[16] *See generally* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 4.500.

[17] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal [as a defense to accomplice liability] has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 13.3).

[18] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability.").

commit a crime are two ways of aiding and abetting its commission.[19] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[20] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *prevention* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[21] Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[22]

This is not to say, however, that the *burden of proof* governing a renunciation defense should be the same as that applicable to a withdrawal defense.[23] Even assuming that the burden of persuasion for a withdrawal defense ultimately rests with the government under current District law,[24] there are nevertheless sound policy and practical reasons (discussed below) to place the burden of persuasion for a renunciation defense on the defendant, subject to a preponderance of the evidence standard. And there is also

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[19] *See, e.g., Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, supra note 9, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States*, 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

[20] Michael T. Cahill, *Defining Inchoate Crime: An Incomplete Attempt*, 9 OHIO ST. J. CRIM. L. 751, 756 n.14 (2012).

[21] As one commentator phrases the distinction:

> "Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates. "Renunciation" generally requires not only desistance, but more active rejection, and usually contains specific subjective requirements, such as a complete and voluntary renunciation.

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[22] Model Penal Code § 5.03 cmt. at 457.

[23] As the D.C. Court of Appeals explained in *Green v. Dist. of Columbia Dep't of Employment Servs.*:

> The term 'burden of proof' [] encompass[es] two separate burdens: the burden of production and the burden of persuasion . . . The former refers to the burden of coming forward with satisfactory evidence of a particular fact in issue . . . The latter constitutes the burden of persuading the trier of fact that the alleged fact is true.

499 A.2d 870, 873 (D.C. 1985) (internal citations omitted).

[24] *Compare* COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102 ("In the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction, [then the] burden [is] on government to prove that the defendant was a member of the conspiracy and did not withdraw it.") *with Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law).

general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[25]

Consistent with the above analysis, and in accordance with national legal trends (discussed below), the RCC recognizes a broadly applicable renunciation defense, subject to proof by the defendant beyond a preponderance of the evidence, to the general inchoate crimes of attempt, solicitation, and conspiracy.

RCC § 304(a) establishes the three main components of this affirmative defense. First, the renunciation defense is only available where the target of an attempt, solicitation, or conspiracy is not, in fact, committed. Second, the defendant must engage in conduct sufficient to prevent commission of the target offense. And third, the defendant's efforts at preventing commission of the target offense must occur under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.

Next, RCC § 304(b) provides further clarity on the meaning of "voluntary and complete" in the context of a renunciation defense. More specifically, subsection (b)(1) establishes that renunciation is not "voluntary" when it is motivated (to any extent) by a belief in the existence of circumstances which either: (1) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or (2) render accomplishment of the criminal plans more difficult. Thereafter, subsection (b)(2) establishes that renunciation is not "complete" when it is motivated (to any extent) by a decision to postpone the criminal conduct until another time, or transfer the criminal effort to another victim or a different but similar objective.

Finally, RCC § 304(c) establishes that the burden of proof applicable to a renunciation defense lies with the defendant and is subject to a preponderance of the evidence standard.

Relation to National Legal Trends. A particularly difficult issue confronting all general inchoate crimes is determining the legal relevance of a defendant's voluntary and complete renunciation of his or her criminal intent prior to completion of the target

[25] Most notably, this includes the District's statutory insanity defense, D.C. Code § 24-501 ("No person accused of an offense shall be acquitted on the ground that he was insane at the time of its commission unless his insanity, regardless of who raises the issue, is affirmatively established by a preponderance of the evidence."); *see Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a prima facie case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury."); *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment."). For other examples, see D.C. Code § 22-3611 (b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against minors); D.C. Code § 22-3011(b) (providing, with respect to child sex abuse, that [m]arriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence . . . .").

offense.[26] On the one hand, "under normal liability rules, an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense."[27] But, on the other hand, at the heart of general inchoate liability is the idea that an actor, if uninterrupted, would complete or bring about a criminal offense—a notion that the person who renounces her criminal plans and stops them from coming to fruition contradicts.[28] The American criminal justice system's efforts at resolving this tension, as well as the competing policy considerations it implicates, in any comprehensive way is a "relatively recent" development, with roots in the Model Penal Code.[29]

Prior to the drafting of the Model Penal Code, renunciation-related issues were typically addressed by courts in a piecemeal fashion (if they were addressed at all), which in turn produced policies that were often unclear and inconsistent. With respect to criminal attempts, for example, it was "uncertain under the [common law] whether abandonment of a criminal effort, after the bounds of preparation have been surpassed, will constitute a defense to a charge of attempt."[30] As for criminal solicitations, early common law authorities, while sparse, seem to indicate that renunciation was a viable

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[26] GEORGE FLETCHER, RETHINKING CRIMINAL LAW 185-186 (2000); Paul R. Hoeber, *The Abandonment Defense to Criminal Attempt and Other Problems of Temporal Individuation*, 74 CAL. L. REV. 377, 407 (1986).

[27] For example, it would be of no avail for a thief to argue that he subsequently returned the goods that he stole as a defense to a theft charge. Nor would courts find persuasive a defense to PWID that, although the actor illegally possessed narcotics with intent to sell on a Monday, he thought better of his drug trafficking scheme/voluntarily threw the drugs away on a Tuesday. Theft and PWID, like most other offenses are complete at the moment that the elements are satisfied, without regardless of whether actor has a subsequent change of heart. *See, e.g.*, ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; Cahill, *supra* note 20, at 753.

[28] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.5; *see, e.g.*, FLETCHER, *supra* note 26, at 188 (observing that "the intent required for an attempt is not merely a firm resolve up to the time the attempt is complete as a punishable act," but rather, an "intent . . . to carry through").

[29] Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 7 (1989).

[30] Model Penal Code § 5.01 cmt. at 356. In reviewing common law authorities the Model Penal Code drafters distinguished between voluntary and involuntary abandonment:

> An "involuntary" abandonment occurs when the actor ceases his criminal endeavor because he fears detection or apprehension, or because he decides he will wait for a better opportunity, or because his powers or instruments are inadequate for completing the crime. There is no doubt that such an abandonment does not exculpate the actor from attempt liability otherwise incurred.
>
> A "voluntary" abandonment occurs when there is a change in the actor's purpose that is not influenced by outside circumstances. This may be termed repentence or change of heart. Lack of resolution or timidity may suffice. A reappraisal by the actor of the criminal sanctions applicable to his contemplated conduct would presumably be a motivation of the voluntary type as long as the actor's fear of the law is not related to a particular threat of apprehension or detection. Whether voluntary abandonments constitute a defense to an attempt charge is far from clear, there being few decisions squarely facing the issue.

