First Draft of Report #30:

Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability

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

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 30, *Withdrawal Defense & Exceptions to Legal Accountability and General Inchoate Liability*, is December 19, 2018 (12 weeks from the date of issue). Oral comments and written comments received after December 19, 2018 will not be reflected in the Second Draft of Report No. 30. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 212. EXCEPTIONS TO LEGAL ACCOUNTABILITY.

(a) *Exceptions to General Principles of Legal Accountability.* A person is not legally accountable for the conduct of another under RCC § 210 or RCC § 211 when:

(1) The person is a victim of the offense; or

(2) The person's conduct is inevitably incident to commission of the offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

COMMENTARY

Explanatory Note. RCC § 212 establishes two exceptions to the general principles of legal accountability set forth in RCC § 210, Accomplice Liability; and RCC § 211, Liability for Causing Crime by an Innocent or Irresponsible Person.

Subsection (a)(1) excludes the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under RCC § 210 or for causing another person to commit that offense under RCC § 211. For example, a minor who pursues and agrees to engage in sex with an adult may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged that adult to perpetrate statutory rape against the minor.[1] Nevertheless, subsection (a)(1) precludes holding the minor criminally liable for the rape as an accomplice in the minor's own victimization under RCC § 210. The outcome would not be any different if the adult involved in the relationship suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the minor caused the adult to perpetrate a statutory rape under these circumstances,[2] subsection (a)(1) precludes holding the minor legally accountable for the irresponsible person's conduct under RCC § 211 where the minor was also victimized by it.

Section (a)(2) excludes actors who engage in conduct inevitably incident to commission of an offense—as defined by statute[3]—from being held legally accountable

[1] *See* RCC § 210(a) ("A person is an accomplice in the commission of an offense by another when, acting with the culpability required by that offense, the person: (1) Purposely assists another person with the planning or commission of conduct constituting that offense; or (2) Purposely encourages another person to engage in specific conduct constituting that offense.").

[2] *See* RCC § 211(a) ("A person is legally accountable for the conduct of another person when, acting with the culpability required by an offense, that person causes an innocent or irresponsible person to engage in conduct constituting an offense."); *id.* at (b)(2) ("An 'innocent or irresponsible person' within the meaning of subsection (a) includes a person who, having engaged in conduct constituting an offense . . . . Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.").

[3] That a person's conduct must be inevitably incident to commission of an offense *as defined by statute* clarifies that subsection (a)(2) only applies when the offense could not have been committed without the defendant's participation under any set of facts. This is to be distinguished from the situation of a defendant whose participation was merely useful or conducive to the commission of a crime *as charged in a particular case*.

as an accomplice in the commission of that offense under RCC § 210 or for causing another person to commit that offense under RCC § 211. For example, the purchaser in a drug transaction may technically satisfy the requirements of accomplice liability in the sense of having purposefully assisted and encouraged the seller to perpetrate the distribution of a controlled substance.[4] Nevertheless, subsection (a)(2) precludes holding the purchaser criminally liable for the seller's distribution as an accomplice under RCC § 210. The outcome would not be any different if the seller suffered from a mental disability sufficient to rise to the level of a complete defense. While it might be said that the purchaser caused the seller to distribute drugs under these circumstances,[5] subsection (a)(2) precludes holding the purchaser legally accountable for the irresponsible person's conduct under RCC § 211.

Subsection (b) establishes an important limitation on the exceptions to legal accountability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 212 is a *default* bar on criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense. It merely establishes that such actors are excluded from the general principles of legal accountability set forth in RCC §§ 210 and 211. As such, the legislature remains free to impose criminal liability upon these general categories of protected actors on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.[6]

Relation to Current District Law. RCC § 212 codifies and fills in gaps in current District law to improve the clarity and proportionality of the revised statutes.

RCC § 212(a)(1) and (b): Relation to Current District Law on Legal Accountability for Victims. There is no current District law directly addressing whether, as a general principle of criminal law, a victim can be held legally accountable for the

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So, for example, the role of a doorman in protecting a drug house from being robbed or ripped off may be incidental to the main business of that home, the sale and purchase of controlled substances. Nevertheless, because it is entirely possible to distribute drugs without the assistance of a doorman, the doorman's conduct—as contrasted with that of the purchaser—is not inevitably incidental to the commission of the crime of drug distribution. Therefore, subsection (a)(2) would not preclude holding a doorman who assists a drug dealer liable for aiding the distribution of controlled substances.

For another example, consider a prospective bribery scheme involving bribe offeror, X, intermediary Y, and public official, Z. X gives Y $20,000 in cash with instructions to approach Z and propose a transaction whereby Z will receive the money in return for providing X with a government license to which X is not otherwise entitled. If Y agrees with X to participate in this scheme and approaches Z, subsection (a)(2) would not preclude holding Y liable for aiding the crime of bribe offering. Although Y's agreed-upon role as middleman might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to commit the crime of bribe offering, which can be completed without an intermediary.

[4] *See supra* note 1.

[5] *See supra* note 2.

[6] The following situation is illustrative: X, the bribe giver in a two-person corruption scheme involving public official Y, agrees to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable as an *accomplice* in the commission of the crime of *bribe receiving* under RCC § 212 since X's conduct is inevitably incident to Y's perpetration of that crime. X can, however, *directly* be held criminally liable for his *own conduct* under a statute that, through its express terms, prohibits the *offering of a bribe*.

commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed.

No current District criminal statute explicitly exempts victims from the scope of general accomplice liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[7] And the District's second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[8] These current offenses exist specifically for the *protection* of minor-victims.[9]

At the same time, the normal principles of aider and abettor liability derived from the District's general complicity statute, D.C. Code § 22-1805,[10] would appear to authorize treating a minor-victim legally accountable as an accomplice in the perpetration of child sex abuse against him or herself.[11] Consider, for example, the situation of a

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[7] D.C. Code § 22-3008.

[8] D.C. Code § 22-3009.

[9] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403."); *Ballard v. United States*, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

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

[11] The District's jury instruction on accomplice liability summarizes current District law as follows:

> You may find [^] [name of defendant] guilty of the crime charged in the indictment without finding that s/he personally committed each of the acts that make up the crime or that s/he was present while the crime was being committed. Any person who in some way intentionally participates in the commission of a crime can be found guilty either as an aider and abettor or as a principal offender. It makes no difference which label you attach. The person is as guilty of the crime as s/he would be if s/he had personally committed each of the acts that make up the crime.
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> To find that a defendant aided and abetted in committing a crime, you must find that the defendant knowingly associated himself/herself with the commission of the crime, that s/he participated in the crime as something s/he wished to bring about, and that s/he intended by his/her actions to make it succeed.
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> Some affirmative conduct by the defendant in planning or carrying out the crime is necessary. Mere physical presence by [name of defendant] at the place and time the crime is committed is not by itself sufficient to establish his/her guilt. [However, mere physical presence is enough if it is intended to help in the commission of the crime.] [It is not necessary that you find that [name of defendant] was actually present while the crime was committed.]

minor who both initiates and pursues a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully assisted and encouraged the adult to commit statutory rape in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[12] In practical effect, then, applying general principles of aider and abettor liability to the District's child sex abuse statutes would mean that a minor may be subject to the same liability and punishment as the adult who perpetrates the offense.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse do not appear to include a single prosecution involving charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to accomplice liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains directly relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense

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> The government is not required to prove that anyone discussed or agreed upon a specific time or method of committing the crime. [The government is not required to prove that the crime was committed in the particular way planned or agreed upon.] [Nor need the government prove that the principal offender and the person alleged to be the aider and abettor directly communicated with each other.]
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> [I have already instructed you on the elements of [each of] the offense[s] with which [name of defendant] is charged. With respect to the charge of [^] [name of offense], regardless of whether [name of defendant] is an aider and abettor or a principal offender, the government must prove beyond a reasonable doubt that [name of defendant] personally acted with [^] [insert mens rea required for the charged offense]. [Repeat as necessary for additional offenses, e.g., with respect to the charge of [^] [name of offense], the government must prove beyond a reasonable doubt that each defendant personally acted with [^] [insert mens rea]]. [When there are alternate mental states that would satisfy the mens rea element of the offense, such as in second-degree murder (specific intent to kill or seriously injure or conscious disregard of an extreme risk of death or serious bodily injury), the Court may want to instruct that the principal and the aider and abettor do not need the same mens rea as each other.]]

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 3.200—AIDING AND ABETTING (5th ed. 2017). For further discussion of District law governing accomplice liability, see Commentary on RCC § 210: Relation to National Legal Trends.

[12] *See id.*; *Porter v. United States*, 826 A.2d 398, 405 (D.C. 2003) (An accomplice is someone who "designedly encouraged or facilitated" the commission of criminal conduct by another) (quoting *Jefferson v. United States*, 463 A.2d 681, 683 (D.C. 1983)).

precisely *because* she was victim of the party committing the act.[13] In the second case, *Thompson v. United States* (1908), the Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[14]

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[15]—from criminal liability for prostitution.[16] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[17] These provisions appear to reflect the D.C. Council's view,

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[13] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[14] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[15] D.C. Code § 22-2701(d)(3).

[16] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

[17] *Id.* at § (d)(2).

articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[18]

RCC § 212(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding the victim of an offense from being held legally accountable as an accomplice in the commission of that offense under RCC § 210 or for causing another person to commit that offense under RCC § 211 unless expressly provided by the target offense.[19] (This is consistent with the similar exclusion for victims applicable to the general inchoate crimes of solicitation and conspiracy under RCC § 304.[20])

RCC § 212(a)(2) and (b): Relation to Current District Law on Legal Accountability for Conduct Inevitably Incident. There is no current District law directly addressing whether, as a general principle of criminal law, a person be held legally accountable in the commission of a crime in which his or her conduct was inevitably incident. That said, this exception is consistent with the legislative intent underlying current statutory offenses enacted by the D.C. Council. And it has also been implicitly recognized by the D.C. Court of Appeals (DCCA) through *dicta* in the course of interpreting one of those statutes.

No current District criminal statute explicitly recognizes an exemption to accomplice liability for those who engage in conduct inevitably incident to the commission of an offense. However, an analysis of the drug statutes in the D.C. Code illustrates why this exception is consistent with legislative intent.

Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances. The District's distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[21] In contrast, the District's possession statute makes it a 180 day misdemeanor to

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[18] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[19] Note that under RCC § 212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[20] *See generally* Commentary on RCC § 304(a)(1).

[21] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]")

"knowingly or intentionally to possess a controlled substance" of a similar nature.[22] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[23]

At the same time, application of the District's normal principles of aider and abettor liability would appear to authorize holding a purchaser-possessor legally accountable for the distribution of drugs by the seller as an accomplice.[24] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully assisted and encouraged the seller to commit distribution in a manner sufficient to satisfy the requirements of accomplice liability under D.C. Code § 22-1805.[25] In practical effect, then, applying general principles of aider and abettor liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller.

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[22] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[23] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, COMMITTEE ON THE JUDICIARY, REPORT ON BILL 4–123, THE UNIFORM CONTROLLED SUBSTANCES ACT OF 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report").

For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Id. at 5. *See also, e.g.*, *Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

[24] *See generally* sources cited *supra* note 11.

[25] *See generally* sources cited *supra* note 11.

Treating the purchaser-possessor in a drug deal in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's controlled substances offenses.[26] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by *dicta* in at least one reported DCCA opinion. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[27] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[28] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession.'"[29]

The bribery statute in the D.C. Code is susceptible to a similar analysis. The relevant District prohibition on bribery applies a statutory maximum of "not more than ten years" to anyone who:

> (1) Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant; or
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> (2) Corruptly solicits, demands, accepts, or agrees to accept anything of value, directly or indirectly, as a public servant;

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[26] *See* sources cited *supra* notes 21-23 and accompanying text; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

[27] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g.*, *Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[28] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori*, every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[29] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

> in return for an agreement or understanding that an official act of the public servant will be influenced thereby . . . .[30]

On its face, the District's bribery statute embodies a legislative judgment that bribe giving and receiving are equally culpable acts deserving of no more than ten years of potential imprisonment. That said, application of the District's normal principles of aider and abettor liability would seem to provide the basis for effectively doubling the punishment for either party to a bribery scheme because each party's conduct is inevitably incident to the other.

Consider, for example, that most (if not all) bribe givers will purposely assist and encourage the bribe receiver's violation of D.C. Code § 22-712(a)(2), thereby satisfying the requirements of accomplice liability as to bribe receiving. Conversely, most (if not all) bribe receivers will purposely assist and encourage the bribe giver's violation of D.C. Code § 22-712(a)(1), thereby satisfying the requirements of accomplice liability as to bribe giving. Such an application of accomplice liability, if accepted, would seem to authorize up to twenty years of potential imprisonment in most (if not all) instances of bribery.

Dealing with bribery in this way seems disproportionate, counterintuitive, and in conflict with the penalty structure reflected in the District's bribery statute. Given these problems, it's unsurprising that reported District case law does not appear to include a single prosecution for bribery involving duplicate liability of this nature.[31] This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to accomplice liability is implicitly understood to exist in District law and practice.[32]

RCC § 212 § (a)(2) accords with this implicit understanding, as well as the policy considerations that support it, by excluding conduct inevitably incident to the commission of an offense as a matter of law from the scope of legal accountability under RCC §§ 210 and 211 unless expressly provided by the target offense. [33] (This is consistent with the similar exclusion for conduct inevitably incident applicable to the general inchoate crimes of conspiracy and solicitation under RCC § 304.[34])

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[30] D.C. Code § 22-712(a), (c).

[31] The only reported case involving this statute appears to be: *Colbert v. United States*, 601 A.2d 603, 608 (D.C. 1992). *Compare May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

[32] One other relevant aspect of District law worth noting is the fact that a substantively related exclusion applies to the general inchoate crime of conspiracy by way of the judicially-recognized doctrine of "Wharton's Rule," which "is an exception to the general principle that a conspiracy and the substantive offense that is its immediate end are discrete crimes for which separate sanctions may be imposed." *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)). The meaning and import of DCCA case law on Wharton's Rule is discussed in the Commentary to RCC § 304(a)(2).

[33] Note that under RCC § 212(b) the legislature remains free to impose criminal liability upon victims on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[34] *See generally* Commentary on RCC § 304(a)(2).

Relation to National Legal Trends. Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense."[35] Two such situations arise in the context of accomplice liability where: (1) the would-be accomplice is also a victim of the offense; and (2) the conduct of the would-be accomplice is inevitably incident to commission of the offense.[36]

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—"the victim of the crime may not be held as an accomplice even though his conduct in a significant sense has assisted in the commission of the crime."[37] This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of the offense perpetrated against themselves.[38]

The paradigm case is presented by a minor who willingly participates in a sexual relationship with an adult that is considered by law to constitute statutory rape.[39] Under these circumstances, the minor may technically satisfy the requirements of accomplice liability as to the statutory rape in the sense of having purposefully assisted and encouraged its perpetration.[40] Nevertheless, "in the absence of express legislative authority to the contrary, [the minor] may not be convicted as an accomplice in her own victimization."[41] The same has also been said about the "[t]he businessman who yields

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[35] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).

[36] *See, e.g.*, WAYNE R. LAFAVE, 3 SUBST. CRIM. L. § 13.3 (2d ed., Westlaw 2018) ("One may be an accomplice in a crime which, by its definition, he could not commit personally. However, one is not an accomplice to a crime if (a) he is a victim of the crime; [or] (b) the offense is defined so as to make his conduct inevitably incident thereto . . ."); *United States v. Southard*, 700 F.2d 1, 19 (1st Cir. 1983) (noting these "exceptions to the general rule that aiding and abetting goes hand-in-glove with the commission of a substantive crime"); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09 (6th ed. 2012).

[37] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Southard*, 700 F.2d at 19.

[38] *See* Ky. Rev. Stat. § 502.040 cmt. (noting victim "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime"); ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (same).

