APPENDIX D1:

DISPOSITION OF ADVISORY GROUP COMMENTS & OTHER CHANGES TO DRAFT DOCUMENTS

Chapter 1. Preliminary Provisions.

RCC § 22E-101. Short Title and Effective Date.

[No new Advisory Group comments received or CCRC recommended changes.]

RCC § 22E-102. Rules of Interpretation.

(1) *OAG, App. C. at 15-16, recommends adding the phrase "to determine the legislative intent" to the second sentence of subsection (a) so it reads "If necessary to determine legislative intent, the structure, purpose, and history of the provision also may be examined*."

- The RCC incorporates the language in the OAG recommendation. This added language is not intended to change current District case law, rather it reflects the fundamental tenet of all statutory interpretation that legislative intent is controlling. Per the first sentence of subsection (a), the first and usually definitive way of determining legislative intent is the plain language of the statute. This change clarifies the revised statutes.

(2) *USAO, App. C at 24, recommends changing subsection (b) to read: "If* the meaning *of a statutory provision remains* genuinely *in doubt after examination of that provision's plain meaning, structure, purpose, and history, then the interpretation that is most favorable to the defendant applies." USAO cites for support to United States Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997).[1]

- The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.

(3) *USAO, App. C. at 24, recommends the commentary reflect District case law recognizing that titles and captions may be of aid in interpreting ambiguous statutes.*

- The RCC incorporates the USAO recommendation by amending the commentary to cite to relevant portions of *In re: J.W.*, 100 A.3d 1091, 1095 (D.C. 2014) and *Mitchell v. United States*, 64 A.3d 154, 156 (D.C. 2013). This change clarifies the revised statutes.

(4) *USAO, App. C. at 24, says it believes a footnote in an earlier draft report concerning other jurisdictions' provisions regarding codification of the effect of headings and captions is imprecise. USAO notes that while the draft report's cited jurisdictions do have statutory provisions concerning the effect of headings and captions, these statutes prohibit reliance on headings.*

- The RCC does not incorporate this comment because the commentary has been changed since to not include other jurisdiction references. Other jurisdiction references made in prior draft reports remain saved in an appendix to the RCC Commentary but are not updated to stay current with changing laws in other jurisdictions.

(5) *USAO, App. C. at 25, recommends adding the phrase "otherwise ambiguous" to subsection (c) to clarify that headings and captions may only be of aid in interpreting "otherwise ambiguous" statutory language.*

[1] *U.S. Parole Comm'n v. Noble*, 693 A.2d 1084, 1104 (D.C. 1997), adhered to on reh'g en banc, 711 A.2d 85 (D.C. 1998) ("The rule of lenity, therefore, can "tip the balance in favor of criminal defendants only where, exclusive of the rule, a penal statute's language, structure, purpose and legislative history leave its meaning genuinely in doubt.". *Lemon v. United States*, 564 A.2d 1368, 1381 (D.C.1989) (internal quotation marks omitted); see Luck, 617 A.2d at 515.").

- The RCC incorporates the language in the USAO recommendation. This change clarifies the revised statutes.

RCC § 22E-103. Interaction of Title 22E With Other District Laws.

(1) O*AG, App. C. at 16, says that the statutory language and/or commentary needs to be "clarified or changed." OAG notes that "[b]eing convicted of a crime for certain conduct can collaterally estop someone, or otherwise prevent them from relitigating the issue of liability based on that same conduct," and questions whether case law establishing such estoppel is preserved by the RCC provision. OAG does not recommend any specific language to clarify or change the statute.*

- The RCC addresses this comment by amending the statute to begin "Unless expressly specified by this title or otherwise provided by law,…" and explaining in commentary that District civil statutes and civil case law may provide consequences for criminal convictions, or Title 22E provisions may expressly provide such consequences (by statute). This change clarifies the revised statutes.

RCC § 22E-104. Applicability of the General Part.