Id.; *see* LAFAVE, *supra* note, at 2 SUBST. CRIM. L. § 11.5 (analyzing common law trends).

defense.[31] But with respect to criminal conspiracies, "[t]he traditional rule concerning renunciation as a defense" clearly pointed in the opposite direction: "no subsequent action can exonerate."[32] Yet this traditional rule was also in seeming conflict with the well-established withdrawal defense to accomplice liability reflected in common law authorities.[33]

Faced with this lack of clarity and consistency of treatment, the drafters of the Model Penal Code opted to develop a comprehensive, broadly applicable statutory approach to dealing with renunciation in the context of general inchoate crimes. What they ultimately devised specifically recognizes a limited "affirmative defense" for "renunciation of criminal purpose" to attempt, solicitation, and conspiracy.[34] The foundation for this approach is provided in the Model Penal Code's general attempt provision, § 5.01.

The relevant sub-section, Model Penal Code § 5.01(4), first establishes that it is an "affirmative defense" to attempt that the defendant "abandoned his effort to commit the crime or otherwise prevented its commission, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[35] Thereafter, this same provision elucidates the meaning of the phrase "complete and voluntary."[36] It provides, first, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, by circumstances, not present or apparent at the inception of the actor's course of conduct, that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[37] Then this provision adds that "[r]enunciation is not *complete* if it is motivated by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[38]

The Model Penal Code applies a similar approach to treating renunciation in the context of the other general inchoate crimes delineated in Article 5. With respect to criminal solicitations, Model Penal Code § 5.02(3) provides that "[i]t is an affirmative defense that the actor, after soliciting another person to commit a crime, persuaded him not to do so or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose." And with respect to criminal conspiracies, Model Penal Code § 5.03(6) establishes that "[i]t is an affirmative defense that the actor, after conspiring to commit a crime, thwarted the

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[31] *See, e.g.*, Hawaii Rev. Laws § 248-8 (1955); *Regina v. Banks*, 12 Cox Crim. Cas. 393, 399 (Assizes 1873); *State v. Kinchen*, 126 La. 39, 52 So. 185 (1910); *Forman v. State*, 220 Miss. 276, 70 So.2d 848 (1954); *State v. Webb*, 216 Mo. 378, 115 S.W. 998 (1909).

[32] Model Penal Code § 5.03 cmt. at 457 (collecting authorities).

[33] The common law rule is that "[o]ne who has given aid or counsel to a criminal scheme sufficient to otherwise be liable for the offense as an accomplice may sometimes escape liability by withdrawing from the crime." LAFAVE, *supra* note9, at 2 SUBST. CRIM. L. § 13.3 (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 457.

[34] Model Penal Code §§ 5.01(4), 5.02(3), 5.03(6).

[35] *Id.* § 5.01(4).

[36] *Id.*

[37] *Id.* In specifying this motive of increased risk, the Model Penal Code drafters intended to distinguish between fear of the law reflected in a general "reappraisal by the actor of the criminal sanctions hanging over his conduct," which satisfies the requirement, and "fear of the law [that] is . . . related to a particular threat of apprehension or detection," which does not. Model Penal Code § 5.01 cmt. at 356.

[38] Model Penal Code § 5.01(4).

success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[39]

The Model Penal Code's renunciation provisions, when viewed collectively and in relevant context, comprise policies that are substantively identical to one another. Most importantly, all three require that the renunciation be "voluntary and complete," as defined in Model Penal Code § 5.01(4).[40] And they also treat renunciation as an "affirmative defense," which, pursuant to the Model Penal Code's general provision concerning legal and evidentiary burdens,[41] "means that the defendant has the burden of raising the issue and the prosecution has the burden of persuasion" as to whether the defendant did, in fact, voluntarily and completely repudiate his or her criminal purpose.[42] (In practical effect, this means that "the prosecution is not required to disprove [the absence of renunciation] unless and until there is evidence in its support."[43])

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[39] The commentary to the Model Penal Code is careful to explain that the issue of renunciation "should be distinguished from abandonment or withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators." Model Penal Code § 5.03 cmt. at 456.

[40] Model Penal Code § 5.01(4) (noting that the definition of "voluntary and complete" applies to all aspects of "this Article," that is, within Model Penal Code Article 5 that governs all inchoate crimes); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[41] The pertinent provision, Model Penal Code § 1.12, states in relevant part that:

> (1) No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.
>
> (2) Subsection (1) of this Section does not:
>
> (a) require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
>
> (b) apply to any defense that the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.

[42] Model Penal Code § 5.01: Explanatory Note. With respect to the Code's allocation of burdens, the drafters provide two main reasons for why "it is proper to require the defendant to come forward first with evidence in support of the defense." Model Penal Code § 5.01 cmt. at 359. First, "[t]he decided cases would seem to indicate that instances of renunciation of criminal purpose are not frequent, and that their occurrence is therefore improbable." *Id.* And second, "the facts that bear on such renunciation are most likely to be within the control of the defendant." *Id.*

[43] Model Penal Code § 5.01 cmt. at 359. Here's how one state appellate court has described this framework:

> A defendant is deemed to have raised the defense of renunciation, and thus to have met his burden of going forward with respect to that defense, whenever the evidence presented at trial, if construed in the light most favorable to the defendant, is sufficient to raise a reasonable doubt in support of each essential element of the defense . . . The defendant, however, has no burden of proof with respect to the defense of renunciation. Instead, the state has the burden of disproving that defense beyond a reasonable doubt whenever it is duly raised at trial.

State v. Riley, 123 A.3d 123, 130 (Conn. 2015).