[39] *See, e.g.*, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

[40] *See generally, e.g.*, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[41] DRESSLER, *supra* note 36, at § 29.09[D]; *see, e.g.*, *In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape," and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse"); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) ("A girl under sixteen years of age, the victim of []sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony."); *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016) ("[A] fourteen-year old who consents to sex with a forty-year old cannot be charged with aiding or abetting statutory rape[.]"); *see also, e.g.*, *Whitaker v. Commonwealth*, 95 Ky. 632, 27 S.W. 83, 84 (1894) (consenting victim of incestuous conduct of her father could not be convicted as an accomplice to his offense); *Ex parte Cooper*, 162 Cal. 81, 85, 121 P. 318 (1912) (rejecting argument that an unmarried woman, although not guilty herself of adultery, was nevertheless a principal in that crime by her participation in the illicit intercourse when she willfully and knowingly aided and abetted her married codefendant in the commission of the offense); *State v. Hayes*, 351 N.W.2d 654 (Minn. App. 1984) (minor who was furnished liquor not an accomplice to crime of furnishing liquor to minor).

to the extortion of a racketeer, [or] the parent who pays ransom to the kidnapper."[42] Although those "who pay extortion, blackmail, or ransom monies" can be understood to have "significantly assisted in the commission of the crime," the fact they are the "victim of a crime" means that they "may not be indicted as an aider or abettor."[43]

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—accomplice liability does not apply "where the crime is so defined that participation by another is inevitably incident to its commission."[44] This rule *exempts* from accomplice liability those who might otherwise satisfy the general requirements of accomplice liability in relation to the commission of an offense for which their participation was logically required as a matter of law.[45]

The paradigm case is a two-party transaction involving the purchase of controlled substances acquired by the buyer for individual use.[46] Under these circumstances, the buyer may technically satisfy the requirements of accomplice liability as to the distribution of controlled substances in the sense of having purposefully assisted and encouraged it.[47] Nevertheless, it is well-established that "a purchaser of a controlled substance is not an aider and abettor in the controlled substance's delivery or distribution."[48] The reason? The buyer's "conduct is necessarily incident to the other

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[42] DRESSLER, *supra* note 36, at § 29.09[D]; LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

[43] *Southard*, 700 F.2d at 19; Haw. Rev. Stat. § 702-224 cmt. ("For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be unwise to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.")

[44] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; *see, e.g.*, *Wegg*, 919 F. Supp. at 907 ("[O]ne cannot be an accomplice if one's conduct is 'inevitably incident' to the commission of the offense."); *United States v. Jefferson*, 13 M.J. 779, 781 (A.C.M.R. 1982) ("[A] person is not an aider and abettor of an offense committed by another if his conduct is 'inevitably incident to its commission,' unless there is a criminal statute which provides otherwise."); *United States v. Carney*, 387 F.3d 436, 455 (6th Cir. 2004) (Guy, J., dissenting) (noting the well-established common law exception to accomplice liability for crimes in which "it takes two to tango"); *Southard*, 700 F.2d at 20.

[45] *See, e.g.*, Ky. Rev. Stat. Ann. § 502.040 cmt. (stating that conduct inevitably incident rule is an "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime," applicable to "a person who joins another in a two-party transaction that constitutes a crime for which criminal sanctions are imposed only on the other party").

[46] *See, e.g.*, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3.

[47] *See generally, e.g.*, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[48] *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760, 770 (1992); *see, e.g., State v. Berg*, 613 P.2d 1125, 1126 (Utah 1980) ("A purchaser of a controlled substance commits the offense of 'possession.' One guilty of that offense . . . is not an accomplice to the crime committed by the seller."); *Wheeler v. State*, 691 P.2d 599, 602 (Wyo. 1984) ("The purchaser of controlled substances commits the crime of 'possession' and not 'delivery,' and, thus, is not an accomplice to a defendant charged with unlawful distribution."); *United States v. Harold*, 531 F.2d 704, 705 (5th Cir.1976) ("It is not necessary to 'sell' contraband to aid and abet its distribution . . . but to participate actively in the distribution [of a controlled substance] to others one must do more than receive it as a user."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("The general rule in Alabama is that the purchaser of an illicit substance is not an accomplice of the seller because the purchaser is guilty of an offense independent from the sale."); *Leigh v. State*, 34 Okla. Crim. 338, 246 P. 667 (1926) ("The purchaser of intoxicating liquor at an illegal sale is not an accomplice of the seller."); *State v. Celestine*, 671 So. 2d 896, 897–98 (La. 1996) (same); *Robinson v. State*, 815 S.W.2d 361, 363–64 (Tex. App. 1991) (collecting legal commentary and citations).

crime."[49] Which is to say: because the distribution of narcotics necessarily requires two parties, a seller and a purchaser, the purchaser may not be held criminally responsible as an accomplice to that distribution under the conduct inevitably incident exception.

For similar reasons, American legal authorities frequently bar both "prosecution of the bribe giver for the crime of bribe receiving" (and vice versa).[50] Here again, general principles of accomplice liability would seem to support criminal responsibility given the likelihood that a bribe giver will have purposely assisted and encouraged the bribe receiver's conduct (and vice versa).[51] Nevertheless, courts preclude this kind of reciprocal liability premised on the "the mutual participation" inherent in bribery.[52] That is, because bribery necessarily requires two parties, the bribe-giver and the bribe-receiver, one of those parties may not be held criminally responsible for the other's conduct as an accomplice under the conduct inevitably incident exception.[53]

It's important to point out that, in applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime."[54] To take just one example, consider "the role of a doorman for a [drug]house, which is to prevent 'ripoffs' or robberies by individuals entering the premises."[55] That role may in a general sense be "incidental to the main business of the house—the sale and purchase of [controlled substances]."[56] Nevertheless, because it is entirely possible (as a matter of law) to distribute drugs without the assistance of a doorman, the doorman's

[49] *State v. Pinson*, 895 P.2d 274, 277 (N.M. Ct. App.1995) ("When an illegal drug sale is completed, there are two separate crimes committed, trafficking by the seller and possession by the purchaser. Each conduct is necessarily incident to the other crime.").

[50] *People v. Manini*, 79 N.Y.2d 561, 571 (1992). (citing N.Y. Penal Law § 20.00 cmt.) ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.")); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with "sports bribery as an accomplice of the briber").

[51] *See generally, e.g.*, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.2; DRESSLER, *supra* note 36, at § 30.04.

[52] *Jennings*, 490 S.W.3d at 344.

[53] *See, e.g., People v. Manini*, 79 N.Y.2d 561, 571 (1992) (code precludes "prosecution of the bribe giver for the crime of bribe receiving") (citing Commentary to N.Y. Penal Law § 20.00 ("[T]he crime of bribe giving by A to B is necessarily incidental to the crime of bribe receiving by B . . . [Therefore] A is not guilty of bribe receiving [as an accomplice]. But, A is criminally liable for his own conduct which constituted the related but separate offense of bribe giving.")); *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 (Ky. 2016) (Kentucky law prohibits charging corrupt sports official with "sports bribery as an accomplice of the briber"); *but see May v. United States*, 175 F.2d 994, 1005 (D.C. Cir. 1949) (extending general complicity principles to hold offeror of bribe criminally responsible for aiding and abetting public official's violation of federal statute prohibiting receipt of unlawful compensation).

[54] LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999).

[55] *Wagers v. State*, 810 P.2d 172, 175 (Alaska Ct. App. 1991).

[56] *Id.*

conduct, unlike that of the purchaser, is not "inevitably incidental to the commission of the crime" of drug distribution.[57]

Both of these exceptions to the general rules of accomplice liability are typically justified on the basis of legislative intent. With respect to the victim exception, for example, it has been observed that "[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose accomplice liability upon such a person."[58] And, with respect to the conduct inevitably incident exception, the standard "justification is that 'the legislature, by specifying the kind of individual who is to be found guilty when participating in a transaction necessarily involving one or more other persons, must not have intended to include the participation by the others in the offense as a crime."[59]

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to criminalize the relevant conduct.[60] For example, it has been argued that where the legislature excludes customers from the definition of prostitution, criminal liability premised on an aiding and abetting theory should be barred by the conduct inevitably

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[57] *Id.*; *see, e.g., Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's conduct was not "inevitably incident" to the crime of assault" because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[58] *United States v. Blankenship*, No. 2:15-CR-00241, 2016 WL 4030943, at *6–7 (S.D.W. Va. July 26, 2016); (quoting LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3); *see* Ky. Rev. Stat. § 502.04 cmt. (noting that this exception "is for individuals whose protection is the very purpose of a criminal prohibition"). As for the rationale behind the legislative purpose, it seems to rest upon basic intuitions. Consider, for example, the commentary to the Hawaii criminal code:

> Even though a victim of an offense in a limited sense assists its commission, it *seems clear* that the victim ought not to be regarded as an accomplice. For example, the business person who yields to extortion ought not be regarded as an accomplice of the extortionist. Similarly it would be *unwise* to regard parents who yield to the threat of kidnappers and clandestinely pay a ransom as accomplices in the commission of the crime.

Haw. Rev. Stat. § 702-224 cmt.

[59] *Blankenship*, 2016 WL 4030943, at *6–7 (quoting *Southard*, 700 F.2d at 19); *Ex parte Cooper*, 162 Cal. 81, 86, 121 P. 318 (1912); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently,"; therefore, "adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); Commentary on Haw. Rev. Stat. Ann. § 702-224 ("In those cases where the commission of an offense necessarily involves the conduct of two persons, it is questionable wisdom to push the concept of complicity to its outer limits."); *see also* LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3 ("A secondary consideration, equally applicable to the victim exception, is that if the law were otherwise convictions would be more difficult to obtain in those jurisdictions requiring corroboration of an accomplice's testimony."); *compare United States v. Hogan*, 886 F.2d 1497, 1504 (7th Cir. 1989) ("Where the statute covers the incidental conduct, the "inevitably incident" defense does not apply.")

[60] *See, e.g.*, ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

incident exception.[61] With that in mind, however, many legislatures "have specifically provided for the liability of [customers] by either redefining the offense of prostitution or by enacting a 'patronizing a prostitute' offense."[62] And where the legislature has made an offense-specific determination of this nature, it is generally agreed that the courts should implement it.[63] In this way, these exceptions from general principles of legal accountability constitute default rules of construction, to be applied in the absence of an explicit, offense-by-offense specification of liability.[64]

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.[65] The relevant code language is contained in Model Penal Code § 2.06(6)(a) and (b), which provide:

> (6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

This language, as the explanatory note highlights, was intended to codify two different "special defenses to a charge that one is an accomplice."[66] The first is applicable "when the actor is himself a victim of the offense"[67]; it reflects the drafters belief that—as the accompanying commentary phrases it—"the victim of a crime should not be held as an accomplice in its perpetration, even though his conduct in a sense may have assisted in the commission of the crime and the elements of complicity previously defined may technically exist."[68] The drafters viewed this first exemption in terms of legislative intent:

> The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or may even be thought immoral; to view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection. So, too, to hold the female an accomplice in a statutory rape upon her person would be inconsistent with the legislative purpose to protect her against her own weakness in consenting, the very theory of the crime.[69]

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[61] *See, e.g.*, *People v. Anonymous*, 161 Misc. 379, 292 N.Y.S. 282 (N.Y. Crim. Ct. 1936).
[62] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83 (collecting statutory citations).
[63] *See, e.g.*, Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.
[64] *See, e.g.*, Haw. Rev. Stat. § 702-224 cmt.; Ky. Rev. Stat. § 502.040 cmt.
[65] *See generally* Model Penal Code § 2.06(6) cmt. at 323-24.
[66] Model Penal Code § 2.06(6): Explanatory Note.
[67] Model Penal Code § 2.06(6): Explanatory Note.
[68] Model Penal Code § 2.06(6) cmt. at 323-24.
[69] Model Penal Code § 2.06(6) cmt. at 323-24.

Apart from the issue of victims addressed by Model Penal Code § 2.06(6)(a) is that of conduct inevitably incident, which is governed by Model Penal Code § 2.06(6)(b).[70] The latter provision creates a second (and distinct) exception applicable "when the offense is so defined that the actor's conduct is inevitably incident to the commission of the offense."[71]

The Model Penal Code drafters intended this provision to speak to difficult questions, such as whether someone who "has intercourse with a prostitute [should] be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe giver an accomplice of the taker?"[72] The drafters believed that "a systematic legislative resolution of these issues" to be a "hopeless effort," and that instead, "the problem must be faced and weighed as it arises in each situation."[73] That said, the drafters also believed that a default rule *against* accomplice liability best accounted for the commonality between them, namely, "that the question is before the legislature when it defines the individual offense involved."[74] "The provision, therefore, is that the general section on complicity is inapplicable, leaving to the definition of the crime itself the selective judgment that must be made."[75]

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[70] *See* Model Penal Code § 2.06(6) cmt. at 323-24 ("Exclusion of the victim does not wholly meet the problems that arise.").

[71] Model Penal Code § 2.06(6): Explanatory Note.

[72] Model Penal Code § 2.06(6) cmt. at 323-24. The commentary goes on to observe that:

> These are typical situations where conflicting policies and strategies, or both, are involved in determining whether the normal principles of accessorial accountability ought to apply. One factor that has weighed with some state courts is that affirming liability makes applicable the requirements that testimony of accomplices be corroborated; the consequence may therefore be to diminish rather than enhance the law's effectiveness by making prosecutions unduly difficult. More than this, however, is involved. In situations like prostitution, prohibition, and even late abortion, there is an ambivalence in public attitudes that makes enforcement very difficult at best; if liability is pressed to its logical extent, public support may be wholly lost. Yet to trust only to the discretion of prosecutors makes for anarchical diversity and elicits sympathy for those against whom prosecution may be launched.

Id. Note that the Model Penal Code has codified several of the crimes noted above in a way that makes conduct that was previously only "inevitably incident" to an offense, now liable for a separate offense. *See* Model Penal Code §§ 230.3(4) (prohibiting a woman from aborting after the 26th week of pregnancy), 251.2(5) (prohibiting patronizing a prostitute), 230.1(3) (prohibiting contracting or proporting to contract marriage with another knowing the other would thereby commit bigamy), 223.6(1) (prohibiting receipt of stolen property knowing it to be stolen).

[73] Model Penal Code § 2.06(6) cmt. at 323-24.

[74] *Id.*

[75] Model Penal Code § 2.06(6) cmt. at 323-24 ("If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime. And since the exception is confined to conduct "inevitably incident to" the commission of the crime, the problem inescapably presents itself in defining the crime.""); *compare id.* ("This method of treatment might be unacceptable in legislating on accomplices for an established system, where the legislature may or may not have dealt with the issue in particular definitions and will not have been consistent in its practice. But in a model code or general revision, former legislative practice appears immaterial; the problem may be faced as each branch of the work proceeds.").

Since completion of the Model Penal Code, the drafters' recommendations concerning codification of broadly applicable exceptions to accomplice liability have been quite influential. A substantial majority of modern criminal codes incorporate a general provision based on Model Penal Code § 2.06(6)(a), which excludes victims from the scope of accomplice liability.[76] Likewise, a substantial majority of modern criminal codes also incorporate a general provision based on Model Penal Code § 2.06(6)(b), which excludes inevitably incident conduct from accomplice liability.[77]

While the exceptions reflected in the Model Penal Code § 2.06(6)(a) and (b) have had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions frequently modify them. Many of these revisions are stylistic and/or organizational; however, at least one is potentially substantive. This modification is reflected in those reform jurisdictions that address a noted textual "inconsistency" in the Model Penal Code's treatment of accomplices and those who cause crime to occur.[78]

The relevant inconsistency is a product of the fact that the Model Penal Code exceptions for victims and conduct inevitably incident are framed in terms of when "a person is not an accomplice in an offense committed by another person."[79] However, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.[80] The other basis, often referred to as the innocent instrumentality doctrine, attaches legal accountability where one person, "acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct."[81] Textually speaking, therefore, the Model Penal Code would appear to *preclude* applying the victim and conduct inevitably incident exceptions to those held criminally liable for causing crime to occur.[82]

Various state criminal codes, in contrast, clearly establish that the relevant

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[76] Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev.Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev.Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Mont. Code Ann. § 45-2-302 (victim only); N.D. Cent. Code § 12.1-03-01 (victim only); Wash. Rev. Code § 9A.08.020 (victim only).

[77] Ala. Code § 13A-2-24; Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ark. Code Ann. § 5-2-404; Colo. Rev. Stat. Ann. § 18-1-604; Conn. Gen. Stat. Ann. § 53a-10; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Ind. Code Ann. § 35-41-3-10; Me. Rev.Stat. Ann. tit. 17-A, § 57; Minn. Stat. Ann. § 609.05; Mo. Ann. Stat. § 562.041; N.H. Rev. Stat. Ann. § 626:8; N.J. Stat. Ann. § 2C:2-6; Ohio Rev. Code Ann. § 2923.03; Or. Rev.Stat. § 161.165; Pa. Cons. Stat. Ann. tit. 18, § 306; Utah Code Ann. § 76-2-307; Wis. Stat. Ann. § 939.05; Ky. Rev. Stat .Ann. § 502.040 (only conduct inevitably incident); N.Y. Penal Law § 20.10 (only conduct inevitably incident).

[78] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

[79] Model Penal Code § 2.06(6).

[80] *Compare* Model Penal Code § 2.06(2)(c) ("A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense") *with* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct").

[81] Model Penal Code § 2.06(2)(a).