(1) *The CCRC recommends changing this statute to read "Unless otherwise expressly specified by statute, the provisions in Subtitle I of this title apply to all other provisions of this title."*

- This change is not intended to substantively change the statute. However, this change clarifies that Subtitle I applies to all other provisions in Title 22, unless expressly specified by *statute*, as opposed to any other source of law.

Chapter 2. Basic Requirements of Offense Liability.

RCC § 22E-201. Proof of Offense Elements Beyond a Reasonable Doubt.

(1) *The CCRC recommends generally specifying the burden of proof for exclusions from liability, defenses, and affirmative defenses in a new subsection (b). If there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt. If there is any evidence of a statutory defense at trial, the government must prove the absence of all elements of the defense beyond a reasonable doubt. Unless otherwise expressly specified by statute, a defendant has the burden of proving an affirmative defense by a preponderance of the evidence.*

- This change improves the clarity and consistency of the revised statutes.

RCC § 22E-202. Conduct Requirement.

(1) *The CCRC recommends subdividing paragraph (c)(2) to include subparagraphs for each alternative element.*

- This change does not substantively change the revised statute.

RCC § 22E-203. Voluntariness Requirement.

(1) *The CCRC recommends substituting the phrase "required for that offense" for the phrase "necessary to establish the offense," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(2) *The CCRC amends the Definitions subsection to cross-reference RCC § 22E-202. The previous reference to RCC § 22E-201 was a typographical error.*

- This change does not substantively change the revised statute.

RCC § 22E-204. Causation.

(1) *PDS, App. C at 225-228, and USAO, App. C at 242-243,*[2] *both offer detailed recommendations concerning the definition of legal cause under RCC § 22E-204(c). Although there are material areas of disagreement between the agencies, there are two main propositions upon which both PDS' and USAO's comments converge. First, both agencies state that the RCC's use of the double negative, "not too unforeseeable" employed in the foreseeability prong of subsection (c) is problematic and should be avoided. Specifically, PDS describes this phraseology as "indeterminate," while USAO describes it as "needlessly indirect." Both PDS and USAO recommend, as a partial solution to these problems, rephrasing the foreseeability prong to read: "reasonably foreseeable in its manner of occurrence." Second, both agencies state that the RCC's reliance on the phrase "just bearing on the person's liability" in subsection (c) is problematic and should be avoided. Specifically, PDS explains that this language "injects a completely subjective element of moral judgment that would lead to arbitrary and unpredictable results." And USAO explains that this language manifests "imprecision," "practical opacity," and "vagueness." Both PDS and USAO therefore recommend eliminating the phrase "just bearing on the person's liability" from subsection (c) altogether.*[3]

- The RCC incorporates PDS' and USAO's consensus recommendations in accordance with the rationales offered by both agencies, while making additional revisions consistent with the concerns underlying those recommendations. To start, and in order to ensure clarity of communication, RCC § 22E-204(c) is reorganized into two separate paragraphs. The first paragraph, (c)(1), rephrases the foreseeability prong along the lines recommended by both PDS and USAO: "reasonably foreseeable in its manner of occurrence." Rephrased in this way, the foreseeability prong now avoids use of the double negative. The second paragraph, (c)(2), rephrases the volitional conduct prong to omit reference to the "just bearing" language in accordance with both agencies' recommendations. Instead, the volitional conduct prong now reads: "not too dependent upon another's volitional conduct *to hold the person responsible for it*." The italicized language, which replaces the phrase "to have a just bearing on the person's liability," more clearly states the principle upon which the volitional conduct prong rests, without inviting

[2] USAO's comment on legal causation was submitted on May 20, 2019. However, the deadline for comments on the First Draft of Report No. 35 was May 12, 2019.