There are, however, some clear textual differences between these three provisions, namely, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy."[44] The commentary accompanying the Model Penal Code explains these variances as follows:

> Since attempt involves only an individual actor, abandonment will generally prevent completion of the crime, although in some cases the actor may have to put a stop to forces that he has set in motion and that would otherwise bring about the substantive crime independently of his will. The solicitor, on the other hand, has incited another person to commit the crime, unless the solicitation is uncommunicated or rejected; consequently, the Code requires that he either persuade the other person not to do so or otherwise prevent the commission of the crime. Since conspiracy involves preparation for crime by a plurality of agents, the objective will generally be pursued despite renunciation by one conspirator, and the Code accordingly requires for a defense of renunciation that the actor thwart the success of the conspiracy.[45]

The Model Penal Code commentary also provides a detailed analysis of the policy considerations that support recognition of the proposed renunciation defense to general inchoate crimes. That analysis revolves around two main rationales. First, "renunciation of criminal purpose tends to negative dangerousness."[46] In the context of attempt liability, for example, the drafters argue that:

> [M]uch of the effort devoted to excluding early "preparatory" conduct from criminal attempt liability is based on the desire not to impose liability when there is an insufficient showing that the actor has a firm purpose to commit the crime contemplated. In cases where the actor has gone beyond the line drawn for defining preparation, indicating prima facie sufficient firmness of purpose, he should be allowed to rebut such a conclusion by showing that he has plainly demonstrated his lack of firm purpose by completely renouncing his purpose to commit the crime . . . .[47]

Second, a renunciation defense "provide[s] actors with a motive for desisting from their criminal designs, thereby diminishing the risk that the substantive crime will be committed."[48] The drafters of the Model Penal Code believed this incentive to hold

[44] *See* Model Penal Code 5.03 cmt. at 458 (noting that "[t]he kind of action that will suffice varies for the three different inchoate crimes"). Textual variances aside, though, it seems relatively clear that a voluntary and complete renunciation, when accompanied by prevention of the offense contemplated, will similarly constitute a defense to attempt, solicitation, and conspiracy under the Code. *See infra* note 99 and accompanying text.
[45] Model Penal Code 5.03 cmt. at 458.
[46] Model Penal Code 5.01 cmt. at 359.
[47] *Id.*
[48] *Id.*

"at all stages of the criminal effort," but nevertheless thought that it would be most significant "as the actor nears his criminal objective and the risk that the crime will be completed is correspondingly high."[49] That is,

> At the very point where abandonment least influences a judgment as to the dangerousness of the actor—where the last proximate act has been committed but the resulting crime can still be avoided—the inducement to desist stemming from the abandonment defense achieves its greatest value.[50]

Although framed in terms of attempt liability, the Model Penal Code commentary clarifies that the same "two most sensible propositions"—that renunciation negates dangerousness and incentivizes desistance—are just as applicable to the general inchoate crimes of solicitation and conspiracy.[51]

Since completion of the Model Penal Code, the drafters' recommendations concerning recognition of a broadly applicable renunciation defense to all general inchoate crimes has gone on to become quite influential. Based upon one survey of prevailing legal trends, for example, it appears that "[a] majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense."[52] That same survey likewise concludes that: (1) "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation"[53]; and that (2) "[n]early every jurisdiction permits some form of renunciation defense to a charge of conspiracy."[54]

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[49] *Id.*

[50] *Id.* The Model Penal Code commentary acknowledge "that the defense of renunciation of criminal purpose may add to the incentives to take the *first* steps toward crime," i.e., "[k]nowledge that criminal endeavors can be undone with impunity may encourage preliminary steps that would not be undertaken if liability inevitably attached to every abortive criminal undertaking that proceeded beyond preparation." Model Penal Code § 5.01 cmt. at 359. The drafters conclude, however, that "this is not a serious problem" for two reasons:

> First, any consolation the actor might draw from the abandonment defense would have to be tempered with the knowledge that the defense would be unavailable if the actor's purposes were frustrated by external forces before he had an opportunity to abandon his effort. Second, the encouragement this defense might lend to the actor taking preliminary steps would be a factor only where the actor was dubious of his plans and where, consequently, the probability of continuance was not great.

Id. "On balance," then, the MPC drafters "concluded that renunciation of criminal purpose should be a defense to a criminal attempt charge because, as to the early stages of an attempt, it significantly negatives dangerousness of character, and, as to later stages, the value of encouraging desistance outweighs the net dangerousness shown by the abandoned criminal effort." *Id.*

[51] *See* Model Penal Code § 5.02 cmt. at 382 (solicitation); Model Penal Code § 5.03 cmt. at 457-58 (conspiracy).

[52] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.16 (collecting authorities).

[53] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.56 (collecting authorities).

[54] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81; *see id.* at n.30 (collecting authorities).

Legislative adoption of the Model Penal Code approach to renunciation is a particularly pervasive feature of modern criminal codes.[55] For example, a strong majority of reform jurisdictions include: (1) a renunciation defense to attempt liability based on Model Penal Code § 5.01(4)[56]; (2) a renunciation defense to solicitation liability based on Model Penal Code § 5.02(3)[57]; and (3) renunciation defense to conspiracy liability based on Model Penal Code § 5.03(6).[58] And "about two thirds" of these reform jurisdictions have also adopted a broadly applicable statutory elaboration of the meaning of "voluntary and complete" based on that provided by Model Penal Code § 5.01(4).[59]

While the Model Penal Code approach to renunciation has had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions routinely modify it. Many of these revisions are clarificatory or organizational; however, some are substantive.[60] Most significant is that a strong plurality of reform jurisdictions relax the Code's requirement that the target of the

[55] *See, e.g.*, Hoeber, *supra* note 26, at 427 ("Most of the jurisdictions adopting comprehensive criminal codes in the wake of the Model Penal Code have enacted provisions for the defense.") (collecting authorities). Various legal authorities have recognized the importance of legislative, rather than judicial, resolution of renunciation-related issues. *See, e.g.*, *Com. v. Nee*, 458 Mass. 174, 185, 935 N.E.2d 1276, 1285 (2010) ("[W]hatever merits renunciation may have . . . its incorporation into our criminal law must be left to the Legislature."); *State v. Stewart*, 143 Wis. 2d 28, 45-46, 420 N.W.2d 44, 51 (1988) ("The public policy arguments in favor of the [renunciation] defense are better addressed to the legislature than to the court."); Robert E. Wagner, *A Few Good Laws: Why Federal Criminal Law Needs A General Attempt Provision and How Military Law Can Provide One*, 78 U. CIN. L. REV. 1043, 1072-73 (2010) ("One problem with [federal judicial recognition of the] abandonment defense is that circuits are not consistent about what is required to establish the defense."). *But cf.* Murat C. Mungan, *Abandoned Criminal Attempts: An Economic Analysis*, 67 ALA. L. REV. 1, 3 (2015) (noting "significant variation among states" on treatment of abandoned criminal attempts, including "cases where courts (i) excuse abandoning defendants even when the law does not provide an abandonment defense and (ii) punish abandoning defendants even where, under a strict reading of the law, the defendant ought to be excused.").