[82] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

exceptions apply equally to their general accomplice and causing crime by an innocent provisions. Illustrative is Section 20.10 of the New York criminal code, which establishes that "a person is not criminally liable for conduct of another person constituting an offense when his own conduct, though causing or aiding the commission of such offense, is of a kind that is necessarily incidental thereto."[83] Similarly, Section 13A-2-24 of Alabama's criminal code provides that, "[u]nless otherwise provided by the statute defining the offense, a person shall not be legally accountable for behavior of another constituting a criminal offense if: (1) He is a victim of that offense; or (2) The offense is so defined that his conduct is inevitably incidental to its commission."[84]

This revision, it's worth noting, also finds support in legal commentary.[85] It has been observed, for example, that the disparate treatment of accomplices and those who cause crime by an innocent may simply have been "the result of careless drafting" given the different time periods in which the relevant Model Penal Code provisions were compiled.[86] Drafting concerns aside, moreover, it has been argued that there exists "little justification for providing or barring these special exemption defenses to one theory of liability for the conduct of another, but not to the other."[87] For example, barring such defenses in the context of the innocent instrumentality doctrine would make it possible to hold X, an underage minor willingly engaged in a sexual relationship with adult Y, criminally responsible for statutory rape provided that Y possesses a mental illness sufficient to constitute an insanity defense.[88] Likewise, it would also authorize holding X, the purchaser in a drug sale by Y, criminally responsible for distribution merely because Y possesses a mental illness sufficient to constitute an insanity defense.[89]

Consistent with the above considerations, the RCC creates two generally applicable exceptions to legal accountability for another person's conduct. The first exception, RCC § 212(a), excludes the "victim of [the] offense" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. The second exception, RCC § 212(a)(2), excludes actors whose "conduct is inevitably incident to commission of the offense as defined by statute" from the general principles of accomplice liability and liability for causing crime by an innocent respectively set forth in RCC §§ 210 and 211. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 212 *is not* intended to constitute a universal bar on

[83] N.Y. Penal Law § 20.10.

[84] Ala. 13A-2-24; Ky. Rev. Stat. Ann. § 502.040 ("A person is not guilty under [statutory provisions governing accomplice liability and causing crime by an innocent] for an offense committed by another person when . . . The offense is so defined that his conduct is inevitably incident to its commission.").

[85] For legal commentary more generally in support of the Model Penal Code's approach to dealing with the intersection between accomplice liability, victims and conduct inevitably incident, see, for example, LAFAVE, *supra* note 36, at 2 SUBST. CRIM. L. § 13.3; DRESSLER, *supra* note 36, at § 29.09.

[86] ROBINSON, *supra* note 35, at 1 CRIM. L. DEF. § 83.

[87] *Id* ("For example, if the victim of an assault has purposely aided another in beating him by providing a whip, the victim nonetheless would receive a specially exempted person defense to complicity under § 2.06(6)(a). The result would be different, however, if the assisted assaulter has an insanity defense and the victim is charged with causing crime by an innocent; § 2.06(6)(a) provides the "victim" defense only to complicity liability.").

[88] *See id.*

[89] *See id.*

criminal liability for victims or those who engage in conduct inevitably incident to commission of an offense, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 2.06(6). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it clarifies that these exceptions apply equally across forms of legal accountability. This departure finds support in state legislative practice[90] and scholarly commentary.[91]

[90] *See supra* notes 83-84 and accompanying text.
[91] *See supra* notes 85-87 and accompanying text.

RCC § 213. WITHDRAWAL DEFENSE TO LEGAL ACCOUNTABILITY.

(a) *Withdrawal Defense.* It is an affirmative defense to a prosecution under RCC § 210 and RCC § 211 that the defendant terminates his or her efforts to promote or facilitate commission of an offense before it has been committed, and either:

(1) Wholly deprives his or her prior efforts of their effectiveness;

(2) Gives timely warning to the appropriate law enforcement authorities; or

(3) Otherwise makes proper efforts to prevent the commission of the offense.

(b) *Burden of Proof for Withdrawal Defense.* The defendant has the burden of proof for this affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

COMMENTARY

RCC § 213 establishes a withdrawal defense to criminal liability premised upon the general principles of legal accountability set forth in RCC § 210, Accomplice Liability, and RCC § 211, Liability for Causing Crime by an Innocent or Irresponsible Person.

Subsection (a) sets forth the scope of this affirmative defense, which is comprised of two basic requirements. The first is that the defendant must—as the prefatory clause phrases it—"terminate[] his or her efforts to promote or facilitate commission of an offense before it has been committed." This clarifies that only *timely* withdrawals from criminal schemes will provide the basis for avoiding legal accountability for conduct of another under RCC § 213.

The second requirement is that the defendant's timely withdrawal must be accompanied by a "proper effort" at preventing the target offense. Importantly, this does not mean that the defendant's conduct *actually* needs to prevent the target offense from being completed. Rather, a withdrawal defense remains available under RCC § 213 although the defendant's efforts are unsuccessful.[1] At the very least, though, the defendant must engage in conduct reasonably calculated towards disrupting—whether directly or indirectly—the offense initially promoted or facilitated. Paragraphs (1) through (3) describe three alternative standards for evaluating the sufficiency of the defendant's conduct in this regard.

RCC § 213(a)(1) establishes that a withdrawal defense is available where the

[1] This is in contrast to the renunciation defense to the general inchoate crimes of attempt, solicitation, and conspiracy, which *does* require proof that the target offense was actually prevented. *See* RCC § 305(a). Because of this difference, it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct. The following example is illustrative. V personally insults Y. Y is predisposed to let the insult slide, but X firmly persuades Y over the phone that Y must respond with lethal violence to protect Y's reputation. X later has a change of heart (motivated, in part, by being alerted to the fact that the police were monitoring the phone call), and firmly communicates to Y his view that violence is the wrong path. However, X's proper effort at dissuading Y is unsuccessful; Y goes on to kill V anyways. On these facts, X satisfies the standard for withdrawal under RCC § 213, and, therefore, cannot be deemed an accomplice to Y's murder of V. X does not, however, satisfy the narrower standard for renunciation to solicitation under RCC § 305 given that: (1) the target of the solicitation was completed; and (2) D's renunciation was not voluntary (i.e., it was motivated by a desire to avoid getting caught). *See* RCC § 305(a) (renunciation defense unavailable where desistance is involuntary or target offense is consummated).

defendant "[w]holly deprives his or her prior efforts of their effectiveness." The type of conduct that satisfies this standard will, by necessity, be contingent upon the nature of the conduct that provides the basis for the defendant's legal accountability in the first place. For example, where the defendant's contribution to a criminal scheme was solely in the form of verbal encouragement, a clear (and timely) oral statement of disapproval communicated to his or her co-participants may provide the basis for a withdrawal defense. But such a statement clearly would not suffice where the defendant's participation involved loaning a weapon central to the scheme's success. In that case, the actual retrieval of the weapon would be necessary to meet the standard proscribed in RCC § 213(a)(1).

RCC § 213(a)(2) establishes that a withdrawal defense is available where the defendant "[g]ives timely warning to the appropriate law enforcement authorities." This standard enables a defendant who provides reasonable notice to a law enforcement agency with jurisdiction over the requisite criminal scheme to avoid legal accountability. This indirect means of withdrawing from an offense is to be encouraged, particularly where it is either: (1) unlikely that the defendant will be able to prevent the consummation of the target offense acting alone[2]; or (2) dangerous for the defendant to attempt to do so by him or herself.[3]

RCC § 213(a)(3) establishes that a withdrawal defense is available where the defendant "[o]therwise makes proper efforts to prevent the commission of the offense." This catchall "proper efforts" alternative allows for the possibility that other forms of conduct beyond those proscribed paragraphs (1) and (2) will provide the basis for a withdrawal defense. It is a flexible standard, which accounts for the varying ways in which a participant in a criminal scheme might engage in conduct reasonably calculated towards disrupting it. This standard should be evaluated in light of the totality of the circumstances.[4]

Subsection (b) establishes that the burden of proof for a withdrawal defense lies with the defendant, and is subject to a preponderance of the evidence standard. This means that the defendant possesses the burden of raising this affirmative defense at trial. Once appropriately raised, the defendant then bears the burden of persuading the fact finder that the elements of a withdrawal defense have been met beyond a preponderance of the evidence.[5]

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[2] For example, where D aids an armed robbery planned to take place in another state by providing a weapon to P1 and P2, alerting the relevant legal authorities in that state in a timely fashion may be the only practical alternative if P1 and P2 later become unreachable by phone or email.

[3] For example, where D aids an armed robbery by loaning a weapon to P1 and P2, but P1 and P2 also have many other weapons available to them, and any attempt by D at retrieving the weapon may pose a risk to D's life, then alerting the relevant legal authorities in a timely fashion would clearly be a more desirable alternative.

[4] For example, alerting the victim of a criminal scheme of its existence could constitute a "proper effort" at preventing the commission of an offense, where: (1) the disclosure to the victim is *timely*; and (2) the disclosure provides the victim with a *reasonably feasible* means of avoiding the target harm. Where, in contrast, the disclosure is made too late, or does not enable to victim to easily and safely escape harm, then the defendant's conduct would not meet the "proper effort" standard.

[5] While the examples and analysis in this commentary entry focus on legal accountability based upon accomplice liability under RCC § 210, a withdrawal defense is similarly available where the defendant has been charged with causing an innocent or irresponsible person to commit a crime under RCC § 211. This ensures equivalency of outcome where the defendant's co-participants in a criminal scheme cannot be held

RCC § 213: Relation to Current District Law on Withdrawal Defense. Subsections (a) and (b) codify, clarify, and fill gaps in District law concerning the availability and burden of proof governing a withdrawal defense to legal accountability.

The D.C. Code does not address the availability of a withdrawal defense; however, the DCCA has discussed it on a few different occasions. The relevant case law can generally be divided into two categories: decisions involving withdrawal from a conspiracy (a topic not addressed by RCC § 213); and decisions involving withdrawal from aider and abettor liability (the focus of RCC § 213).

With respect to the first category, the relevant case law pertains to when an actor may be relieved from the *collateral consequences of a conspiracy*.[6] 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."[7] Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run."[8] On these kinds of collateral issues, the DCCA recognizes a defense of withdrawal, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation."[9]

With respect to the second category, the relevant case law addresses when an actor may be relieved from liability as an aider and abettor.[10] In this context, withdrawal provides the basis for a *complete defense to criminal liability*.[11] Which is to say, under District law an accomplice who "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete

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liable due to their being "innocent or irresponsible." RCC § 211(a); *see* RCC § 211(b) ("An 'innocent or irresponsible person' . . . includes a person who, having engaged in conduct constituting an offense: (1) Lacks the culpable mental state requirement for that offense; or (2) Acts under conditions that establish an excuse defense, such as insanity, immaturity, duress, or a reasonable mistake as to a justification.").

[6] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) ("Withdrawal," commonly used in reference to the collateral consequences of conspiracy, tends to require only notification of an actor's abandonment to his confederates."); Model Penal Code § 5.03 cmt. at 456 (distinguishing "withdrawal from the conspiracy (1) as a means of commencing the running of time limitations with respect to the actor, or (2) as a means of limiting the admissibility against the actor of subsequent acts and declarations of the other conspirators, or (3) as a defense to substantive crimes subsequently committed by the other conspirators").

[7] *See, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (2d ed., Westlaw 2018); *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.")

[8] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 12.4; *see* DRESSLER, *supra* note 7, at § 27.07 ("[O]nce a person withdraws, the statute of limitations for the conspiracy begins to run in her favor."); Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1168 (1975) ("[W]ithdrawal is principally directed toward the time dimension of conspiracy.").

[9] *Bost v. United States*, 178 A.3d 1156, 1200 (D.C. 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g.*, *Tann v. United States*, 127 A.3d 400, 467 (D.C. 2015) (citing *United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011); *Baker v. United States*, 867 A.2d 988, 1007 n.24 (D.C. 2005).

[10] *See Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("Legal withdrawal has been defined as '(1) repudiation of the defendant's prior aid or (2) doing all that is possible to countermand his prior aid or counsel, and (3) doing so before the chain of events has become unstoppable.") (quoting LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3).

[11] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[12]

With respect to both categories, there does not appear to be any reported District case law in which a defendant has successfully raised a withdrawal defense. Rather, the published decisions in these areas of law primarily clarify the kind of proof that fall short of establishing it. For example, in at least two cases the DCCA has determined that where the defendant plays a central role in the planning and facilitation on a crime (e.g., providing a weapon), "[l]eaving the scene before a crime occurs is," by itself, "insufficient to demonstrate withdrawal."[13]

The DCCA has also clarified that a withdrawal defense is unavailable although an accused who was intimately involved in a robbery scheme "may have 'wanted to get out of there, and didn't want to do further damage to the victim'" after the robbery had commenced.[14] Observing the requirement that the defendant take "affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation,"[15] the court deemed the mere fact that the defendant "regretted the unfolding consequences of the brutal robbery in which he participated" to be insufficient to "relieve him of criminal liability."[16]

One issue relevant to a withdrawal defense that is unresolved by DCCA case law is the *burden of proof*.[17] The commentary accompanying the District's criminal jury

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[12] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013) ("Withdrawal is no defense to accomplice liability unless the defendant takes affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation.") (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)); *see In re D.N.*, 65 A.3d at 95 ("Even if D.N. regretted the unfolding consequences of the brutal robbery in which he participated, that does not relieve him of criminal liability."); *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994).

[13] *Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *Harris*, 377 A.2d at 38) (the fact that appellant merely left the scene before the shooting occurred was "insufficient to establish withdrawal as a matter of law").

Relatedly, the U.S. Court of Appeals for the D.C. Circuit has observed that:

> Whatever may be the other requirements of an effective abandonment of a criminal enterprise, it is certain both as a matter of law and of common sense that there must be some appreciable interval between the alleged abandonment and the act from responsibility for which escape is sought. It must be possible for a jury to say that the accused had wholly and effectively detached himself from the criminal enterprise before the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed. While it may make no difference whether mere fear or actual repentance is the moving cause, one or the other must lead to an actual and effective retirement before the act in question has become so imminent that its avoidance is practically out of the question.

Mumforde v. United States, 130 F.2d 411, 413 (D.C. Cir. 1942) (quoting *People v. Nichols*, 230 N.Y. 221, 222, 129 N.E. 883 (1921)).

[14] *In re D.N.*, 65 A.3d 88, 95 (D.C. 2013).

[15] *Id.* (citing *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977)).

[16] *Id.* (citing *Plater v. United States*, 745 A.2d 953, 958 (D.C. 2000) ("The defendants' fleeing of the crime scene after participating in the assault does not constitute legal withdrawal.").

[17] 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

instruction on conspiracy seems to recommend that, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the burden should be on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it."[18] However, recent U.S. Supreme Court case law—cited to in recent DCCA case law—indicates that the burden of proof should instead rest with the defendant.[19] And the commentary accompanying the District's criminal jury instruction on accomplice liability says nothing at all about the burden of proof for a withdrawal defense.[20]

Even assuming that under current District law the burden of persuasion for a withdrawal defense to the collateral consequences of a conspiracy rests with the government, there are sound policy and practical reasons (discussed below) to place the burden of persuasion for a withdrawal defense to accomplice liability (the focus of RCC § 213) on the defendant, subject to a preponderance of the evidence standard. And there is also general District precedent supporting such an approach; many statutory defenses in the D.C. Code are subject to a preponderance of the evidence standard that must be proven by the defendant.[21]

Consistent with the above analysis, and in accordance with national legal trends,[22] the RCC recognizes a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a preponderance of the evidence.[23]

> 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).

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

[19] *Smith v. United States*, 568 U.S. 106 (2013) (placing burden on defendant to prove withdrawal from conspiracy under federal law); *see Bost v. United States*, 178 A.3d 1156, 1201 (D.C. 2018) (citing *id.*). The *Smith* decision is discussed *infra*, notes 92-98 and accompanying text.

[20] *See generally* D.C. Crim. Jur. Instr. § 3.200.

[21] 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 . . . .").

[22] *See infra* Relation to National Legal Trends.

[23] The withdrawal defense established by RCC § 213 also applies to legal accountability based upon culpably causing an innocent or irresponsible person to commit an offense. It is unclear under current District law whether a withdrawal defense would be available in this rare situation. There are only a handful of reported District cases involving this theory of liability and none implicate a withdrawal defense. *See generally* Commentary on RCC § 211: Relation to District Law.

(Recognition of a withdrawal defense to legal accountability is generally congruent with recognition of the renunciation defense to general inchoate crimes under RCC § 305.[24])

Relation to National Legal Trends. Typically, "an offense is complete and criminal liability attaches and is irrevocable as soon as the actor satisfies all the elements of an offense."[25] There is, however, an important exception applicable to both the general inchoate crimes of attempt, solicitation, and conspiracy, as well as criminal liability based on complicity. In these contexts, the criminal justice system affords an "offender the opportunity to escape liability, even after he has satisfied the elements of these offenses, by renouncing, abandoning, or withdrawing from the criminal enterprise."[26] As it arises in the complicity context, the relevant defense is typically referred to as "withdrawal."[27]

The withdrawal defense to complicity both "originated and has persisted as a judicially-developed concept."[28] This concept embodies the idea that "a person who provides assistance to another for the purpose of promoting or facilitating the offense, but who subsequently abandons the criminal endeavor, can avoid accountability for the subsequent criminal acts of the primary party."[29] Importantly, though, not just any

[24] *See* RCC § 305(a) ("In a prosecution for attempt, solicitation, or conspiracy in which the target offense was not committed, it is an affirmative defense that: (1) The defendant engaged in conduct sufficient to prevent commission of the target offense; (2) Under circumstances manifesting a voluntary and complete renunciation of the defendant's criminal intent.").