[3] While PDS and USAO agree on omission of the "just bearing" language, as well as revision of the reasonable foreseeability prong, the agencies disagree on what to do about the volitional conduct prong in subsection (c). For example, PDS recommends reframing it in terms of being "*directly dependent* upon another's volitional conduct," whereas USAO would simply eliminate it altogether. In addition, PDS recommends adding an entirely new prong to subsection (c), which focuses on evaluating whether the "connection between the conduct and the result is not otherwise remote, indirect, or purely contingent on other factual causes." In contrast, USAO recommends relying on the requirement of reasonable foreseeability as the sole basis for evaluating legal causation under the RCC.

unnecessarily broad considerations of justice into the fact finder's evaluative process.[4]

- These revisions do not further change current District law, and they improve the clarity and consistency of the revised statutes.

(2) *The CCRC recommends omitting all references in the Commentary to* "urban *gun battle liability," and replacing them with references to "gun battle liability." The term "urban" does not serve any useful explanatory purpose in this context and may be unnecessarily prejudicial. This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends omitting the final two sentences in the current District law section addressing legal causation, which may improperly suggest that legal causation under the RCC is only a matter of fairness, wholly detached from considerations of foreseeability or volitionality.*[5] *This revision is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

[4] USAO recommends deleting the volitional conduct prong in its entirety. In support of this deletion, the agency offers the following rationale, which reads (in its entirety): "Nor is [the volitional conduct prong] necessary, as the 'reasonable foreseeability' requirement already incorporates the idea that, depending on the circumstances of a particular case, the volitional acts of others might (or might not) break the causal link between act and result." For a detailed explanation of why the reasonable foreseeability requirement does not, and cannot, adequately account for the causal influence of the volitional conduct of another person, see the Explanatory Note and Relation to Current District Law entry on RCC § 22E-204(c)(2).

[5] These two sentences state that: "[The] inquiry [required by the RCC approach to legal causation] would not necessarily preclude the assignment of criminal liability upon X for D's criminal conduct. But it would require the factfinder to consider the fairness of attributing criminal liability under such circumstances."

RCC § 22E-205. Culpable Mental State Requirement.

(1) *The CCRC recommends deleting the phrase "or a comparable mental state specified in this Title" from the definition of culpable mental state in RCC § 22E-205(b)(1). This revision better accords with the Council's ultimate authority to define criminal offenses (i.e., whatever culpable mental state the Council drafts is what applies to an offense, regardless of what a prior legislative provision of general application says). Corresponding to this revision, the CCRC also recommends revising the accompanying Explanatory Note to omit discussion of the now-deleted language. Both of these revisions are consistent with informal comments received from OAG.*

- These revisions do not change current District law, and they improve the clarity and consistency of the revised statutes.

RCC § 22E-206. Definitions and Hierarchy of Culpable Mental States.

[No new Advisory Group comments received.]

RCC § 22E-207. Rules of Interpretation Applicable to Culpable Mental States.

(1) *The CCRC recommends amending the distribution of culpable mental states provision to provide that, like the culpable mental states, any strict liability specified in an offense applies to all subsequent result elements and circumstance elements.*

- Offenses definitions have been amended to ensure this rule does not substantively change the revised offenses.

RCC § 22E-208. Mistake.

(1) *The CCRC recommends reorganizing paragraph (c) so that paragraph (c)(1) is not left blank.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(2) *The CCRC recommends rephrasing paragraph (d) so that the introductory sentence is clearer and the culpable mental state (purpose) appears before the conduct element in (d)(2), consistent with other provisions in the RCC.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(3) *The CCRC recommends revising a footnote in the Explanatory Note accompanying RCC § 22E-208(c) to clarify the interaction between the RCC approach to culpability as to criminality under this subsection and the RCC approach to deliberate ignorance under RCC § 22E-208(d).*[6] *This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(4) *The CCRC recommends revising the Explanatory Note accompanying RCC § 22E-208(d) to address the substantial motivating factor requirement governing deliberate ignorance evaluations in the main text of the commentary, rather than in the footnotes. (Other than moving the footnote to the main text, no further changes to the relevant statement have been made.) This new placement better reflects the relative importance of the principle being stated and is consistent with informal comments received from PDS.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