[56] *See* Ala. Code § 13A-4-2; Alaska Stat. § 11.31.100; Ark. Code Ann. § 5-3-204; Colo. Rev. Stat. Ann. § 18-2-101; Conn. Gen. Stat. Ann. § 53a-49; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Ga. Code Ann. § 16-4-5; Ky. Rev. Stat. Ann. § 506.020; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mont. Code Ann. § 45-4-103; N.H. Rev. Stat. Ann. § 629:1; N.J. Stat. Ann. § 2C:5-1; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Ohio Rev. Code Ann. § 2923.02; Or. Rev. Stat. § 161.430; Pa. Cons. Stat. Ann. tit. 18, § 901; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-301; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; Minn. Stat. Ann. § 609.17.

[57] *See* Alaska Stat. § 11.31.110; Ark. Code Ann. § 5-3-302; Colo. Rev. Stat.Ann. § 18-2-301; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Iowa Code Ann. § 705.2; Kan. Stat. Ann. § 21-5303; Ky. Rev. Stat. Ann. § 506.060; Me. Rev. Stat. Ann. tit. 17-A, § 153; Mich. Comp. Laws Ann. § 750.157b; N.H. Rev. Stat. Ann. § 629:2; N.Y. Penal Law § 40.10; N.D. Cent. Code § 12.1-06-05; Or. Rev. Stat. § 161.440; Pa. Cons. Stat. Ann. tit. 18, § 902; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-302; Ala. Code § 13A-4-1; Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.M. Stat. Ann. § 30-28-3.

[58] *See* Ark. Code Ann. § 5-3-405; Colo. Rev. Stat. Ann. § 18-2-203; Conn. Gen. Stat. Ann. § 53a-48; Del. Code Ann. tit. 11, § 541; Fla. Stat. Ann. § 777.04; Haw. Rev. Stat. § 705-523; Ky. Rev. Stat. Ann. § 506.050; Me. Rev. Stat. Ann. tit. 17-A, § 154; Mo. Ann. Stat. § 564.016; N.J. Stat. Ann. § 2C:5-2; N.Y. Penal Law § 40.10; Ohio Rev.Code Ann. § 2923.01; Or. Rev. Stat. § 161.460; Pa. Cons. Stat. Ann. tit. 18, § 903; Tenn. Code Ann. § 39-12-104; Tex. Penal Code Ann. § 15.04; Wyo. Stat. § 6-1-303; Ala. Code § 13A-4-3; Alaska Stat. § 11.31.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-3-405; Haw. Rev. Stat. § 705-530; Neb. Rev. Stat. § 28-203; N.H. Rev. Stat. Ann. § 629:3; Vt. Stat. Ann. tit. 13, § 1406.

[59] Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1188 n.267 (1975) (collecting citations); *see* Hoeber, *supra* note 26, at 427 n.102 (same).

[60] *See infra* notes 98-116 and accompanying text.

attempt, solicitation, or conspiracy *actually* be prevented/thwarted.[61] Instead, these state statutes allow for proof of a "substantial,"[62] "reasonable,"[63] or "proper"[64] effort to prevent or thwart the target offense—including, but not limited to, providing "timely warning to law enforcement authorities"[65]—to support a renunciation defense to either all,[66] some,[67] or at least one[68] of the general inchoate crimes of attempt, solicitation, and conspiracy.[69]

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[61] *See, e.g.*, R. Michael Cassidy & Gregory I. Massing, *The Model Penal Code's Wrong Turn: Renunciation As A Defense to Criminal Conspiracy*, 64 FLA. L. REV. 353, 368 (2012).

[62] With respect to conspiracy, for example, see Ala. Code § 13A-4-3(c) (stating that the defendant is not liable if "he gave a timely and adequate warning to law enforcement authorities or made a substantial effort to prevent the enforcement of the criminal conduct contemplated by the conspiracy"); N.Y. Penal Law § 40.10(1) (allowing an affirmative defense that "the defendant withdrew from participation in such offense prior to the commission thereof and made a substantial effort to prevent the commission thereof"); Ark. Code Ann. § 5-3-405 (stating that defendant may qualify for renunciation defense if he or she "(A) [g]ave timely warning to an appropriate law enforcement authority; or (B) [o]therwise made a substantial effort to prevent the commission of the offense").

[63] With respect to conspiracy, for example, see Ariz. Rev. Stat. Ann. § 13-1005(A) (recognizing renunciation if the defendant "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the . . . conspiracy"); Haw. Rev. Stat. Ann. § 705-530(3) (allowing an affirmative defense if the defendant "gave timely warning to law-enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result which is the object of the conspiracy"); Minn. Stat. Ann. § 609.05(3) (holding that a person who "makes a reasonable effort to prevent the commission of the crime prior to its commission is not liable if the crime is thereafter committed"); Neb. Rev. Stat. Ann. § 28-203 (allowing the defense for a defendant who "gave timely warning to law enforcement authorities or otherwise made a reasonable effort to prevent the conduct or result");

[64] With respect to conspiracy, for example, see Alaska Stat. § 11.31.120(f) (allowing the affirmative defense if defendant "either (1) gave timely warning to law enforcement authorities; or (2) otherwise made proper effort that prevented the commission of the crime that was the object of the conspiracy"); *see also* N.H. Rev. Stat. Ann. § 629:3(III) (allowing a defendant who renounces "by giving timely notice to a law enforcement official of the conspiracy and of the actor's part in it, or by conduct designed to prevent commission of the crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (establishing that renunciation is achieved by "(1) conduct designed to prevent the commission of the crime agreed upon; or (2) giving timely notice to a law enforcement official of the conspiracy and of the defendant's part in it"). Note that Ohio fully exonerates a defendant who merely withdraws from or "abandon[s] the conspiracy . . . by advising all other conspirators of the actor's abandonment." Ohio Rev. Code Ann. § 2923.01(I)(2).