Note, however, that the RCC renunciation defense differs from the RCC withdrawal defense in two primary ways. First, the renunciation defense incorporates an "actual prevention" standard, which entails that the defendant successfully prevent the target of the general inchoate crime from being consummated—whereas a "proper effort" on behalf of the defendant will suffice to establish a withdrawal defense. Second, the renunciation defense incorporates a voluntariness requirement, which entails that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the withdrawal defense does not incorporate any subjective requirement. Given these differences, it is possible that a defendant may satisfy the standard for a withdrawal defense, and therefore escape legal accountability under RCC §§ 210 and 211, but fail to satisfy the standard for a renunciation defense, and thus retain criminal liability under one or more of the general inchoate crimes under RCC § 301, 302, and 303.

[25] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

[26] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.

[27] *Id.*

[28] Buscemi, *supra* note 8, at 1178; *see, e.g.*, CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL LAW § 37 (15th ed. 2018) ("At common law, a party could withdraw from a criminal transaction and avoid criminal liability by communicating his withdrawal to the other parties in sufficient time for them to consider terminating their criminal plan and refraining from committing the contemplated crime."); *State v. Allen*, 47 Conn. 121 (1879); *State v. Peterson*, 213 Minn. 56, 4 N.W.2d 826 (1942); *Galan v. State*, 44 Ohio App. 192, 184 N.E. 40 (1932).

[29] DRESSLER, *supra* note__, at § 30.07; *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) ("Withdrawal is traditionally a defense to crimes of complicity: conspiracy and aiding and abetting."); *see also* ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 ("A majority of jurisdictions recognize some form of withdrawal or abandonment defense to complicity liability."); *cf.* Buscemi, *supra* note 8, at 1178 ("Withdrawal originated and has persisted as a judicially-developed concept. No evidence has been uncovered to indicate that its application will be discontinued under the new Federal Criminal Code, whichever form is ultimately adopted.").

On the federal level, "it is unsettled if a defendant can withdraw from aiding and abetting a crime," for "[u]nlike a conspiracy, which by its very nature involves an agreement that can be refuted, accomplice liability can arise from merely encouraging the principal." *United States v. Burks*, 678 F.3d

abandonment will provide the basis for a withdrawal defense. For example, it is well established among common law authorities that a "spontaneous and unannounced withdrawal will not do."[30] Nor will proof that the defendant merely regretted his or her participation,[31] fled from the scene of a crime,[32] or was apprehended by the police before the crime aided or abetted was committed.[33] Rather, the contemporary common law rule is that the defendant must terminate his or her participation in a criminal scheme and: "(1) repudiate his prior aid, or (2) do all that is possible to countermand his prior aid or counsel, and (3) do so before the chain of events has become unstoppable."[34]

This is generally understood to be a flexible standard, the satisfaction of which is contingent upon the nature of the conduct that establishes the defendant's complicity in

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1190 (10th Cir. 2012) ("declin[ing] the government's suggestion to categorically hold that withdrawal can never be a valid defense to aiding and abetting a federal crime."). Note, however, that the U.S. Supreme Court's recent decision in *Rosemond v. United States*, 572 U.S. 65, 78 (2014) "explained that an accomplice must know of the substantive offense beforehand in order to be shown to have embraced its commission . . . in a manner suggesting an accomplice might be able to withdraw and escape liability prior to the commission of the substantive offense, even if he had contributed to the crime's ultimate success." Charles Doyle, *Aiding, Abetting, and the Like: An Overview of 18 U.S.C. 2*, CONGRESSIONAL RESEARCH SERVICE REPORT, at 10-11 (Oct. 24, 2014).

[30] DRESSLER, *supra* note 7, at § 30.07 (citing *State v. Thomas*, 356 A.2d 433, 442 (N.J. Super. Ct. App. Div. 1976), *rev'd on other grounds*, 387 A.2d 1187 (N.J. 1978)); *see, e.g., Karnes v. State*, 159 Ark. 240, 252 S.W. 1 (1923); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959); *State v. Guptill*, 481 A.2d 772 (Me. 1984).

[31] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *In re D.N.*, 65 A.3d 88 (D.C. 2013); *People v. Rybka*, 16 Ill.2d 394, 158 N.E.2d 17 (1959)).

[32] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Plater v. United States*, 745 A.2d 953 (D.C. 2000); *State v. Forsha*, 190 Mo. 296, 88 S.W. 746 (1905)); *see People v. Lacey*, 49 Ill.App.2d 301, 200 N.E.2d 11, 14 (1964) ("A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene.").

[33] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing *Sheppard v. State*, 312 Md. 118, 538 A.2d 773 (1988)); *see State v. Amaro*, 436 So.2d 1056 (Fla. Dist. Ct. App. 1983); *Commonwealth v. Doris*, 287 Pa. 547, 135 A. 313 (1926)).

[34] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g., Smith v. State*, 424 So. 2d 726, 732 (Fla. 1982) ("To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan."); DRESSLER, *supra* note 7, at § 30.07 ("[T]he accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance."); Ky. Rev. Stat. § 502.040 cmt. (observing the "prevailing doctrine which allows an aider or abettor or an accessory before the fact to relieve himself of liability by countermanding his counsel, command or encouragement through a communication delivered in time to allow his principal to govern his actions accordingly").

The common law rule has similarly been described as follows:

> Where the perpetration of a felony has been entered on, one who had aided and encouraged its commission may nevertheless, before its completion, withdraw all his aid and encouragement and escape criminal liability for the completed felony; but his withdrawal must be evidenced by acts or words showing to his confederates that he disapproves or opposes the contemplated crime. Moreover, it is essential that he withdraw in due time, that the one seeking to avoid liability do everything practicable to detach himself from the criminal enterprise and to prevent the consummation of the crime, and that, if committed, it be imputable to some independent cause.

Blevins v. Com., 209 Va. 622, 626, 166 S.E.2d 325, 328–29 (1969) (quoting 22 C.J.S. CRIMINAL LAW § 89).

the first place.[35] Which is to say: the greater the defendant's contribution to a criminal scheme, the stronger the evidence needed to prove that the defendant withdrew from it.[36] For example, a defendant who contributes a weapon to a criminal scheme to be used by the principal actor in the commission of an offense cannot avoid legal accountability by merely asking for the gun to be returned.[37] Rather, conduct such as actual retrieval is needed.[38] This is to be contrasted with the situation of a defendant whose contribution to a criminal scheme merely involved verbal encouragement.[39] In that case, an oral communication indicating one's intentions to withdraw may be sufficient.[40] And it is also well established that, as an alternative in either of the above situations, a defendant can avoid legal accountability by providing the police with reasonable notice or by engaging in some other "proper effort" directed toward prevention of the target offense.[41]

While the nature of the conduct that will provide the basis for a withdrawal defense is varied, one limiting principle is uniform: the withdrawal must be timely.[42] For example, where the withdrawal is based on oral repudiation by the defendant, that repudiation must "be communicated far enough in advance to allow the others involved in the crime to follow suit."[43] Similarly, in the situation of a defendant who opts to withdraw by notifying law enforcement, that notification must be early enough to provide the police with a reasonable opportunity to disrupt the criminal scheme.[44] In practice, then, it must "be possible for the trier of fact to say that the accused had wholly and effectively detached himself from the criminal enterprise *before* the act with which he is charged is in the process of consummation or has become so inevitable that it cannot reasonably be stayed."[45]

None of which is to say that the defendant's conduct "must *actually prevent* the crime from occurring."[46] Indeed, just the opposite is true: the common law rule is that "[i]t is *not necessary* that the crime actually have been prevented" in order to successfully

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[35] Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").
[36] Haw. Rev. Stat. Ann. § 702-224 cmt ("More will be required of one who distributes arms than one who offers verbal encouragement.").
[37] Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).
[38] Ala. Code § 13A-2-24 cmt.; DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); *see, e.g.*, *State v. Adams*, 225 Conn. 270, 623 A.2d 42 (1993) ("Depriving this act of its effectiveness would have required a further step, such as taking back the weapon"); *State v. Miller*, 204 W.Va. 374, 513 S.E.2d 147 (W.Va.1998) (where defendant gave her son gun and drove him to where his father was, after which son shot and killed father, her abandonment defense rejected because she "did not do everything practicable to abandon the enterprise," such as taking back the gun or driving her son from where the father was located).
[39] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).
[40] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).
[41] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).
[42] Haw. Rev. Stat. Ann. § 702-224 cmt ("What the erstwhile accomplice must do to relieve the accomplice of potential liability will vary depending on the conduct that establishes the accomplice's complicity.").
[43] *State v. Formella*, 158 N.H. 114, 116–19, 960 A.2d 722, 724–26 (2008); *see, e.g.*, *People v. Brown*, 26 Ill.2d 308, 186 N.E.2d 321 (1962); *Commonwealth v. Chhim*, 447 Mass. 370, 851 N.E.2d 422 (2006).
[44] DRESSLER, *supra* note 7, at § 30.07; LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).
[45] *Id*. (quoting *People v. Lacey*, 49 Ill. App. 2d 301, 307, 200 N.E.2d 11, 14 (Ill. App. Ct. 1964)).
[46] *Id.*

raise a withdrawal defense.[47] What matters is that the defendant's conduct was reasonably calculated towards negating—whether directly or indirectly—his or her initial contribution to a criminal scheme, thereby ameliorating the justification for imposing legal accountability in the first place.[48]

The Model Penal Code provides the basis for most efforts at codifying a withdrawal defense to accomplice liability.[49] The relevant code language is contained in Model Penal Code § 2.06(6)(c), which provides:

> (6) Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
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> . . . .
>
> (c) he terminates his complicity prior to the commission of the offense and
>
> (i) wholly deprives it of effectiveness in the commission of the offense; or
>
> (ii) gives timely warning to the law enforcement authorities or otherwise makes proper effort to prevent the commission of the offense.

This language, as the explanatory note highlights, was intended to codify a "special defense[] to a charge that one is an accomplice," which "relates to a termination of the actor's complicity prior to the commission of the offense."[50] More specifically, the specified defense "requires that the actor wholly deprive his conduct of its effectiveness in the commission of the offense or that he give timely warning to law enforcement authorities or otherwise make a proper effort to prevent the commission of the offense."[51]

With respect to the requirement in subsection (6)(c)(i) that "the accomplice must deprive his prior action of its effectiveness," the Model Penal Code commentary explains that "[t]he action needed for that purpose will, of course, vary with the accessorial behavior."[52] So, for example, "[i]f the behavior consisted of aid, as by providing arms, a statement of withdrawal ought not to be sufficient; what is important is that he get back the arms, and thus wholly deprive his aid of its effectiveness in the commission of the

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[47] *Id.*; *see, e.g.,* Ky. Rev. Stat. Ann. § 502.040 cmt. (Withdrawal defense "allows an accomplice to avert liability through appropriate withdrawal, even though the offense which he aids is ultimately committed"); *State v. Allen*, 47 Conn. 121 (1879).

[48] In this sense, the withdrawal defense to accomplice liability "is clearly more lenient" than the renunciation defense to general inchoate crimes, which is typically comprised of an "'actual prevention' standard." ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Another way the withdrawal defense to accomplice liability is more lenient is that it generally has no subjective renunciation requirement (i.e., any motive underlying the withdrawal will suffice), whereas for general inchoate crimes the renunciation must be voluntary. *See id.*

[49] *See generally* Model Penal Code § 2.06(6) cmt. at 323-24.

[50] Model Penal Code § 2.06(6): Explanatory Note.

[51] *Id.*

[52] Model Penal Code § 2.06(6) cmt. at 326.

offense."[53] Conversely, if "complicity inhered in request or encouragement, countermanding disapproval may suffice to nullify its influence, providing it is heard in time to allow reconsideration by those planning to commit the crime."[54]

Thereafter, the Model Penal Code commentary explains that subsection (6)(c)(ii) speaks to the fact that "[t]here will also be cases where the only way that the accomplice can deprive his conduct of effectiveness is to make independent efforts to prevent the crime."[55] Even under these circumstances, the drafters of the Model Penal Code believed that "the law should nonetheless accord the possibility of gaining an immunity, provided there is timely warning to the law enforcement authorities or there otherwise is proper effort to prevent commission of the crime."[56] That said, the drafters also believed that "[t]he sort of effort that should be demanded turns so largely on the circumstances that it does not seem advisable to attempt formulation of a more specific rule."[57] To that end, "Subsection (6)(c)(ii) accordingly provides that the actor must make 'proper effort' to prevent the commission of the offense."[58]

The Model Penal Code treatment of withdrawal in the complicity context is to be distinguished from its treatment of renunciation in the context of the general inchoate crimes. For example, 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 success of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose."[59]

The key phrase in these formulations—"complete and voluntary"—is defined in Model Penal Code § 5.01(4). This provision 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."[60] 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

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] 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.
[60] *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.

advantageous time or to transfer the criminal effort to another but similar objective or victim."[61]

Overall, the Model Penal Code's renunciation defense to general inchoate crimes departs from—and is ultimately narrower than—its withdrawal defense in two primary ways.[62] First, Model Penal Code's renunciation defense incorporates an "actual prevention" standard, which entails that the defendant successfully prevent the target of the solicitation or conspiracy from being consummated—whereas a "proper effort" on behalf of the defendant will suffice to establish a withdrawal defense to complicity.[63] Second, the Model Penal Code's renunciation defense incorporates a voluntariness requirement, which requires that the abandonment of criminal purpose have been motivated by something other than a desire to avoid getting caught—whereas the Model Penal Code's approach to withdrawal does not incorporate any subjective requirement (i.e., any motive underlying the withdrawal will suffice).[64]

Practically speaking, these differences mean that it is possible for a defendant to avoid legal accountability for another person's conduct yet still incur general inchoate liability for his or her own conduct under the Model Penal Code.[65] The following example is illustrative. V personally insults Y. Y is predisposed to let the insult slide, but X firmly persuades Y over the phone that he must respond with lethal violence to protect Y's reputation. X later has a change of heart (motivated, in part, by being alerted to the fact that the police were monitoring the phone call), and firmly communicates to Y his view that violence is the wrong path. However, X's proper effort at dissuading Y is unsuccessful; Y goes on to kill V anyways. On these facts, X would presumably satisfy the Model Penal Code's withdrawal standard, and, therefore, could not be deemed an accomplice to Y's murder of V. X would not, however, satisfy the Model Penal Code's narrower renunciation standard, and, therefore, could be held liable for the general inchoate crime(s) of solicitation and/or conspiracy to commit murder.

Since completion of the Model Penal Code, the drafters' recommendations concerning recognition of a withdrawal defense to complicity liability have been quite influential. It has been observed, for example, that "most of the recent recodifications"

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[61] Model Penal Code § 5.01(4).
[62] *See* ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81.
[63] *See id.*
[64] *See id.*
[65] Distinguishing renunciation from withdrawal, one commentator observes that:

> A different rule is applied where the actor's liability is predicated upon the conduct of another. In such cases the actor may achieve immunity if he or she terminates complicity and makes a 'proper effort' to prevent companions from committing the crime. The failure of such an actor to prevent the offense is not an absolute bar to the defense if he or she has made a reasonable effort to do so. The former associates, of course, are liable for the crimes the subsequently they go on to complete. While avoiding liability for later offenses, the former accomplice would still seem to retain liability for any inchoate offenses, such as attempt or conspiracy, which he or she may have committed prior to abandonment. As to these offenses, the actor will be subject to the ordinary application of the law and will retain criminal liability unless he or she has succeeded in preventing the offense attempted or in thwarting the success of any conspiracy he or she may have joined.

Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1, 34–35 (1989).

incorporate general provisions addressing when "withdrawal is a bar to accomplice liability" that are based on Model Penal Code § 2.06(6)(c).[66] And courts in jurisdictions that have not undertaken comprehensive code reform efforts have relied on Model Penal Code § 2.06(6)(c) through case law.[67]

While the Model Penal Code approach to withdrawal has had a broad influence on American criminal codes, legislatures in reform jurisdictions also routinely modify it. Many of these revisions are clarificatory or organizational; however, some are substantive.[68] Among these varied substantive revisions, two are particularly noteworthy.[69]

First, various states narrow the scope of a withdrawal defense to accomplice liability by demanding that "the withdrawal must not be motivated by a belief that the circumstances increase the probability of detection or apprehension or render accomplishment of the crime more difficult, or by a decision to postpone the crime to another time or transfer the effort to another victim or objective."[70] Practically speaking, this imports the "voluntariness" and "completeness" requirements applicable to the renunciation defense provided by the Model Penal Code to general inchoate crimes.