[6] That footnote adds, in relevant part:

> Another example of an implied culpability as to illegality element is reflected in the RCC general provision governing deliberate ignorance, RCC § 22E-208(d), which authorizes the factfinder to impute knowledge as to a circumstance where the government proves beyond a reasonable doubt that: (1) the actor was at least reckless as to whether the prohibited circumstance existed; and (2) the actor avoided confirming or failed to investigate the existence of the circumstance with the purpose of avoiding criminal liability. The second prong of this general provision entails proof of knowledge as to the illegality of the deliberately ignorant actor's conduct to the extent that such awareness of criminality is a necessary prerequisite to acting "*with the purpose of avoiding criminal liability*." RCC § 22E-208(d)(2) (italics added).

RCC § 22E-209. Intoxication.

(1) *The CCRC recommends revising the phrase "afford a general defense to a charge of crime," as employed in RCC § 22E-209(d)(2), to more simply, succinctly, and clearly read: "establish a general defense." This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing the definition of self-induced intoxication to both highlight and clarify the "pursuant to medical advice" exception under RCC § 22E-209(d)(2).*[7] *This revision is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends revising the self-induced intoxication provision to clarify that a person must act "at least" negligently. This clarifies that proof that a person acted intentionally or purposely is also sufficient.*

- This change clarifies and does not substantively change the revised statute.

(4) *The CCRC recommends revising the self-induced intoxication provision to specify that medical advice must be given by a "licensed health professional," as defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statutes and may eliminate an unnecessary gap in liability.

(5) *The CCRC recommends replacing the pronouns "his or her" with gender-neutral references to "the person."*

- This change does not substantively change the revised state.

[7] That footnote now adds, in relevant part:

> Note[] that a person who knowingly consumes an intoxicating substance "pursuant to medical advice" falls outside the scope of the RCC definition of self-induced intoxication. RCC § 22E-209(d)(2)(C); *see, e.g.,* Model Penal Code § 2.08(5)(a) (excluding from definition of self-induced intoxication person who "introduces [intoxicating substances] pursuant to medical advice"); ROBINSON, *supra* note 6, at 2 CRIM. L. DEF. § 176 ("[T]hough a patient may voluntarily take prescription drugs, intoxication as a result of such use may be involuntary so long as it is done pursuant to medical advice."). In contrast, where "medically prescribed drugs" are *not* "taken according to prescription," then any intoxication resulting from their knowing consumption *could* be considered "self-induced" for purposes of RCC § 22E-209. *E.g.*, *State v. Gardner*, 230 Wis. 2d 32, 41–42 (Wis. Ct. App. 1999) (for this reason involuntary intoxication defense unavailable "where a patient knowingly takes more than the prescribed dosage, [] or mixes a prescription medication with alcohol or other controlled substances") (collecting cases).

RCC § 22E-210. Accomplice Liability.

(1) *The CCRC recommends clarifying that the accomplice must intend that "all" circumstance elements exist.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-211. Liability for Causing Crime by an Innocent or Irresponsible Person.

(1) *The CCRC recommends striking "causes" from the definitions subsection because "causes" is not a defined term in the RCC.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-212. Exclusions from Liability for Conduct of Another Person.[8]

(1) *The CCRC recommends retitling the provision to make clear that it is an exclusion from liability. Under RCC § 22E-201(b), if there is any evidence of a statutory exclusion from liability at trial, the government must prove the absence of all elements of the exclusion from liability beyond a reasonable doubt.*

- This change clarifies the revised statute.

(2) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, "Unless otherwise expressly specified by statute," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

[8] Previously titled "Exceptions to Legal Accountability."

RCC § 22E-213. Withdrawal Defense to Legal Accountability.

(1) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*

- This change improves the consistency of the revised statute.