[65] *See* sources cited *supra* notes 62-64.

[66] *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1005 (reasonable effort formulation, applicable to attempt, conspiracy, and solicitation); Haw. Rev. Stat. Ann. § 705-530 (same).

[67] *Compare* Ala. Code § 13A-4-1 (substantial effort for solicitation) and Ala. Code § 13A-4-3 (substantial effort for conspiracy) *with* Ala. Code § 13A-4-2 (actually prevent commission of target offense, where attempt charged).

[68] *Compare* Neb. Rev. Stat. Ann. § 28-203 (reasonable efforts for conspiracy) *with* Neb. Rev. Stat. Ann. § 28-201 (no renunciation defense for attempt).

[69] In support of this position, it has been argued that "[t]he law should not demand more than can reasonably be expected. In particular, criminal liability should not be imposed because of police ineptitude or other happenstance factors, which deprive an actor's attempts to defuse a conspiracy of their ordinary effectiveness. Buscemi, *supra* note 59, at 1171. The opposing position contends that:

> If the renunciation defense is regarded as essentially a form of statutory grace conferred on deserving transgressors, then the more limited applicability of the MPC definition may be justified. To put it another way, since renunciation by its very nature comprehends absolution for an already-completed conspiracy offense, the defense may legitimately be restricted to those occasions when an actor succeeds in protecting society from the consequences of his prior criminal agreement. Where prevention efforts are unavailing,

Modifications aside, it is nevertheless clear that the Model Penal Code approach to renunciation has robust support in American legal practice. And it is also supported by American legal commentary.[70] Indeed, as the drafters of the Hawaii Criminal Code observe: "Modern penal theory" has embraced "renunciation as an affirmative defense to inchoate crimes" for the same "two basic reasons" emphasized by the drafters of the Model Penal Code, namely, dangerousness and deterrence.[71]

With respect to incapacitating dangerous persons, it has been argued that recognition of a renunciation defense is:

> [a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous and whom we most fear . . . If on their own [people] renounce their wrongdoing and cease to aim at bringing about criminal ends, they no longer pose a danger and we no longer have a basis to fear them. Their actions suggest that they possess sufficient internal controls to avoid criminal conduct and therefore are not in need of the external control mechanisms wielded by the criminal law.[72]

And, insofar as deterrence is concerned, it has been asserted that the renunciation defense appropriately reflects the fact that:

> [T]hose that commit some harm should be encouraged to commit less rather than more. Just as the degree structure of criminal law threatens greater punishment for more aggravated forms of a given crime, thereby providing greater deterrence for the higher degrees of crime, so too can the reward of remission of punishment motivate persons who have not yet caused the more aggravated species of harm to abandon their enterprise and refrain from causing more damage than they have already.[73]

Legal scholarship also highlights other relevant justifications beyond these dangerousness and deterrence-based rationales. For example, "[r]etributively oriented

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> even a reformed conspirator will not be heard, under this line of reasoning, to gainsay his part in the illegal scheme.

Id.

[70] For scholarly commentary in support, see Moriarty, *supra* note 29; Hoeber, *supra* note 26; FLETCHER, *supra* note 26; LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. at §§ 11.1, 11.5, and 12.4; D. Stuart, *The Actus Reus in Attempts*, 1970 CRIM. L. REV. 505. *But see* Cassidy & Massing, *supra* note 61 (arguing against recognition of renunciation defense to conspiracy).

[71] Haw. Rev. Stat. Ann. § 705-530. Other state law reform commissions have similarly endorsed these rationales. *See, e.g.,* Ala. Code § 13A-4-1 cmt. at 80 (1982); Minn. Stat. Ann. § 609.17 cmt. at 144 (1987); N.Y. Penal Law § 40.10 cmt. at 137 (1987).

[72] Moriarty, *supra* note 29, at 5-6.

[73] Moriarty, *supra* note 29, at 5. *See, e.g.,* LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.1 ("The avoidance-of-harm rationale for such a defense is very strong. The person who solicits an offense is commonly in the best position to, and sometimes is the only person who can, avoid the commission of the offense. In addition, the possibility of effecting such avoidance is generally high; since the solicitor had the means to provide the motivation for the commission of the offense, he is also likely to have the means to effectively undercut that motivation.").

commentators note that [renunciation] makes us reassess our vision of the defendant's blameworthiness or deviance."[74] This may be a reflection of the fact that (as various authorities have asserted):

> [a]ll of us, or most of us, at some time or other harbor what may be described as a criminal intent to effect unlawful consequences. Many of us take some steps—often slight enough in character—to bring the consequences about; but most of us, when we reach a certain point, desist, and return to our roles as law-abiding citizens.[75]

Whatever the basis of this intuition, it seems that members of the public share it.[76] Based upon the limited empirical research that has been conducted, it appears that lay jurors believe that those who voluntarily and completely renounce their criminal plans are not sufficiently blameworthy to merit punishment.[77]

One other point highlighted by scholarly commentary is the extent to which "[i]nstances of renunciation of criminal purpose are not frequent."[78] As a result, the practical effect of enacting renunciation defenses rooted in the Model Penal Code approach "has *not been* to save large numbers of repentant criminals from confinement."[79] Rather, it has been to secure an intuitively fair outcome, otherwise consistent with important crime control considerations, with comparatively little social cost.[80]

It's important to point out that the broad support for the substantive policies that comprise the Model Penal Code's renunciation provisions does not extend to the Code's recommended evidentiary policies. Whereas the Model Penal Code ultimately places the burden of disproving the existence of a renunciation defense on the government beyond a reasonable doubt,[81] the majority approach, reflected in both contemporary national case law and legislation, is to require the defendant to persuade the factfinder of the presence

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[74] Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981).

[75] LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4 (quoting Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1103 (9th Cir. 2011), *as amended* (Aug. 31, 2011) (quoting LAFAVE, *supra* note 9, at 2 SUBST. CRIM. L. § 11.4).