Second, various states *potentially expand* the applicability of a withdrawal defense by explicitly applying it to those who cause crime to occur.[71] This revision addresses a noted "inconsistency" in Model Penal Code § 2.06(6),[72] which, as drafted, only addresses when "a person is not an accomplice in an offense committed by another person."[73] Importantly, accomplice liability is only one of two bases for holding one person legally accountable for the conduct of another under the Model Penal Code.[74]

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[66] Model Penal Code § 2.06(6) cmt. at 325 ("Termination defenses have been provided by most, though not all, of the recently revised and proposed codes."); *see, e.g.*, Ark. Code Ann. § 5-2-404; Del. Code Ann. tit. 11, § 273; Haw. Rev. Stat. § 702-224; Ill. Comp. Stat. Ann. ch. 720, § 5/5-2; Mont. Code Ann. § 45-2-302; N.H. Rev. Stat. Ann. § 626:8; Pa. Cons. Stat. Ann. tit. 18, § 306.

[67] *See, e.g., United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (citing Model Penal Code § 2.06(6)(c); *compare Kaiser v. Hannigan*, No. CIV. 97-3239-DES, 1999 WL 1289470, at *6 (D. Kan. Dec. 16, 1999), *aff'd sub nom. Kaiser v. Nelson*, 229 F.3d 1163 (10th Cir. 2000) (discussing Kansas case law).

[68] *See, e.g.*, Ala. Code § 13A-2-24 (adding third alternative of giving timely warning to intended victim); Colo. Rev. Stat. Ann. § 18-1-604 (must give timely warning to victim or police); Mo. Ann. Stat. § 562.041 (only alternative (i)); Utah Code Ann. § 76-2-307 (alternative (i) or timely warning to police or victim); Ind. Code Ann. § 35-41-3-10 (voluntarily abandoned his efforts to commit it and voluntarily prevented its commission); Me. Rev. Stat. Ann. tit 17-A, § 57 (informs accomplice of his abandonment and leaves the scene); Minn. Stat. Ann. § 609.05 (abandons purpose and makes a reasonable effort to prevent); Ohio Rev. Code § 2923.03 (terminates complicity, manifesting a complete and voluntary renunciation); Wis. Stat. Ann. § 939.05 (voluntarily changes his mind and notifies other parties within a reasonable time to allow them to withdraw).

[69] Note that the Model Penal Code formulation requires that the defendant "wholly deprive *it* of effectiveness." "It seems clear that this is meant to refer back to 'his complicity.'" ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that "[s]ome codes make this clear by repeating the phrase.")

[70] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) (citing Conn. Gen. Stat. Ann. § 53a-10; N.Y. Penal Law § 40.10; *see, e.g.*, Alaska Stat. § 11.16.120; Ariz. Rev. Stat. Ann. § 13-1005; Ky. Rev. Stat. Ann. § 502.040; N.J. Stat. Ann. § 2C:2-6;

[71] *See, e.g.*, Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

[72] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

[73] Model Penal Code § 2.06(6).

[74] *Compare* Model Penal Code § 2.06(2)(c) ("A person is legally accountable for the conduct of another person when . . . (c) he is an accomplice of such other person in the commission of the offense") *with* Model Penal Code § 2.06(2)(a) ("A person is legally accountable for the conduct of another person when . .

The other basis, often referred to as the innocent instrumentality doctrine, attaches legal accountability where one person, "acting with the kind of culpability that is sufficient for the commission of the offense, [] causes an innocent or irresponsible person to engage in such conduct."[75] Textually speaking, then, the Model Penal Code suggests that a withdrawal defense is not available to those held criminally liable for causing crime to occur[76] —whereas these reform states explicitly clarify that it is.[77]

Modifications aside, it is nevertheless clear that the Model Penal Code approach to withdrawal has robust support in American legal practice. And it is also supported by American legal commentary.[78] This commentary clarifies that at the heart of both the withdrawal defense and renunciation defense is the basic principle 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.[79]

Consistent with this principle, Wayne R. LaFave argues that:

> Permitting withdrawal under the circumstances [specified by Model Penal Code § 2.06(6)] so as to avert criminal liability is certainly appropriate. One of the objectives of the criminal law is to prevent crime, and thus it is desirable to provide an inducement to those who have counseled and aided a criminal scheme to take steps to deprive their complicity of effectiveness.[80]

With that in mind, LaFave goes on to observe that "[w]hether the added requirements imposed by some statutes concerning the person's motives are desirable is debatable."[81] True, "one who withdraws merely because of a belief that the chances of

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. acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct").

[75] Model Penal Code § 2.06(2)(a).

[76] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 83.

[77] Ky. Rev. Stat. Ann. § 502.040; Ala. Code § 13A-2-24.

[78] *See, e.g.*, LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. For an argument that a person who withdraws lacks the *mens rea* of accomplice liability, see Sherif Girgis, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 460, 484–85 (2013).

[79] Moriarty, *supra* note 65, at 5; *see also* LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.1(d)("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.").

[80] LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d).

[81] *Id.*

apprehension have increased has not truly reformed."[82] That said, it "may be argued that even one acting under such a motive should be induced to take action directed toward prevention of the crime."[83]

This is particularly true give that—as Paul Robinson observes—a person who makes a "proper effort" at withdrawing from a crime that is *not voluntary or complete* will "nonetheless be eligible for liability for an inchoate offense."[84] As Robinson proceeds to argue:

> Where the defendant abandons his complicity in a way that generally neutralizes the assistance he provided—as is generally assured by the "proper effort" requirements described above—he no longer merits liability for the full substantive offense. His culpability is more akin to that of an attemptor: while he has not in fact caused or contributed to the offense, he did try to do so. In other words, where the "proper effort" standard is met, the defendant ought to escape complicity liability for the full offense, but ought nonetheless be eligible for liability for an inchoate offense, unless he also satisfies the more demanding complete and voluntary renunciation defense for inchoate offenses.[85]

It's important to point out that the broad support for the substantive policies that comprise the Model Penal Code's withdrawal 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 withdrawal defense on the government beyond a reasonable doubt,[86] the majority approach is to require the defendant to persuade the

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[82] *Id.*
[83] *Id.*
[84] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see* LAFAVE, 2 SUBST. CRIM. L. § 13.3(d) ("One who has participated in a criminal scheme to a degree sufficient for accomplice liability may also have engaged in conduct which brings him within the definition of conspiracy or solicitation. Whether his withdrawal is a defense to those crimes is a separate matter.").
[85] ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81; *see also* Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981) ("Retributively oriented commentators note that abandonment makes us reassess our vision of the defendant's blameworthiness or deviance."); LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 11.4 ("All 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.") (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).
[86] *See, e.g.*, Model Penal Code § 1.12(2)(b) (defendant bears the burden of persuasion only where the statute specifically requires him to prove the matter by a preponderance); Model Penal Code § 2.06(6) (withdrawal defense to accomplice liability does not require defendant to prove by a preponderance); ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81. Practically speaking, this means that once the defendant has met his or her burden of raising the issue of withdrawal, the prosecution is then required to *disprove* the presence of a withdrawal defense beyond a reasonable doubt. Absent this showing by the government, the defendant cannot be held legally accountable for a crime committed by another person.

factfinder of the presence of a withdrawal defense beyond a preponderance of the evidence.[87]

Scholarly commentary emphasizes a range of policy rationales, which help to explain this departure from the Model Penal Code. First, "as an accurate reflection of reality, the defense will be relatively rare." [88] Second, the absence of a withdrawal defense 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."[89] Third, and perhaps most important, presenting a withdrawal defense is "tantamount to an admission that [the] defendant did participate in a criminal [scheme]."[90] 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."[91]

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.[92] "Where," as the *Smith* Court

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[87] *See* LAFAVE, *supra* note 7, at 2 SUBST. CRIM. L. § 13.3(d) ("The prevailing view is that the defendant has the burden of proof with respect to such withdrawal."); ROBINSON, *supra* note 6, 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."); *United States v. Burks*, 678 F.3d 1190, 1196 (10th Cir. 2012) ("The burden of proving withdrawal in the conspiracy context unequivocally rests with the defendant, and we see no basis for distinguishing situations when accomplice liability is at issue."); *compare State v. Currie*, 267 Minn. 294, 306–08, 126 N.W.2d 389, 398–99 (1964) ("We think the rule ought to be that, once the state has established a prima facie case, the burden rests on the defendant of going forward with the evidence of withdrawal to a point where it can be said a reasonable doubt exists and that, having reached that point, the burden rests on the state of proving beyond a reasonable doubt that the defendant remained as a participant in the consummation of the crime."); Ala. Code § 13A-2-24 ("The burden of injecting this issue is on the defendant, but this does not shift the burden of proof.").

[88] Buscemi, *supra* note 8, at 1173.

[89] *Id.*

[90] *Id.*

[91] ROBINSON, *supra* note 6, 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 7, at 1 SUBST. CRIM. L. § 1.8 (quoting Model Penal Code § 1.12, cmt. at 194).

[92] *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 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

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."[93] This is particularly true in the context of repudiating a criminal enterprise, where "the informational asymmetry heavily favors the defendant."[94] Whereas "[t]he defendant knows what steps, if any, he took to dissociate" himself from the criminal enterprise,[95] it may be "nearly impossible for the Government to prove the negative that an act of withdrawal never happened."[96] And, perhaps most importantly, "[f]ar from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense."[97] 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."[98]

Consistent with the above considerations, the RCC incorporates a broadly applicable withdrawal defense to legal accountability, subject to proof by the defendant beyond a preponderance of the evidence. The RCC's recognition of a broadly applicable withdrawal defense comprised of broad "proper efforts" standard 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 two notable ways.[99] First, RCC § 213(a) clarifies that these

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> 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 6, 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)).

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

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

[95] *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.*

[96] *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.").

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

[98] *Id.*

[99] RCC § 213 is based on, but not identical to, general withdrawal provision incorporated into the Delaware Reform Code. More specifically, that provision reads as follows:

> (b) EXCEPTION TO ACCOUNTABILITY. Unless the statute defining the offense provides otherwise, a person is not so accountable for the conduct of another, notwithstanding Subsection (a), if . . . .
>
> (3) before commission of the offense, the person terminates his or her efforts to promote or facilitate its commission, and
>
> (A) wholly deprives his or her prior efforts of their effectiveness; or
>
> (B) gives timely warning to the proper law enforcement authorities;
>
> or

exceptions apply equally across forms of legal accountability. Second, RCC § 213(b) establishes that the burdens of production and persuasion with respect to a withdrawal defense rests upon the defendant. These departures are supported by legislation, case law, and commentary.[100]

> (C) otherwise makes proper efforts to prevent the commission of the offense . . . .

Proposed Del. Crim. Code § 211 (2017).

[100] *See supra* notes 68-98 and accompanying text. RCC § 213 also departs from Model Penal Code formulation, which ambiguously requires that the defendant "wholly deprive *it* of effectiveness." However, "[i]t seems clear that this is meant to refer back to 'his complicity.'" ROBINSON, *supra* note 6, at 1 CRIM. L. DEF. § 81 (and observing that "[s]ome codes make this clear by repeating the phrase.") For this reason, RCC § 213 replaces "it" with "his or her prior efforts."

RCC § 304. EXCEPTIONS TO GENERAL INCHOATE LIABILITY.

(a) *Exceptions to General Inchoate Liability.* A person is not guilty of solicitation to commit an offense under RCC § 302 or conspiracy to commit an offense under RCC § 303 when:

(1) The person is a victim of the target offense; or

(2) The person's criminal objective is inevitably incident to commission of the target offense as defined by statute.

(b) *Exceptions Inapplicable Where Liability Expressly Provided by Offense.* The exceptions established in subsection (a) do not limit the criminal liability expressly provided for by an individual offense.

COMMENTARY

Explanatory Note. RCC § 212 establishes two exceptions to the general principles of inchoate liability set forth in RCC § 302, Solicitation; and RCC § 303, Conspiracy.

Subsection (a)(1) excludes the victim of an offense from being held liable for soliciting or conspiring in its commission. For example, a minor who asks an adult to engage in sex may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested that adult to perpetrate statutory rape against a minor.[1] And if that adult accepts the solicitation, then the minor may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed to the commission of a statutory rape against the minor.[2] Nevertheless, subsection (a)(1) precludes holding the minor criminally liable for soliciting or conspiring in the commission of the minor's own victimization.

Subsection (a)(2) excludes an actor whose criminal objective is inevitably incident to commission of an offense—as defined by statute[3]—from being held liable for

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[1] *See* RCC § 302(a) ("A person is guilty of a solicitation to commit an offense when, acting with the culpability required by that offense, the person: (1) Purposely commands, requests, or tries to persuade another person; (2) To engage in or aid the planning or commission of conduct, which, if carried out, will constitute that offense or an attempt to commit that offense; and (3) The offense solicited is, in fact, [a crime of violence].").

[2] *See* RCC § 303(a) ("A person is guilty of a conspiracy to commit an offense when, acting with the culpability required by that offense, the person and at least one other person: (1) Purposely agree to engage in or aid the planning or commission of conduct which, if carried out, will constitute that offense or an attempt to commit that offense; and (2) One of the parties to the agreement engages in an overt act in furtherance of the agreement."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 29.09[D] (6th ed. 2012).

[3] That the person's criminal objective must be inevitably incident to commission of an offense *as defined by statute* clarifies that subsection (a)(2) only applies when the target offense could not have been committed without the defendant's planned participation under any set of facts. This is to be distinguished from the situation of a defendant whose planned participation was merely useful or conducive to the commission of target offense *as charged in a particular case*.

For example, the role of a doorman in protecting a drug house from being robbed or ripped off may be incidental to the main business of that home, the sale and purchase of controlled substances. However, because it is entirely possible to distribute controlled substances without the assistance of a doorman, the doorman's conduct—as contrasted with that of the purchaser—is not inevitably incident to the commission of the distribution of controlled substances. Therefore, subsection (a)(2) would not

soliciting or conspiring in its commission. For example, a prospective purchaser who approaches a dealer in the hopes of securing a supply for personal use may technically satisfy the requirements of general solicitation liability in the sense of having purposefully requested the seller to perpetrate the distribution of a controlled substance.[4] And if that dealer accepts the solicitation, then the purchaser may technically satisfy the requirements of general conspiracy liability in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[5] Nevertheless, because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances, subsection (a)(2) precludes holding the purchaser criminally liable for soliciting or conspiring in the commission of drug distribution.[6]

Subsection (b) establishes an important limitation on the exceptions to solicitation and conspiracy liability set forth in subsection (a), namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 304 is a *default* bar on criminal liability for victims and those who engage in conduct inevitably incident to commission of an offense. It merely establishes that such actors are excluded from the general principles of solicitation and conspiracy liability set

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preclude holding a prospective doorman who offers a drug dealer his services in return for a portion of the proceeds liable for soliciting or conspiring to commit the distribution of controlled substances.

For another example, consider a prospective bribery scheme involving bribe offeror, X, intermediary Y, and public official, Z. X gives Y $20,000 in cash with instructions to approach Z and propose a transaction whereby Z will receive the money in return for providing X with a government license to which X is not otherwise entitled. If Y agrees with X to participate in this scheme and approach Z, subsection (a)(2) would not preclude holding Y liable for conspiring to commit the crime of bribe offering. Although Y's agreed-upon role as middleman might be useful and conducive to the crime of bribe offering *as perpetrated on these facts*, it is not strictly necessary to consummate the crime of bribe offering, which can be completed without an intermediary. Therefore, subsection (a)(2) would not preclude holding Y liable for conspiring with X to commit the crime of bribe offering.

[4] *See supra* note 1.

[5] *See supra* note 2.

[6] In contrast, subsection (a)(2) would not preclude holding the *dealer* liable for conspiring to distribute controlled substances based on an agreement with the purchaser. This is because the dealer's criminal objective—the *distribution* of controlled substances—is not inevitably incident to commission of the target offense, but rather, actually *constitutes* the target offense (i.e., provides the actual basis for a drug distribution charge). According to the same logic, subsection (a)(2) would neither preclude holding the purchaser liable for conspiring to *possess* controlled substances based on an agreement with the dealer.

This treatment is consistent with the RCC approach to dealing with conduct inevitably incident in the context of complicity. Specifically, RCC § 212(a)(2) generally precludes holding: (1) a drug purchaser liable for *distribution* as an accomplice to the drug dealer; and (2) a drug dealer liable for *possession* as an accomplice to the *drug purchaser*. Conversely, RCC § 212(a)(2) does not preclude holding: (1) a drug dealer directly liable for distribution; or (2) a drug purchaser directly liable for possession. And because such actors can be held directly liable for committing an offense, RCC § 304(a)(2) would not preclude holding them liable for conspiring to commit that offense.