(2) *The CCRC recommends striking the word "otherwise" from paragraph (a)(2) as superfluous.*

- This change clarifies and does not substantively change the revised statute

RCC § 22E-214. Merger of Related Offenses.

(1) *USAO, App. C at 233-234, recommends deleting RCC § 22E-214(a)(4), which provides for merger where: "One offense reasonably accounts for the other offense given the harm or wrong, culpability, and penalty proscribed by each." USAO states that this "open-ended provision is vague and subjective, and thus contrary to the RCC's overarching goal of stating the law clearly [], rather than relying upon common law []." In addition, USAO notes that "[t]his subsection would likely exacerbate, rather than remedy, the historically 'uneven treatment' of merger issues that § 214 seeks to address," while "confer[ring] a windfall upon defendants, who would surely invoke the Rule of Lenity in seeking its broad application." Lastly, USAO states that, "[i]f the goal is to require merger for certain combinations of offenses even where they would not merge under the Blockburger elements test, it would be more direct, and avoid needless uncertainty, to simply identify those mergers in the substantive offense statutes themselves."*[9]

- The RCC does not incorporate USAO's recommended deletion. Paragraph (a)(4) offers a fair and effective resolution of the unavoidable tension between proportionality, certainty, and administrative efficiency in merger evaluations. Removal of paragraph (a)(4), in contrast, would support the disproportionate multiplication of liability, and effectively provide for a *de facto* rule of severity in merger evaluations, with comparatively small efficiency gains. However, consistent with USAO's comment, the current draft of the RCC special part incorporates a greater number of offense-specific merger rules, thereby circumscribing the situations in which reliance on paragraph (a)(4) will be necessary.
- The elements test (and comparable formulations[10]) purports to offer a wholly descriptive, bright-line rule for resolving merger evaluations. However, as outlined at length in the RCC commentary, legal practice both inside and outside the District has revealed two fundamental problems with the elements test. First, the requisite comparative analysis between offense elements is highly uncertain in difficult cases (of which there are many). Second, the elements test analysis is inherently narrow, and thus effectively creates a default presumption in favor of multiplying convictions and punishment for offenses that substantially (if not entirely) overlap. The first of these problems creates significant amounts of litigation (e.g., legal disputes over when the elements of one offense are necessarily included in another), while the second problem detrimentally impacts the administration of justice (e.g., by distorting the plea-bargaining process and leading to disproportionate collateral consequences).

[9] USAO also states that the more expansive, fact-sensitive proportionality-based approaches to merger stated in the Report "do not support (a)(4) at all, in that they are based on a rationale that the RCC disavows."

[10] *See* RCC §§ 22E-214(a)(2)-(3) (stating merger principles similar to, or arising from, the elements test).

- There are a few paths for solving these problems. The first, and simplest, path is by limiting the government to one conviction per course of conduct, thereby avoiding the need for a comparison of offense elements (or application of any other merger standard). There are a few jurisdictions that appear to employ a categorical merger limitation of this nature. However, such an approach arguably supports disproportionate leniency,[11] while largely departing from current District practice.[12] For these reasons, the CCRC does not recommend pursuing this path.
- The second path is through offense-specific merger rules, which specify in advance the combinations of offenses that should, and should not, merge as a matter of law. This kind of approach, which is recommended by USAO, directly furthers the interests of clarity and consistency, and is employed by RCC to the greatest extent possible.[13] However, this approach unfortunately does not offer a workable, long-term solution. There is a multitude of section-level, offense-specific merger combinations arising under any criminal code, which the legislative branch of government would need to resolve to comprehensively dispose of all proportionality-related issues raised by the elements test. And neither the RCC, nor any other criminal code, attempts to do this (though the RCC likely goes much farther than any other American criminal code in this respect).
- The question, then, is what to do about those combinations of substantially overlapping offenses that are neither disposed of *explicitly* by the RCC (through offense-specific rules) or *clearly* by the elements test. To deal with this narrower set of potential merger combinations, two policy alternatives present themselves. The first option, which follows from USAO's recommended revision, is to do nothing (i.e., legislative silence).