[76] *See* PAUL H. ROBINSON, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014).

[77] In the relevant study, researchers employed a scenario-based methodology, which offered variations on a core burglary scenario. With respect to the renunciation scenario that occurred *after a substantial step* had been committed, the study found that 85% of people polled reported a finding of "no liability" and 92% reported a finding of "no liability or no punishment." And with respect to the renunciation scenario that occurred *after the point of dangerous proximity to completion* had been reached, the study found that 46% reported a finding of "no liability" and 85% reported a finding of "no liability or no punishment." *See id.* at 250.

[78] Model Penal Code § 5.01 cmt. at 361.

[79] Moriarty, *supra* note 29, at 11.

[80] *Id.*

[81] As noted above, this means that once the defendant has met his or her burden of raising the issue, the prosecution is then required to *disprove* the presence of a voluntary and complete renunciation beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held guilty of the general inchoate crime for which he or she has been charged. *See supra* notes 41-43 and accompanying text.

of a renunciation defense beyond a preponderance of the evidence.[82] This is so, moreover, in the context of attempt,[83] solicitation,[84] and conspiracy[85] prosecutions alike.

Scholarly commentary emphasizes a range of policy rationales, which explain this departure from the Model Penal Code. First, "as an accurate reflection of reality, the defense will be relatively rare."[86] Second, "the absence of renunciation will be difficult for a prosecutor to prove" given that (among other reasons) "the defense will frequently involve information peculiarly within the knowledge of the defendant which he is best qualified to present."[87] Third, and perhaps most important, presenting a renunciation defense is "tantamount to an admission that [the] defendant did participate in a criminal [scheme]."[88] As a result, "one's sense of fairness is not as likely to be offended if the defendant is given the burden of demonstrating that it is more likely than not that he should be exculpated."[89]

An illustrative example of these policy considerations at work is the U.S. Supreme Court's recent decision in *Smith v. United States*, which held that the burden of persuasion for withdrawal from a conspiracy under federal law rests with the defendant, subject to a preponderance of the evidence standard.[90] "Where," as the *Smith* Court

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[82] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 ("The burden of production for the defenses of renunciation, abandonment, and withdrawal is always on the defendant . . . . The burden of persuasion is generally on the defendant, by a preponderance of the evidence."); *State v. Rollins*, 321 S.W.3d 353 (Mo. Ct. App. W.D. 2010) (observing that, as a matter of common law, "[t]he burden of establishing [a renunciation] defense is on the defendant"); *see also* LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (observing that "[a] few of the modern codes put the burden of persuasion on the prosecution as to virtually all issues, while a greater number allocate the burden to the defendant as to any matter which has been designated an 'affirmative defense.'").

[83] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("Most jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of an attempt require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.01 cmt. at 361 n.282 (citing reform codes which apply this evidentiary scheme to renunciation of an attempt).

[84] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of solicitation require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities).

[85] ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81 n.15 ("[M]ost jurisdictions employing general provisions to allocate the burden of persuasion for renunciation of conspiracy require the defendant to prove the defense by a preponderance of the evidence.") (collecting authorities); *see* Model Penal Code § 5.03 cmt. at 460 (citing reform codes which apply this evidentiary scheme to renunciation of a conspiracy).

[86] Buscemi, *supra* note 59, at 1173.

[87] *Id.*

[88] *Id.*

[89] Robinson, *supra* note 11, at 1 CRIM. L. DEF. § 171. As various legal commentators have observed, this reflects a:

> [S]ubtle balance which acknowledges that a defendant ought not to be required to defend until some solid substance is presented to support the accusation, but beyond this perceives a point where need for narrowing the issues coupled with the relative accessibility of evidence to the defendant warrants calling upon him to present his defensive claim.

LAFAVE, *supra* note 9, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).

[90] *Smith v. United States*, 568 U.S. 106 (2013); *see* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. In determining that the burden of persuasion for withdrawal from a conspiracy under federal law lies with the

explained, "the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof."[91] This is particularly true in the context of repudiating a criminal enterprise, where "the informational asymmetry heavily favors the defendant."[92] Whereas "[t]he defendant knows what steps, if any, he took to dissociate" himself from the criminal enterprise,[93] it may be "nearly impossible for the Government to prove the negative that an act of withdrawal never happened."[94] And, perhaps most importantly, "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense."[95] As a result, the *Smith* Court concluded, requiring the defendant to establish a withdrawal defense beyond a preponderance of the evidence is both "practical and fair."[96]

Consistent with the above considerations, the RCC incorporates a broadly applicable renunciation defense, subject to proof by the defendant beyond a preponderance of the evidence, to the general inchoate crimes of attempt, solicitation, and conspiracy. The RCC's recognition of a broadly applicable renunciation defense comprised of prevention, voluntariness, and completeness requirements generally accords with the substantive policies reflected in the relevant Model Penal Code provisions. At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in a few notable ways.[97]

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defense, the *Smith* held that doing so does not violate the Due Process Clause. *Id.* at 110. The *Smith* Court's reasoning can be summarized as follows:

> While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense does negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but "does not controvert any of the elements of the offense itself," the Government has no constitutional duty to overcome the defense beyond a reasonable doubt. Withdrawal does not negate an element of the conspiracy crimes charged . . . .

ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. For a state appellate decision applying the same constitutional reasoning in the renunciation context, see *Harriman v. State*, 174 So. 3d 1044, 1050 (Fla. Dist. Ct. App. 2015); *see also Cowart v. State*, 136 Ga. App. 528 (1975); *People v. Vera*, 153 Mich. App. 411 (1986)).

[91] *Smith*, 568 U.S. at 111 (quoting *Dixon v. United States*, 548 U.S. 1, 9 (2006)).

[92] *Smith*, 568 U.S. at 111.

[93] *Id.* at 113. For example, "[h]e can testify to his act of withdrawal or direct the court to other evidence substantiating his claim." *Id.*

[94] *Id.* at 113 ("Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him.").

[95] *Id.* at 110-11.

[96] *Id.* The *Smith* Court's observations have even more force in the context of a renunciation defense, however, given that the elements of a *voluntary* and *complete* renunciation are even more subjectively-oriented than those of withdrawal.