Note that in a case where (1) the agreed-upon distribution of controlled substances is consummated and (2) the dealer is subsequently convicted for both distribution and conspiracy to distribute, the conspiracy conviction would merge on the basis that the distribution conviction reasonably accounts for the underlying criminal agreement. *See* RCC § 214(a)(4) (establishing presumption of merger whenever "[o]ne offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each").

forth in RCC §§ 302 and 303.[7] As such, the legislature remains free to impose criminal liability upon these general categories of protected actors on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.[8]

Relation to Current District Law. RCC § 304 codifies and fills in gaps in current District law to improve the clarity and proportionality of the revised statutes.

RCC § 304(a)(1) and (b): Relation to Current District Law on General Inchoate Liability for Victims. There is no current District law directly addressing whether, as a general principle of criminal law, a victim can be held criminally liable for soliciting or conspiring in the commission of a crime perpetrated against him or herself. That said, this exception is consistent with the legislative intent underlying some current statutory offenses enacted by the D.C. Council. And it also has been explicitly recognized by two century-old judicial decisions from the District interpreting congressionally enacted statutes that have since been repealed in the context of accomplice liability.

No current District criminal statute explicitly exempts victims from the scope of general solicitation or conspiracy liability. However, an analysis of the child sex abuse statutes contained in the D.C. Code illustrates why this exception is consistent with legislative intent. For example, the District's first-degree child sex abuse offense subjects to potential life imprisonment a person who, "being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."[9] And the District's second-degree child sex abuse offense subjects to ten years of imprisonment a person who, "being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."[10] These current offenses exist specifically for the *protection* of minor-victims.[11]

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[7] RCC § 304 should also be construed to exclude victims and conduct inevitably incident from the scope of general attempt liability based on a solicitation. For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation could potentially satisfy the requirements for attempted distribution of controlled substances, given both the proximity and likelihood that the deal will be consummated. *See generally* RCC § 301(a). Nevertheless, subsection (a)(2) should be understood to preclude holding the purchaser criminally liable for attempting to perpetrate the distribution of controlled substances on the basis of that solicitation.

[8] The following situation is illustrative: X, the bribe offeror in a two-person corruption scheme involving public official Y, proposes to give Y $20,000 in cash in return for a government license to which X is not otherwise entitled. On these facts, X *cannot* be held liable for soliciting the commission of the crime of *bribe receiving* under RCC § 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his conduct under a statute that, through its express terms, prohibits the *offering of a bribe*.

The same analysis is applicable to general conspiracy liability. For example, if Y agrees to the transaction, X *cannot* be held liable for conspiring in the commission of the crime of *bribe receiving* under RCC § 304 since X's criminal objective—the *giving* of a bribe—is inevitably incident to Y's perpetration of that crime. X can, however, be held criminally liable for his own conduct under a statute that, through its express terms, prohibits *bribery agreements.*

[9] D.C. Code § 22-3008.

[10] D.C. Code § 22-3009.

[11] *See* D.C. Code § 22-3011(a) ("Neither mistake of age nor consent is a defense to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403.");

At the same time, the normal principles of general inchoate liability derived from the District's general solicitation statute, D.C. Code § 22-2107,[12] and general conspiracy statute, D.C. Code § 22-1805a,[13] would appear to authorize treating a minor-victim criminally liable for soliciting or conspiring in the perpetration of child sex abuse against him or herself.[14] Consider, for example, the situation of a minor who both initiates and

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Ballard v. United States, 430 A.2d 483, 486 (D.C. 1981) ("[T]he statutory proscription against carnal knowledge is intended to protect females below the age of sixteen, regardless of the use of force or consent, from any sexual relationship.").

[12] The relevant statutory text 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.

D.C. Code § 22-2107.

[13] The relevant statutory text reads:

> (a)(1) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.
>
> (2) If 2 or more persons conspire to commit a crime of violence as defined in § 23-1331(4), each shall be fined not more than the amount set forth in § 22-3571.01 nor the maximum fine prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or imprisoned not more than 15 years nor the maximum imprisonment prescribed for the offense, the commission of which was the object of the conspiracy, whichever is less, or both.
>
> (b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose . . . .

D.C. Code § 22-1805a.

[14] The District's jury instruction on solicitation liability summarizes current District law as follows: "[The defendant solicited another person] voluntarily, on purpose, and not by mistake or accident. 'Solicit' means to request, command, or attempt to persuade." CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 4.500—SOLICITATION (5th ed. 2017).

And the District's jury instruction on conspiracy liability summarizes current District law as follows:

> [A] conspiracy is a kind of partnership in crime. For any defendant to be convicted of the crime of conspiracy, the government must prove two [three] things beyond a reasonable doubt: first, that [during (the charged time period)] there was an agreement to [^] [describe object of conspiracy]; [and] second, that [^] [name of defendant] intentionally joined in that agreement; [and third, that one of the people involved in the conspiracy did one of the overt acts charged].

agrees to a sexual act or contact with an adult. Under these circumstances, it might be said that the minor purposefully solicited and conspired with the adult to commit statutory rape in a manner sufficient to satisfy the requirements of general inchoate liability. In practical effect, then, applying general principles of solicitation and conspiracy liability to the District's child sex abuse statutes would mean that a minor may be subject to significant levels of criminal liability.

Treating the minor-victim of a statutory rape in this way seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's statutory rape offenses. Given these problems, it's unsurprising that reported District case law involving prosecutions for first or second-degree child sex abuse do not appear to ever include charges of this nature. This example may also indicate that—from a broader legislative and executive perspective—a victim exception to general inchoate liability is implicitly understood to exist in District law and practice.

This kind of exception has also been explicitly recognized in the complicity context through two century-old District judicial decisions in the course of interpreting congressionally-enacted statutes that have since been repealed. Although in both cases the victim exceptions to accomplice liability were recognized for testimonial/evidentiary purposes, and not because the would-be accomplices were themselves being prosecuted for aiding or abetting the target offenses, the holding in each case remains relevant. In the first case, *Yeager v. United States* (1900), the U.S. Court of Appeals for the D.C. Circuit (CADC) determined that the victim of an offense criminalizing sexual intercourse with a female under sixteen years of age could not be deemed an accomplice to that offense precisely *because* she was victim of the party committing the act.[15] In the second case, *Thompson v. United States* (1908), the U.S. Court of Appeals for the District of Columbia applied similar reasoning in holding that a woman who consented to an illegal abortion could not be deemed an accomplice in the commission of an offense criminalizing the procurement of a miscarriage.[16]

Id. at § 7.102.

[15] *Yeager v. United States*, 16 App. D.C. 356, 357, 360 (D.C. Cir. 1900) ("The crime is committed against her, and not with her. She is, by force of the law, victim and not *particeps criminis* or accomplice.").

The relevant statute, as quoted in *Yeager*, reads:

> Every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction, . . . shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offense for not more than fifteen years and for each subsequent offense not more than thirty years.

Id.

[16] *Thompson v. United States*, 30 App. D.C. 352, 362–63 (D.C. Cir. 1908) (the woman whose "miscarriage has been produced, though with her consent, [] is regarded as his victim, rather than an accomplice.").

The relevant statute, as quoted in *Thompson*, reads:

> Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health, and under the direction of

Another relevant aspect of District law is the *de facto* victims exception incorporated into the District's prostitution offense. The relevant criminal statute, D.C. Code § 22-2701, codifies a general policy of excluding "children"—defined as anyone under the age of 18[17]—from criminal liability for prostitution.[18] Beyond creating a general immunity from prosecution for victimized children (including, presumably, those who might otherwise satisfy the requirements of accomplice liability), this statute further requires the police to "refer any child suspected of engaging in or offering to engage in a sexual act or sexual contact in return for receiving anything of value to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22-1834."[19] These provisions appear to reflect the D.C. Council's view, articulated in supporting legislative history, that "[v]ictims of sexual abuse should not be arrested, prosecuted, or convicted."[20]

RCC § 304(a)(1) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding the victim of an offense from the scope of general solicitation and conspiracy liability unless expressly provided by statute.[21] (This is consistent with the similar exclusion for victims applicable to legal accountability under RCC § 212.[22])

RCC § 304(a)(2) and (b): Relation to Current District Law on General Inchoate Liability for Conduct Inevitably Incident. A conduct inevitably incident exception to general inchoate liability is generally consistent with District case law recognizing Wharton's Rule. This exception is also consistent with the legislative intent underlying

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> a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or, if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.

Id.

[17] D.C. Code § 22-2701(d)(3).

[18] *See generally* D.C. Code § 22-2701. More specifically, subsection (a) of the relevant statute makes it "unlawful for any person to engage in prostitution or to solicit for prostitution," subject to the "[e]xcept[ion] provided in subsection (d)." *Id.* Thereafter, subsection (d) creates an exception from criminal liability for any "child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value." *Id.* at § (d)(1).

[19] *Id.* at § (d)(2).

[20] COUNCIL OF THE DISTRICT OF COLUMBIA, COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY, COMMITTEE REPORT ON BILL 20-714, *Sex Trafficking of Children Prevention Amendment Act of 2014*, at 5 (Nov. 7, 2014). The Committee Report goes on to observe that:

> Without this immunity, law enforcement can use threats of prosecution to coerce victims into testifying as witnesses and into participating in treatment programs. However, this coercion inevitably creates a relationship of antagonism between the government and these victims, causing victims to fear and distrust the police, prosecutors and services provided by the government, and being less willing to cooperate as trial witnesses or program participants.

Id.

[21] Note that under RCC § 304(b) the legislature remains free to subject victims to general inchoate liability on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[22] *See generally* Commentary on RCC § 212(a)(1).

current statutory offenses enacted by the D.C. Council. And it is consistent with conduct inevitably incident exception to accomplice liability, which the D.C. Court of Appeals (DCCA) has implicitly recognized through *dicta* on at least one occasion.

No current District criminal statute explicitly recognizes an exemption to general solicitation or conspiracy liability for an actor whose criminal objective is inevitably incident to the commission of an offense. That said, DCCA case law recognizes the doctrine known as Wharton's Rule, which has been described as a "specialized application" of the conduct inevitably incident exception to conspiracy liability.[23]

Specifically, Wharton's Rule "is an 'exception to the general principle that a conspiracy and the substantive offense that is its immediate end' are discrete crimes for which separate sanctions may be imposed."[24] As the court in *Pearsall v. United States* observed:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to require necessarily the participation of two people for its commission. [] For example, Wharton's Rule applies to offenses such as adultery, incest, bigamy, and duelling that require concerted criminal activity, a plurality of criminal agents and is essentially an aid to the determination of legislative intent. [] Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule bar convictions for both the substantive offense and conspiracy to commit that same offense . . . . .
>
> In determining whether more than one person is necessary to commit the offense, it is recognized that a participant is necessary to the commission of a crime, for purposes of merging substantive and conspiracy counts, if the substantive statute requires the [participant's] existence as an abstract legal element of the crime . . . .
>
> The crimes that traditionally fall under Wharton's Rule share three characteristics:
>
> [1] [t]he parties to the agreement are the only persons who participate in commission of the substantive offense . . . . [2] the immediate consequences of the crime rest on the parties themselves rather than on society at large . . . . and [3] the agreement that attends the substantive offense does not appear likely to pose the distinct kinds of threats to society that the law of conspiracy seeks to avert.[25]

[23] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 83 (2d. Westlaw 2018).
[24] *Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002) (quoting *Iannelli v. United States*, 420 U.S. 770, 95 S. Ct. 1284, 43 L. Ed. 2d 616 (1975)).
[25] *Pearsall*, 812 A.2d at 962 (internal citations, quotations, and footnotes removed); *see also id.* n.11 ("Even if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment.")

In light of these principles, the *Pearsall* court rejected the defendant's claim that his dual convictions for (1) conspiracy to commit armed robbery and (2) armed robbery premised on his role as an accomplice violated Wharton's Rule.[26]

At the heart of the DCCA's reasoning is a recognition that it is "entirely possible for appellant to commit the offense of armed robbery . . . without the participation of anyone else."[27] True, consummation of "armed robbery may be *easier* with the assistance of others."[28] Nevertheless, "such assistance is not *necessary* to commit the offense," i.e., "[a]rmed robbery does not require proof that there was more than the one actor."[29] And "[s]ince the focus of a Wharton's Rule inquiry is on the statutory elements, rather than the facts proved at trial, that the evidence showed several persons participated in the armed robbery does not make the rule applicable."[30] Accordingly, the *Pearsall* court concluded, "Wharton's Rule does not preclude conviction in a single trial of conspiracy to commit armed robbery and the substantive offense of armed robbery or its lesser-included offense of attempted armed robbery."[31]

Both the general recognition of Wharton's Rule in *Pearsall* as well as DCCA's decision to uphold the defendant's conspiracy conviction in light of it provides judicial support for a conduct inevitably incident exception to conspiracy liability.[32] The conduct inevitably incident exception, like Wharton's Rule, has the practical effect of curtailing general conspiracy liability where the target offense necessarily requires the participation of two parties as a matter of law.[33] And the conduct inevitably incident

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[26] *Id.* at 962.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* (internal citations and quotations omitted).
[31] *Id.* at 963.
[32] As the commentary to the D.C. jury instruction on conspiracy observes:

> Under Wharton's Rule, an agreement by two people to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two people for its commission. Typically, this Rule applies to offenses such as adultery, incest, bigamy, and dueling that require concerted activity. Only where it is impossible under any circumstances to commit the substantive offense without cooperative action, does Wharton's Rule, under a double jeopardy analysis, bar convictions for both the substantive offense and the conspiracy to commit that same offense. *See Pearsall v. U.S.*, 812 A.2d 953 (D.C. 2002); *U.S. v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993). The focus of Wharton's Rule is on the statutory elements of an offense, rather than the facts proved at trial. Thus, an armed robbery, for example, does not require proof that there was more than one actor and Wharton's Rule does not apply in such circumstances. *Pearsall*, 812 A.2d at 962.

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, INSTRUCTION NO. 7.102—CONSPIRACY (5th ed. 2017).

[33] *See, e.g., State v. Roldan*, 314 N.J. Super. 173, 182–83, 714 A.2d 351, 356 (App. Div. 1998) (Wharton's Rule holds that "where an agreement between two parties is inevitably incident to the commission of a crime, such as a sale of contraband, 'conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained.'") (quoting *Iannelli v. United States*, 420 U.S. 770, 773, 95 S.Ct. 1284, 1288, 43 *L. Ed.*2d 616, 620 (1975)). For discussion of the differences between Wharton's Rule and the conduct inevitably incident exception to conspiracy, see ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

exception, like Wharton's Rule, has no application where—as was the case in *Pearsall*—the participation of one party was merely helpful to completion of the target offense based on the facts of the case.[34]

Case law aside, an analysis of the drug statutes in the D.C. Code illustrates why a conduct inevitably incident exception to general inchoate liability is consistent with legislative intent. Compare the District's different approaches to punishing those who distribute and those who merely possess controlled substances.

The District's distribution statute makes it a thirty year felony for "any person knowingly or intentionally to manufacture, distribute, or possess, with intent to manufacture or distribute, a controlled substance," which is, in fact, "a narcotic or abusive drug" subject to classification "in Schedule I or II."[35] In contrast, the District's possession statute makes it a 180 day misdemeanor to "knowingly or intentionally to possess a controlled substance" of a similar nature.[36]

These different approaches are likewise reflected in the District's drug offense-specific attempt and conspiracy penalty provision, D.C. Code § 48-904.09, which penalizes an attempt or conspiracy to commit any particular drug offense at precisely the same level as the completed version of that drug offense.[37] This stark contrast in grading appears to reflect a legislative judgment that mere possessors are far less culpable and/or dangerous than distributors, and, therefore, should be subject to significantly less liability.[38]

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[34] *Roldan*, 314 N.J. Super. at 182–83, 714 A.2d at 356 (noting that no exception where "the evidence shows that two or more parties have entered into an agreement to engage in concerted criminal activity which goes beyond the kind of simple agreement inevitably incident to the sale of contraband") (citing *Iannelli*, 420 U.S. at 778, 95 S.Ct. at 1290, 43 L.Ed.2d at 623) (quoting *Callanan v. United States*, 364 U.S. 587, 593-94, 81 S.Ct. 321, 325, 5 L.Ed.2d 312, 317 (1961)).

[35] D.C. Code § 48-904.01(a)(1)-(2); *see id.* at (a)(2)(A) ("Any person who violates this subsection with respect to . . . A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both[.]")

[36] D.C. Code § 48-904.01(d)(1) ("It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter or Chapter 16B of Title 7, and provided in § 48-1201. Except as provided in paragraph (2) of this subsection, any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than $1,000, or both."); *compare* D.C. Code § 48-904.01(d)(2) ("Any person who violates this subsection by knowingly or intentionally possessing the abusive drug phencyclidine in liquid form is guilty of a felony and, upon conviction, may be imprisoned for not more than 3 years, fined not more than the amount set forth in § 22-3571.01, or both.").