[97] RCC § 304 is based on, but not identical to, general renunciation provision incorporated into the Delaware Reform Code. More specifically, that provision, Delaware Reform Code § 706, reads as follows:

> (a) In a prosecution for attempt, solicitation, or conspiracy in which the offense contemplated was not in fact committed, it is a defense that:
>
> (1) the defendant prevented the commission of the offense

First, and most generally, RCC § 304 culls together all renunciation policies into a single general provision—whereas the Model Penal Code separately codifies them in distinct general provisions. This organizational revision, which is consistent with legislative practice in other jurisdictions, enhances the clarity, simplicity, and accessibility of the RCC. [98]

Second, RCC § 304(a) codifies the conduct element of renunciation (i.e., the nature of the requisite preventative efforts by the defendant) in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is one of statutory drafting, namely, the Model Penal Code variously describes the kinds of preventative acts that will suffice for a renunciation defense, thereby obscuring their substantive similarity. For example, whereas § 5.01(4) speaks of "abandon[ing] [one's] effort to commit the crime or otherwise prevent[ing] its commission," § 5.02(3) speaks of "persuad[ing] [the solicitiee] not to do so or otherwise prevent[ing] the commission of the crime," while § 5.03(6) speaks of "thwart[ing] the success of the conspiracy." Notwithstanding these textual variances, prevention of the target offense appears to constitute both a necessary and sufficient condition for meeting any of these standards.[99] As a result, the Code's varying references to abandonment, persuasion, and thwarting are

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(2) under circumstances manifesting a voluntary and complete renunciation of his or her criminal purpose.

(b) *Voluntary and Complete Renunciation Defined*. A renunciation is not "voluntary and complete" within the meaning of Subsection (a) when it is motivated in whole or in part by:

(1) a belief that circumstances exist that:

(A) increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise; or

(B) render accomplishment of the criminal purpose more difficult; or

(2) a decision to:

(A) postpone the criminal conduct until another time; or

(B) transfer the criminal effort to:

(i) another victim; or

(ii) another but similar objective.

(c) *Burden of Persuasion on Defendant.* The defendant has the burden of persuasion for this defense and must prove the defense by a preponderance of the evidence.

[98] For jurisdictions that compile their renunciation policies within a single general provision, see Ariz. Rev. Stat. Ann. § 13-1005; Haw. Rev. Stat. § 705-530; N.Y. Penal Law § 40.10; Fla. Stat. Ann. § 777.04. Note also that RCC § 304(c) incorporates the burden of proof for this affirmative defense. *See, e.g.*, 18 U.S.C.A. § 373(b) ("If the defendant raises the affirmative defense [of renunciation to solicitation] at trial, the defendant has the burden of proving the defense by a preponderance of the evidence.").

[99] For example, the "otherwise prevented" language employed in the Code's attempt provision "is intended to make clear that abandonment will not be sufficient where the attempt has already progressed to the point where abandonment alone will not prevent the offense." ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81. As for the use of such language in the Code's solicitation provision, persuading the solicitee not to commit the target offense is but one means of preventing commission of an offense (e.g., notifying/assisting law enforcement with prevention provides another). *Id.* And while the Code's conspiracy provision instead speaks of "thwart[ing] the success of the conspiracy," this "[p]resumably [] means that the defendant must prevent the achievement of the offense or offenses that are the objective of the conspiracy." *Id.* (noting, however, that one could also "argue that preventing any part of multiple objectives, or even reducing the degree of success of the conspiracy, might constitute 'thwart[ing] the success of the conspiracy.'"); *see also id.* (suggesting that these varying formulations might reflect "inadvertence in drafting").

unnecessarily confusing—whereas a singular reference to prevention of the target offense would suffice.

The second problem relates to the substance of the Model Penal Code's conduct requirement, namely, it appears[100] to require proof that the defendant's preventative efforts were, in fact, a causal force leading to prevention of the target offense.[101] Aside from the potential proof issues this kind of actual prevention standard raises,[102] such an approach effectively "den[ies] the defense to those who have unwittingly attempted the impossible [while offering] it to all others."[103] Illustrative of the problem is the impossible conspiracy/solicitation presented in the New York case, *People v. Sisselman*: D1 asked D2, an undercover police informant, to assault V, only to thereafter renounce the assault scheme—prior to finding out that D2 was a police informant—by directing D2 not to carry out the assault.[104] Under circumstances like these, actual prevention cannot be proven since D2 never intended to go through with the crime in the first place.[105] Yet it would be would be "unfair to deny" this kind of defendant a renunciation defense given that he or she lacks "individual dangerousness" in precisely the same way that a defendant who *actually* prevents commission of the target offense does.[106]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(a) revises the Model Penal Code approach to codifying the conduct requirement of renunciation in two key ways. First, RCC § 304(a) simplifies the conduct requirement for renunciation to a uniformly phrased prevention prong.[107]

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[100] *But see* Model Penal Code § 5.03 cmt. at 458 ("Second, he must take action *sufficient* to prevent consummation of the criminal objective.").

[101] Moriarty, *supra* note 29, at 37 ("Since the crime could not have occurred whether or not defendant renounced, the desistance is not a 'but for' condition of the crime's non-occurrence. Consequently, it cannot be said that his or her abandonment caused that result."); *United States v. Dvorkin*, 799 F.3d 867, 880 (7th Cir. 2015) (noting that prevention means "actually prevented the commission of the crime (not merely made efforts to prevent it") (quoting S. Rep. No. 98–225, at 309 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3489).

[102] For example, in the context of multi-participant inchoate crimes, how does one establish that the defendant's conduct was the but for cause of the criminal scheme's failure where the police have received other information relevant to preventing that scheme independent of the defendant's assistance?

[103] Moriarty, *supra* note 29, at 37.

[104] *People v. Sisselman*, 147 A.D.2d 261, 262–64 (1989).

[105] *Id.*

[106] *Id.* (quoting Model Penal Code § 5.03, cmt. at 457–458); *see* Moriarty, *supra* note 29, at 37 (noting that "[t]here seems to be no reason to distinguish between the two classes on the basis of [] social danger . . .").