[37] D.C. Code § 48-904.09 ("Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[38] Indeed, "[t]he District of Columbia Uniform Controlled Substances Act was enacted, in part, in order to punish offenders according to the seriousness of their conduct." *Long v. United States*, 623 A.2d 1144, 1151 n.13 (D.C. 1993) (citing Council of the District of Columbia, *Committee on the Judiciary, Report on Bill 4–123*, The Uniform Controlled Substances Act of 1981, 2–3 (April 8, 1981)) (hereinafter "Committee Report"). For example, the legislative history underlying the District's Uniform Controlled Substances Act observes that:

> While there is dispute over what penalties should be imposed, the proposition that the criminal consequences of prohibited conduct should be tied to the nature of the offense

At the same time, application of the District's normal principles of conspiracy liability would appear to authorize holding a purchaser-possessor criminally liable for conspiring in the distribution of drugs by the seller to the purchaser-possessor.[39] Consider, for example, the situation of a drug user who both initiates and pursues the purchase of a controlled substance from a seller. Under these circumstances, it might be said that the drug user purposefully agreed to commit distribution in a manner sufficient to satisfy the requirements of conspiracy liability under D.C. Code § 22-1805(a).[40] In practical effect, then, applying general principles of conspiracy liability to the District's drug distribution statute would mean that the drug user could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

A similar analysis is likewise applicable to solicitation. Although the District's general solicitation statute, D.C. Code § 22-2107, only applies to crimes of violence[41] (and therefore not to drug distribution), a solicitation might also provide the basis for attempt liability.[42] For example, where a prospective drug purchaser asks a dealer to sell him his daily supply, knowing that the dealer will agree and has the drugs on his person, the purchaser's solicitation might potentially satisfy the conduct requirement for attempt liability, given both the proximity to and likelihood that the solicitation would result in

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> committed is unassailable. Title IV of the CSA would abolish the unilateral approach of the UNA and would introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.

Committee Report, at 5. *See also, e.g.*, *Long*, 623 A.2d at 1150 (observing that "the fundamental message [in a federal case]—that the legislature did not intend to treat with equal severity on the one hand, entrepreneurs who profit from distribution of heroin or crack, and on the other hand, addicts who pool their resources to purchase drugs for their own joint use—finds meaningful support in the legislative history of the District's Uniform Controlled Substances Act."); *Lowman v. United States*, 632 A.2d 88, 98 (D.C. 1993) (Schwelb, J. dissenting) ("[A] central purpose of the enactment of the [District's] local [drug] statute was to abolish the 'unilateral approach' of the former Uniform Narcotics Act, which was viewed as not discriminating sufficiently between serious and less serious offenders, and to introduce a system in which the penalty for prohibited conduct is graded according to the nature of the offense and the schedule of the substance involved.").

[39] *See generally supra* note 14.

[40] *See generally supra* note 14.

[41] The phrase "crime of violence" 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.

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

the distribution of controlled substances.[43] If true, however, then it would follow that the drug user, by attempting to perpetrate the distribution of controlled substances, could be held liable to the same extent as the seller under D.C. Code § 48-904.09.

Treating the purchaser-possessor in a drug deal in either of the ways described above seems disproportionate, counterintuitive, and in conflict with the policy goals animating the District's controlled substances offenses.[44] Given these problems, it's unsurprising that reported District case law does not appear to include a single drug distribution prosecution involving general inchoate crimes brought against a drug user purchasing for individual use. This example may also indicate that—from a broader legislative and executive perspective—a conduct inevitably incident exception to general inchoate liability is implicitly understood to exist in District law and practice.

This conclusion is further bolstered by the conduct inevitably incident exception to accomplice liability, which the DCCA has implicitly recognized through *dicta*. In the relevant case, *Lowman v. United States*, two of the three judges on the panel held—relying on a line of prior District precedent—that an intermediary who arranges a drug transaction between "a willing buyer [and] a willing seller" can be held criminally liable for distribution as an accomplice.[45] One judge dissented, arguing that, among other problems, the majority's holding *could* logically support holding the *buyer* him or herself liable for distribution as an accomplice.[46] In response, the two-judge majority explained that they were "unpersuaded at this point that the court's interpretation of aiding and abetting might result in a buyer of illegal drugs being guilty of the crime of distribution," while citing to federal case law explicitly recognizing that "one who receives drugs does not aid and abet distribution 'since this would totally undermine the statutory scheme [by effectively writing] out of the Act the offense of simple possession."[47]

RCC § 304(a)(2) and (b) accords with the above authorities, as well as the policy considerations that support them, by excluding an actor whose criminal objective is inevitably incident to the commission of an offense as a matter of law from the scope of

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[43] *Id.*; *see also State v. Fristoe*, 135 Ariz. 25, 658 P.2d 825 (Ariz. App. 1982) (mere solicitation can amount to an attempt); *Ward v. State*, 528 N.E.2d 52 (Ind. 1988) (same); *but see Tyler v. State*, 587 So. 2d 1238 (Ala. Crim. App. 1991) (mere solicitation cannot amount to attempt).

[44] *See* sources cited *supra* note 38; *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that if every purchaser were to be "deemed an aider and abettor to [distribution]," this would effectively "write out of the Act the offense of simple possession, since under such a theory every drug abuser would be liable for aiding and abetting the distribution which led to his own possession.'") (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

[45] *Lowman v. United States*, 632 A.2d 88, 91 (D.C. 1993) (upholding distribution conviction where defendant brought "a willing buyer to a willing seller" and "specifically asked [distributor] if he had any twenty-dollar rocks, the precise drugs that the undercover officer had said he wanted to buy"); *see, e.g.*, *Griggs v. United States*, 611 A.2d 526, 527, 529 (D.C. 1992) (upholding distribution conviction where an officer approached the defendant and asked if anyone was "working," the defendant escorted the officer to a seller, and the defendant told the seller that the officer "wanted one twenty"); *Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) ("[B]eing an agent of the buyer is not a defense to a charge of distribution.").

[46] *Lowman*, 632 A.2d at 96 (Schwelb, J. dissenting) (observing that "if the government's position were adopted, and if everyone who assisted a buyer of drugs were thereby rendered a distributor, then, *a fortiori*, every purchaser would also logically have to be deemed an aider and abettor to a felony, and would therefore be subject to a mandatory minimum sentence.").

[47] *Lowman*, 632 A.2d at 92 (quoting *United States v. Swiderski*, 548 F.2d 445, 451 (2d Cir. 1977)).

general solicitation and conspiracy liability unless expressly provided by statute.[48] (This is consistent with the similar exclusion for conduct inevitably incident applicable to legal accountability under RCC § 212.[49])

Relation to National Legal Trends. Within American criminal law, there are a range of situations where "an actor may technically satisfy the requirements of an offense definition, yet be of a class of persons that was not in fact intended to be included within the scope of the offense."[50] Two such situations arise in the context of the general inchoate crimes of solicitation and conspiracy where: (1) the would-be solicitor/conspirator is also a victim of the target offense; and (2) the criminal objective of the would-be solicitor/conspirator is inevitably incident to commission of the target offense.[51]

With respect to the first situation, the common law rule is that—absent legislative intent to the contrary—a person may not be held criminally liable for soliciting or conspiring to commit acts that would also victimize that person.[52] This rule *exempts* from general inchoate liability those who might otherwise satisfy the general requirements of solicitation or conspiracy in relation to the commission of the offense perpetrated against themselves.[53]

The paradigm case is presented by a minor who engages in a sexual relationship with an adult that is considered by law to constitute statutory rape.[54] If the minor initiates the relationship, then the minor may technically satisfy the requirements of soliciting the commission of a statutory rape in the sense of having purposefully requested its perpetration.[55] And where the adult accepts the invitation, the minor may also technically satisfy the requirements of conspiring to commit statutory rape in the sense of having purposefully agreed to facilitate its perpetration.[56] Nevertheless, in the absence of

[48] Note that under RCC § 304(b) the legislature remains free to impose general inchoate liability on those whose criminal objectives are inevitably incident to an offense on an offense-specific basis. In that case, however, the legislature should draft individual criminal statutes to clearly reflect this determination.

[49] *See generally* Commentary on RCC § 212(a)(2).

[50] ROBINSON, *supra* note 23, at § 83.

[51] *See, e.g.*, WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 12.4 (3d ed., Westlaw 2017) ("[O]ne who is in a legislatively protected class and thus could not even be guilty as an accessory of the crime which is the objective is likewise not guilty of conspiracy to commit that crime."); *In re Meagan R.*, 42 Cal. App. 4th 17, 24, 49 Cal. Rptr. 2d 325, 329–30 (1996) (same); LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d) ("[I]t is a defense to a charge of solicitation to commit a crime that if the criminal object were achieved, the solicitor would not be guilty of a crime under the law defining the offense or the law concerning accomplice liability."); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) (same).

[52] *See, e.g.*, DRESSLER, *supra* note 2, at § 29.09[D]; Alan C. Michaels, *Fastow and Arthur Andersen: Some Reflections on Corporate Criminality, Victim Status, and Retribution*, 1 OHIO ST. J. CRIM. L. 551, 562 (2004); *In re Meagan R.*, 42 Cal. App. 4th at 24–25; ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[53] *See* Ky. Rev. Stat. § 502.040 cmt. (noting victim "exemption[] to the general doctrine of imputed liability for conduct which aids in the perpetration of crime"); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83 (same in context of solicitation and conspiracy).

[54] *See, e.g.*, DRESSLER, *supra* note 2, at § 29.09[D]; *Queen v. Tyrrell*, [1894] 1 Q.B. 710; *Regina v. Tyrell*, 17 Cox Crim.Cas. 716 (1893).

[55] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[56] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

express legislative authority to the contrary, the minor may not be convicted for soliciting or conspiring in the commission of her own victimization.[57]

With respect to the second situation, the common law rule is that—again, absent legislative intent to the contrary—general solicitation or conspiracy liability does not apply where the nature of the target offense is such that the solicitor or conspirator's criminal objective is inevitably incident to its commission.[58] This rule *exempts* from general solicitation and conspiracy liability those who might otherwise satisfy the requirements for these general inchoate crimes in relation to the commission of an offense for which their planned participation was logically required as a matter of law.[59]

The paradigm case is a two-party transaction involving the purchase of controlled substances, which the buyer initiates for purposes of acquiring an individual supply.[60] Under these circumstances, the buyer may technically satisfy the requirements of general solicitation liability as applied to the distribution of controlled substances in the sense of having purposefully requested the seller to distribute a controlled substance.[61] And if the seller accepts the solicitation, the buyer may technically satisfy the requirements of general conspiracy liability as applied to the distribution of controlled substances in the sense of having purposefully agreed with the seller to perpetrate the distribution of a controlled substance.[62] That said, it is well established that the buyer's conduct, without more, cannot not provide the basis for establishing general solicitation or conspiracy liability.[63] The reason? Because "the existence of a willing buyer is a prerequisite to the

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[57] DRESSLER, *supra* note 2, at § 29.09[D]; *see, e.g., In re Meagan R.*, 42 Cal. App. 4th 17, 21–22, 49 Cal. Rptr. 2d 325 (1996) (minor "cannot be liable as either an aider or abettor or coconspirator to the crime of her own statutory rape," and, as such, cannot be guilty of burglary based on a building entry for the purpose of engaging in consensual sexual intercourse"); *Application of Balucan*, 44 Haw. 271, 353 P.2d 631, 632 (1960) ("A girl under sixteen years of age, the victim of []sexual intercourse with a female under sixteen, a felony, cannot be charged as a principal aiding in the commission of, or as an accessory to, the felony."). *See also* Commentary on Proposed Del. Crim. Code § 705 (2017) (noting that this exception would also apply to "people who are victims of the underlying offense—such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a 'conspiracy' with the extortionist.").

[58] *See, e.g., Com. v. Fisher*, 426 Pa. Super. 391, 395–96, 627 A.2d 732, 734 (1993) (quoting LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1); *Commonwealth v. Jennings*, 490 S.W.3d 339, 343–44 (Ky. 2016).

[59] *See, e.g.*, Commentary on Ky. Rev. Stat. Ann. § 502.040; Commentary on Ala. Code § 13A-4-3.

[60] *See, e.g.*, LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3(e); *Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991).

[61] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 11.1(d); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[62] *See generally* LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c); DRESSLER, *supra* note 2, at § 29.09[D].

[63] *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). For solicitation case law, see, for example, *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998) (solicitation of marijuana sale not criminal, as "the existence of a willing buyer is a prerequisite to the commission of the completed crime" and thus is "necessarily incident" to crime); *Com. v. Fisher*, 426 Pa. Super. 391, 394, 627 A.2d 732, 733 (1993) ("[A]ppellant as the buyer of drugs is "inevitably incident" to the delivery of drugs and his conduct cannot be considered that of an accomplice. [Therefore, he cannot be convicted of solicitation]."); *Tyler*, 587 So. 2d at 1241–43 ("[W]here A solicits B only to sell drugs to A, and A does not receive any controlled substance, A is not guilty as an accomplice to the offense of distribution and is not guilty of solicitation to commit the offense of distribution of a controlled substance.").

For conspiracy case law, see, for example, *United States v. Parker*, 554 F.3d 230 (2d Cir. 2009) ("the objective to transfer the drugs from the seller to the buyer cannot serve as the basis for a charge of conspiracy to transfer drugs"); *United States v. Hawkins*, 547 F.3d 66, 71-72 (2d Cir. 2008) (simple drug

commission of the completed crime," the purchaser's conduct is "necessarily incident" to commission of the target offense of distribution.[64]

It's important to point out that, in applying the conduct inevitably incident exception, "the question is whether the crime charged is so defined that the crime could not have been committed without a third party's involvement, not whether the crime 'as charged actually involved a third party whose 'conduct was useful or conducive to' the crime."[65] To take just one example, consider a situation where X persuades Y to join in a tightly coordinated two-person plan to perpetrate an armed robbery against V.[66] Although, on these facts, consummation of an "armed robbery" is clearly "*easier* with the assistance of others," X and Y's teamwork "is not *necessary* to commit the offense" against V (i.e., the statutory elements of "[a]rmed robbery do[] not require proof that there was more than the one actor."[67]) As such, the conduct inevitably incident exception would not bar convicting X for soliciting or conspiring with Y to commit armed robbery.[68]

Both of these exceptions to the general rules of general inchoate liability are typically justified on the basis of legislative intent.[69] For example, with respect to the victim exception, the standard justification is that, "[w]here the statute in question was enacted for the protection of certain defined persons thought to be in need of special protection, it would clearly be contrary to the legislative purpose to impose [general inchoate] liability upon such a person."[70] And, with respect to the conduct inevitably

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transaction is not sufficient, by itself, to support a conspiracy conviction); *compare Ex parte Parker*, 136 So. 3d 1092, 1095 (Ala. 2013) (assuming that simple drug transaction is sufficient to support conspiracy to distribute conviction against *seller*); *Tyler*, 587 So. 2d at 1241–43 (observing that: (1) "[i]n a prosecution against the seller, where the statutorily proscribed conduct is the sale of the controlled substance, the buyer's conduct would be 'inevitably or necessarily incidental' to the sale"; and (2) "in a prosecution against the buyer, where the proscribed conduct is the possession of the controlled substance, the seller's conduct would be 'inevitably or necessarily incidental' to that possession"); *see also People v. Moses*, 291 A.D.2d 814, 814, 737 N.Y.S.2d 748, 749 (2002); *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009) ("The buyer-seller exception [exists to protect] a buyer or transferee from the severe liabilities intended only for transferors.").

[64] *People v. Allen*, 92 N.Y.2d 378, 681 N.Y.S.2d 216, 703 N.E.2d 1229 (1998); *Tyler*, 587 So. 2d at 1241–43.

[65] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3 (citing *State v. Duffy*, 8 S.W.3d 197 (Mo. App. 1999).

[66] *See Pearsall v. United States*, 812 A.2d 953, 961-62 (D.C. 2002).

[67] *Id.*

[68] *See, e.g.*, LAFAVE, *supra* note 51, at § 12.4(c)(4) (observing that a conspiracy exists where "*D* and *E* agreed to bribe *F*") (citing *United States v. Burke*, 221 F. 1014 (D.N.Y. 1915)); *Tyler v. State*, 587 So. 2d 1238, 1243 (Ala. Crim. App. 1991) ("The crime of solicitation to commit the offense of distribution of a controlled substance is committed where A solicits B to distribute drugs to C. If the solicited crime were consummated, both A and B would be guilty of the distribution."); *Commonwealth v. Jennings*, 490 S.W.3d 339, 345 (Ky. 2016) (holding that, "as a matter of law," defendant's conduct was not "inevitably incident" to the crime of assault" because that offense "does not as defined require one person to identify the victim and another to strike the blow").