[107] For state legislation that reduces the conduct requirement of renunciation of attempt to a singular prevention prong, see, for example, Alaska Stat. Ann. § 11.31.100 ("In a prosecution under this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent, prevented the commission of the attempted crime."). For state legislation that reduces the conduct requirement of renunciation of conspiracy and solicitation to a singular prevention prong, see, for example, N.Y. Penal Law § 40.10 ("In any prosecution for criminal solicitation pursuant to article one hundred or for conspiracy pursuant to article one hundred five in which the crime solicited or the crime contemplated by the conspiracy was not in fact committed, it is an affirmative defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the defendant prevented the commission of such crime."). *See also* Model Penal Code § 5.03 cmt. at 458 ("The means required to thwart the success of the conspiracy will of course vary in particular cases, and it would be impractical to endeavor to formulate a more specific rule."); *cf.* Model Penal Code § 2.06 cmt. at 326 (adopting general requirement of a "proper effort" to prevent the commission of the offense for withdrawal from accomplice liability, and observing that because "[t]he sort

Second, this prevention prong does not require *actual* prevention; instead, it only requires proof that "[t]he defendant engaged in conduct *sufficient* to prevent commission of the target offense."[108]

A third variance worth noting is that RCC § 304(b) codifies the meaning of "voluntary and complete" in a manner that addresses two different problems reflected in the Model Penal Code approach. The first problem is reflected in the Model Penal Code's explanation of voluntariness, which states, in relevant part, that "renunciation of criminal purpose is not *voluntary* if it is motivated, in whole or in part, *by circumstances* . . . that increase the probability of detection or apprehension or that make more difficult the accomplishment of the criminal purpose."[109] The italicized language *could* be read to incorporate an objectiveness component—i.e., renunciation is only *involuntary* when such circumstances *actually exist*.[110] Such a reading, if accurate, is problematic, however, given the general immateriality of accuracy to voluntariness.[111] For example, a renunciation motivated by an erroneous belief in probable police interference—or any other circumstance rendering completion less likely—seems just as involuntary as a renunciation motivated by an accurate belief in the same.

The second problem relates to the disjunction between the Model Penal Code's usage of the "in whole or in part" language in the context of the Code's explanation of voluntariness and the absence of such language in the Code's explanation of completeness. More specifically, whereas under Model Penal Code § 5.01(4), renunciation "is not voluntary if *it is motivated, in whole or in part,* by [relevant] circumstances," a renunciation "is not complete if *it is motivated* by a decision to postpone the criminal conduct until a more advantageous time or to transfer the criminal effort to another but similar objective or victim."[112] This drafting variance *could* be read to indicate that where a defendant's renunciation is motivated *only in part* by a decision to postpone the criminal conduct until another time—or to transfer the criminal effort to another victim or similar objective—then the defense is still available. If true, however, this would be problematic: a renunciation premised only *in part* upon a decision to delay or transfer one's criminal scheme to another person seems just as incomplete as one *solely* motivated by such a decision.[113]

Consistent with the above analysis, as well as legislative practice in other reform jurisdictions, RCC § 304(b) revises the Model Penal Code approach to codifying the meaning of "voluntary and complete" in two key ways. First, RCC § 304(b) reframes the

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of effort that should be demanded turns so largely on the circumstances . . . it does not seem advisable to attempt formulation of a more specific rule").

[108] *See, e.g.,* N.H. Rev. Stat. Ann. § 629:3(III) (allowing defense for a defendant who renounces "by conduct designed to prevent commission of the crime agreed upon"); Vt. Stat. Ann. tit. 13, § 1406 (2009) (same); *see also* COMMENTARY ON HAW. REV. STAT. ANN. § 705-530 (noting that the "reasonable effort" standard entails proof that the defendant's conduct be sufficient under all foreseeable circumstances to prevent the offense); *see also* Moriarty, *supra* note 29, at 37 (observing that "a rule whose formulation leads to the conviction of the impossible attempter, while simultaneously freeing all others who renounce, suggests that a rethinking and possible reformulation of the rule may be in order").

[109] Model Penal Code § 5.01(4).

[110] Which is to say, where such circumstances do not in fact exist, then perhaps a defendant motivated by an *erroneous belief* in their existence could still avail him or herself of the defense.

[111] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[112] Model Penal Code § 5.01(4).

[113] *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

voluntariness prong in terms of whether a defendant is motivated by a "*belief* that [such] circumstances exist."[114] Second, RCC § 304(b) applies the "in whole or in part" language to both the voluntariness and completeness prongs of the renunciation defense.[115]

Finally, RCC § 304(c), by placing the burdens of production *and* persuasion with respect to a renunciation defense on the defendant, departs from the Model Penal Code's recommendations.[116] As noted above, this departure reflects majority legal trends and is also supported by important policy considerations.

[114] *See, e.g.*, Haw. Rev. Stat. Ann. § 705-530(4)(a) ("belief that circumstances exist"); Ariz. Rev. Stat. Ann. § 13-1005(C)(1) (same); N.Y. Penal Law § 40.10(5) (same). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then it is intended to effectively narrow the instances in which renunciation will be held voluntary, by excluding from the defense cases where the defendant is motivated by an erroneous belief that one of the enumerated circumstances exists. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[115] *See, e.g.*, Haw. Rev. Stat. Ann. § 705-530(4) ("A renunciation is not 'voluntary and complete' within the meaning of this section if it is motivated in *whole or in part* by . . . ."); Ariz. Rev. Stat. § 13-1005(C)(same); N.Y. Penal Law § 40.10(5) (same); *see also* 18 U.S.C.A. § 373 ("A renunciation is not 'voluntary and complete' if it is motivated in whole or in part by a decision to postpone the commission of the crime until another time or to substitute another victim or another but similar objective."). This revision likely clarifies the meaning of the Model Penal Code approach; however, assuming that the reading discussed above is the right one, then the dual application of the "in whole or in part" language is intended to effectively narrow the instances in which renunciation will be held complete, by excluding from the defense cases where the defendant is partially motivated by a decision to postpone or transfer the criminal effort. *See* ROBINSON, *supra* note 11, at 1 CRIM. L. DEF. § 81.

[116] *But see* Model Penal Code § 5.03 cmt. at 459 n.260 (conceding that it would be reasonable to put the burden on the defendant in states that have less stringent renunciation requirements, such as taking "reasonable efforts" to prevent the crime").