[69] *See, e.g.*, ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 23 ("There is a single principle behind these [victims and conduct inevitably incident] modifications of an offense definition [for conspiracy and solicitation]: while the actor has apparently satisfied all elements of the offense charged, he has not in fact caused the harm or evil sought to be prevented by the statute defining the offense.").

[70] LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 13.3; *id.* at § 11.1(d) ("Were the [exemptions for solicitation liability] otherwise, the law of criminal solicitation would conflict with the policies expressed in the definitions of the substantive criminal law."); Michaels, *supra* note 52, at 571 ("This rule is often cast in

incident exception, the standard justification is that "the legislature, by specifying the kind of individual who was guilty when involved in a transaction necessarily involving two or more parties, must have intended to leave the participation by the others unpunished."[71]

In this way, the victim and conduct inevitably incident exceptions to the general rules of general inchoate liability are congruent with—and ultimately derived from—comparable exceptions that arise in the context of accomplice liability. For example, one commentator summarizes the relationship in the conspiracy context as follows:

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the form of not permitting a conviction for conspiracy to commit an offense when doing so would undermine the legislative purpose in creating the offense."); DRESSLER, *supra* note 52, at § 29.09 n.195 ("The prevailing rationale is that the offense of statutory rape is meant to protect a very young person (traditionally, females) from her less-than-fully informed decision to have sexual contact with an older individual (traditionally, a male). It would frustrate legislative intent, therefore, if the underage party . . . were subject to prosecution for conspiracy in her own victimization.")

As the U.S. Supreme Court observed in *Gebardi v. United States:*

> [W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished. We think it a necessary implication of that policy that when the Mann Act and the conspiracy statute came to be construed together, as they necessarily would be, the same participation which the former contemplates as an inseparable incident of all cases in which the woman is a voluntary agent at all, but does not punish, was not automatically to be made punishable under the latter. It would contravene that policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers.

287 U.S. 112, 123, 53 S.Ct. 35, 77 L.Ed. 206 (1932).

[71] *Commonwealth v. Jennings*, 490 S.W.3d 339, 344 n.4 (Ky. 2016) (quotations and citations omitted); *see Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) ("The traditional law is that where a statute treats one side of a bilateral transaction more leniently . . . adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature."); *see also Tyler v. State*, 587 So. 2d 1238, 1241–43 (Ala. Crim. App. 1991) ("Under the State's argument, a purchaser convicted of soliciting the sale of a controlled substance (a Class B felony) would be punished more harshly then either a seller convicted of soliciting the purchase of a controlled substance (a Class C felony) or a purchaser who actually received the controlled substance (a Class C felony). Such an interpretation is unreasonable.")

For example, in *United States v. Parker*, the U.S. Court of Appeals for the Second Circuit justified the buyer-seller exemption to conspiracy liability by reference to:

> [A] policy judgment that persons who acquire or possess illegal drugs for their own consumption because they are addicted are less reprehensible and should not be punished with the severity directed against those who distribute drugs . . . .
>
> [I]f an addicted purchaser, who acquired drugs for his own use and without intent to distribute it to others, were deemed to have joined in a conspiracy with his seller for the illegal transfer of the drugs from the seller to himself, the purchaser would be guilty of substantially the same crime, and liable for the same punishment, as the seller. The policy to distinguish between transfer of an illegal drug and the acquisition or possession of the drug would be frustrated. The buyer-seller exception thus protects a buyer or transferee from the severe liabilities intended only for transferors.

554 F.3d 230, 235 (2d Cir. 2009).

> [I]n the absence of express legislative authority to the contrary, if a male and an underage female have sexual intercourse, the female may not be convicted as an accomplice in her own "victimization." Similarly, in the absence of contrary legislative intent, a pregnant woman may not be convicted as an accomplice in a criminal abortion of her own fetus, because her conduct is "inevitably incident" to the commission of the crime. And, because underage females and pregnant women cannot be convicted as accomplices in these offenses, they are also immune from prosecution for conspiracy to commit these offenses upon themselves.[72]

Because these exceptions are understood to be an outgrowth of legislative intent, it is also understood that they should not apply when the legislature clearly manifests a desire to criminalize the relevant conduct.[73] This is to say: where the legislature has made an offense-specific determination regarding liability for victims or conduct inevitably incident, it is generally agreed that the courts should implement it.[74] In practice, then, these exceptions from general principles of inchoate liability constitute default rules of construction, to be applied in the absence of an offense-by-offense specification of liability.[75]

The Model Penal Code provides the basis for most legislative efforts at codifying the victim and conduct inevitably incident exceptions.[76] The relevant code language is contained in Model Penal Code § 5.04(2), which establishes that:

> It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under . . . 2.06(6)(a) or (6)(b).[77]

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[72] DRESSLER, *supra* note 2, at § 29.09[D].

[73] *See, e.g.*, ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83 ("The controlling test for whether these defenses will be recognized is the intent of the legislature in defining the offense charged. The defense is generally based upon an analysis of the legislative history of the offense definition and an application of the normal rules of statutory construction.").

[74] *See, e.g.* Ala. Code § 13A-4-1(c) ("When the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the offense solicited, defendant is guilty of such related offense only and not of criminal solicitation."); N.Y. Penal Law § 100.20 ("When under such circumstances the solicitation constitutes an offense other than criminal solicitation which is related to but separate from the crime solicited, the actor is guilty of such related and separate offense only and not of criminal solicitation.").

[75] *See, e.g., United States v. Previte*, 648 F.2d 73 (1st Cir. 1981); *United States v. Langford*, 647 F.3d 1309, 1331–32 (11th Cir. 2011); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83.

[76] *See generally* Model Penal Code § 5.04(2) cmt. at 481.

[77] Model Penal Code § 5.04(2) also references "Section 2.06(5)" of the Code's complicity provisions. That subsection provides that "[a] person who is legally incapable of committing a particular offense himself may be guilty thereof if it is committed by the conduct of another person for which he is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his incapacity." However, the RCC approach to complicity does not incorporate a similar provision. *See generally* Commentary on RCC § 210. Therefore, the relevance of this provision to general inchoate liability is not addressed here.

And the relevant complicity provisions incorporated by reference, Model Penal Code § 2.06(6)(a) and (6)(b), establish that:

> Unless otherwise provided by the Code or by the law defining the offense, a person is not an accomplice in an offense committed by another person if:
>
> (a) he is a victim of that offense; or
>
> (b) the offense is so defined that his conduct is inevitably incident to its commission . . . .

The latter complicity provisions, as the explanatory note highlights, were intended to codify two different "special defenses to a charge that one is an accomplice."[78] The first is applicable "when the actor is himself a victim of the offense."[79] And the second is applicable "when the offense is so defined that the actor's conduct is inevitably incident to the commission of the offense."[80] With those exceptions in mind, Model Penal Code § 5.04(2) subsequently establishes that—as the explanatory note phrases it—"[i]n cases where the actor would not be guilty of the substantive offense as an accessory because of some special policy of the criminal law, [that actor is not] liable for solicitation of or conspiracy to commit the same offense."[81] In this way, Model Penal Code § 5.04(2) "make[s] the scope of liability for conspiracy and solicitation congruent with the provisions of Section 2.06 on the liability of accessories."[82]

In support of this parallel approach, the Model Penal Code drafters point to the same justifications "embodied in the complicity provisions of the Model Code."[83] As the accompanying Model Penal Code commentary observes:

> The commentary to Section 2.06 explains that to hold the victim of a crime guilty of conspiring to commit it would confound legislative purpose. Concerning crimes as to which the behavior of more than one person is "inevitably incident," such as unlawful intercourse, bribery, or unlawful sales, it is pointed out that varying and conflicting policies are often involved—for example, ambivalence in public attitudes toward the crime and the requirement of corroboration of accomplice testimony. The position taken in the complicity provision, and now adopted for conspiracy and solicitation, is to leave to the legislature in defining each particular offense the selective judgment that must be made as to whether more than one participant ought to be subject to liability. Since the exception is confined to behavior "inevitably incident" to the commission of the crime, the problem inescapably presents itself in defining the crime.[84]

[78] Model Penal Code § 2.06(6): Explanatory Note.
[79] *Id.*
[80] *Id.*
[81] Model Penal Code § 5.04(2): Explanatory Note.
[82] *Id.*
[83] Model Penal Code § 5.04(2) cmt. at 481.
[84] *Id.*

The Model Penal Code drafters are also careful to distinguish this approach to general inchoate liability from the approach reflected in the common law doctrine known as Wharton's Rule. As accompanying Model Penal Code commentary proceeds to observe:

> As formulated by the author whose name it bears, th[is] doctrine holds that when to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents cannot be maintained. The classic Wharton's rule cases involve crimes such as dueling, bigamy, adultery, and incest, but it has also been said to apply to gambling, the giving and receiving of bribes, and the buying and selling of contraband goods.[85]

While acknowledging that Wharton's Rule "has been unevenly applied and has been subject to a number of exceptions and limitations," the Model Penal Code drafters believed that the basic idea of barring conspiracy liability for any target offense that requires joint agreement was flawed as a matter of policy:

> Wharton's Rule as generally stated . . . completely overlooks the functions of conspiracy as an inchoate crime. That an offense inevitably requires concert is no reason to immunize criminal preparation to commit it. Further, the rule operates to immunize from a conspiracy prosecution both parties to any offense that inevitably requires concert, thus disregarding the legislative judgment that at least one should be punishable and taking no account of the varying policies that ought to determine whether the other should be. The rule is supportable only insofar as it avoids cumulative punishment for conspiracy and the completed substantive crime, for it is clear that the legislature would have taken the factor of concert into account in grading a crime that inevitably requires concert.[86]

With that in mind, Model Penal Code § 5.04(2) "goes no further than to provide that a person who may not be convicted of the substantive offense under the complicity provision may not be convicted of the inchoate crime under the general conspiracy and solicitation sections."[87] This approach, as the drafters conclude, appropriately ensures that "the party who would be guilty of the substantive offense if it should be committed, may equally be convicted of soliciting or conspiring for its commission . . . ."[88]

Since completion of the Model Penal Code, the drafters' recommendations regarding adoption of parallel victim and conduct inevitably incident exceptions to general solicitation and conspiracy liability have been quite influential. For example, as a

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[85] *Id.*
[86] *Id.*; *see* 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. 571, 1048 (1961).
[87] Model Penal Code § 5.04(2) cmt. at 481.
[88] *Id.*

legislative matter, "many state codes follow [the] example" set by Model Penal Code § 5.04(2).[89] This includes about half of the criminal codes in jurisdictions that have undertaken comprehensive modernization efforts.[90] However, "[e]ven in jurisdictions without an express statutory limitation" based on Model Penal Code § 5.04(2), courts have adopted a "legislative-exemption rule" of comparable scope.[91]

While the exceptions reflected in the Model Penal Code § 5.04(2) have had a broad influence on modern criminal codes, it's also important to note that legislatures in reform jurisdictions frequently modify them.[92] One particularly useful revision is the

[89] Michaels, *supra* note 52, at 562.

[90] *See* Ala. Code § 13A-4-1(c) ("A conspirator is not liable under this section if, had the criminal conduct contemplated by the conspiracy actually been performed, he would be immune from liability under the law defining the offense or as an accomplice under Section 13A-2-24"); Ark. Code Ann. § 5-3-103(a) ("It is a defense to a prosecution for solicitation or conspiracy to commit an offense that . . . [t]he offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense); Me. Rev. Stat. tit. 17-A, § 153 ("It is a defense to prosecution under this section that, if the criminal object were achieved, the person would not be guilty of a crime under the law defining the crime or as an accomplice under section 57."); Or. Rev. Stat. Ann. § 161.475(2) ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under ORS 161.150 to 161.165."); N.Y. Penal Law § 100.20 ("A person is not guilty of criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the crime solicited."); Colo. Rev. Stat. Ann. § 18-2-301 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission."); N.D. Cent. Code § 12.1-06-03 ("It is a defense to a prosecution under this section that, if the criminal object were achieved . . . the offense is so defined that his conduct would be inevitably incident to its commission, or he otherwise would not be guilty under the statute defining the offense or as an accomplice under section 12.1-03-01."); Ill. Comp. Stat. Ann. ch. 720, § 5/8-3 ("It is a defense to a charge of solicitation or conspiracy that if the criminal object were achieved the accused would not be guilty of an offense."); N.J. Stat. Ann. § 2C:5-3(b) ("It is a defense to a charge of conspiracy to commit a crime that if the object of the conspiracy were achieved, the person charged would not be guilty of a crime under the law defining the crime or as an accomplice under section 2C:2-6e. (1) or (2)"); Pa. Cons. Stat. Ann. tit. 18, § 904 ("It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under section 306(e) of this title (relating to status of actor) or section 306(f)(1) or (2) of this title (relating to exceptions)"); Haw. Rev. Stat. Ann. § 705-523(1) ("A person shall not be liable . . . for criminal conspiracy if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); and § 511(1) ("A person shall not be liable under section 705-510 for criminal solicitation of another if under sections 702-224(1) and (2) and 702-225(1) he would not be legally accountable for the conduct of the other person."); Tenn. Code Ann. § 39-12-105(c) ("It is a defense to a charge of attempt, solicitation or conspiracy to commit an offense that if the criminal object were achieved, the person would not be guilty of an offense under the law defining the offense or as an accomplice under § 39-11-402."); N.M. Stat. Ann. § 30-28-3(D) ("A person is not liable for criminal solicitation when his solicitation constitutes conduct of a kind that is necessarily incidental to the commission of the offense solicited."); and sources cited *infra* note 92.

[91] Michaels, *supra* note 52, at 562–64.

[92] For example, the legislatures in at least two jurisdictions statutorily adopt a broad version of Wharton's Rule alongside a conduct inevitably incident exception. *See* Ky. Rev. Stat. Ann. § 506.050 ("No person may be convicted of conspiracy to commit a crime *when an element of that crime is agreement with the person with whom he is alleged to have conspired* or when that crime is so defined that his conduct is an inevitable incident to its commission."); Del. Code Ann. tit. 11, § 521 ("No person may be convicted of conspiracy to commit an offense *when an element of the offense is agreement with the person with whom the person is alleged to have conspired*, or when the person with whom the person is alleged to have conspired is necessarily involved with the person in the commission of the offense."). For scholarly

replacement of the Model Penal Code's incorporation-by-reference approach to codifying the victim and conduct inevitably incident exceptions in the general inchoate context with an explicit statement of those exceptions. Section 5-3-103(a) of the Arkansas Criminal Code is illustrative. The relevant provision provides:

> It is a defense to a prosecution for solicitation or conspiracy to commit an offense that: (1) The defendant is a victim of the offense; or (2) The offense is defined so that the defendant's conduct is inevitably incident to the commission of the offense.[93]

Consistent with the above authorities, the RCC creates two generally applicable exceptions to solicitation and conspiracy liability. The first exception, RCC § 304(a)(1), excludes the "victim of the target offense" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. The second exception, RCC § 304(a)(2), excludes an actor whose "criminal objective is inevitably incident to commission of the target offense as defined by statute" from the general principles of solicitation and conspiracy liability respectively set forth in RCC §§ 302 and 303. Thereafter, subsection (b) establishes an important limitation on these two exceptions, namely, that they do not apply when "criminal liability [is] expressly provided for by an individual offense." This clarifies that RCC § 304 *is not* intended to constitute a universal bar on criminal liability for victims or conduct inevitably incident, but rather, constitutes a default rule of construction applicable in the absence of legislative specification to the contrary.

The RCC's recognition of victim and conduct inevitably incident exceptions generally accords with the substantive policies reflected in Model Penal Code § 5.04(2). At the same time, the manner in which the RCC codifies the relevant policies departs from the Model Penal Code approach in one notable way, namely, it provides an explicit statement of the victim and conduct inevitably incident exceptions as they apply in the general inchoate context, rather than relying on the parallel complicity provisions to articulate them by reference. This departure finds support in state legislative practice.[94]

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critiques of this form of Wharton's Rule consistent with the Model Penal Code approach, see, for example, Peter Buscemi, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1141–45 (1975); ROBINSON, *supra* note 23, at 1 CRIM. L. DEF. § 83; LAFAVE, *supra* note 51, at 2 SUBST. CRIM. L. § 12.4(c)(4).

[93] Ark. Code Ann. § 5-3-103(a); *see* Ala. Code § 13A-4-1(c); N.Y. Penal Law § 100.20; Ky. Rev. Stat. Ann. § 506.050; Colo. Rev. Stat. Ann. § 18-2-301. Note also that a similar approach has been incorporated into a proposed revision to the Delaware Criminal Code, which reads:

> *Section 705. Defense for Victims and Conduct Inevitably Incident*
>
> Unless otherwise provided by the Code or by the law defining the offense, it is a defense to soliciting or conspiring to commit an offense that:
> (a) the person is the victim of the offense; or
> (b) the offense is defined in such a way that the person's conduct is inevitably incident to its commission.

Proposed Del. Crim. Code § 705 (2017).

[94] *See supra* note 93 and accompanying text.