[11] That is, where a single course of conduct satisfies the requirements of liability for two unrelated offenses (e.g., rape and theft), limiting the government to a single conviction ignores the distinct violation of a separate societal interest protected by the additional offense. *See also, e.g.,* Michael T. Cahill, *Offense Grading and Multiple Liability: New Challenges for A Model Penal Code Second,* 1 OHIO ST. J. CRIM. L. 599, 605 (2004) (noting that the problem with a system in which courts "impose concurrent sentences for multiple offenses of conviction [when such offenses do not overlap]" is that it "has the obvious and pervasive flaw of trivializing, to the point of complete irrelevance, every offense other than the most serious one. A sensible liability scheme should require, or at least allow, some additional punishment for each such harm—although perhaps incrementally reduced punishment instead of the equally crude alternative of full consecutive sentences for each offense.").

[12] *But see* DCSG R. 6.2 ("The following sentences must be imposed concurrently: For offenses that are not crimes of violence: multiple offenses in a single event…"); RCC § 22E-214, Relation to Current District Law ("[Under this Rule,] multiple convictions for all non-violent offenses arising from the same course of conduct are to be sentenced concurrently. This appears to be true, moreover, without regard to whether there exists *any overlap* between the offenses of conviction in the first place. So, for example, a judge sentencing a defendant convicted of theft and carrying a dangerous weapon (CDW) based on the same course of conduct would, under this rule, impose concurrent sentences for each offense—notwithstanding the fact that CDW and theft are completely different offenses.").

[13] For example, RCC § 22E-214(a)(5) and (6) has always codified an assortment of categorical rules for dealing with merger of inchoate offenses, while the most recent draft of the RCC special part has been revised to incorporate a variety of chapter-specific merger rules.

In effect, this establishes a general presumption of multiple liability and punishment for any combinations of offenses that fail the formalistic (and therefore narrow) elements test. The second option, in contrast, is to adopt a standard that goes beyond the scope of elements test, and merges combinations of substantially (but not wholly) overlapping offenses for which multiple liability and punishment would be disproportionate.

- This kind of merger standard provides the third path for mitigating the problems associated with the elements test, and is reflected in the proportionality-based, fact-driven approaches applied in a number of jurisdictions. In practice, these approaches strive to ensure that relatively minor variances between offenses (that fail the elements test) do not disproportionately multiply liability and punishment. In so doing, however, these approaches may also bring with them costs of their own, namely, increased and more fact-intensive litigation, as well as uncertainty surrounding their scope of application. With that in mind, the RCC incorporates a modified proportionality-based approach that largely excludes factual considerations,[14] while providing—through legislative text and accompanying commentary—significant clarity concerning its intended scope. This appears to be the best resolution of a difficult policy problem under the circumstances.

(2) *OAG, App. C at 230, recommends revising RCC § 22E-214(d)(1) to clarify that the phrase "statutory maximum" refers to "statutory maximum* sentence*." This addresses the current ambiguity regarding whether "statutory maximum" refers to maximum prison sentence or maximum fine. "This may not be a concern if the two consistently correlate (as when the Council follows the Fine Proportionality Act), but may create a problem in any context where one offense has a higher maximum fine (especially with any punitive fine multipliers) but a lower maximum prison sentence than another." Building on this recommendation, OAG recommends revising RCC § 22E-214(b) to "address the issue regarding how judges should merge offenses where there is a higher maximum penalty, but a lower maximum fine in one offense and a lower maximum penalty but a much higher maximum fine in the other offense." The current RCC language reads: "The merger rules set forth in subsection (a) are inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct." In contrast, OAG suggests that the language be amended to state that: "The merger rules set forth in subsections (a)* and (d) are *inapplicable whenever the legislature clearly expresses an intent to authorize multiple convictions for different offenses arising from the same course of conduct* or establish a different rule of priority."

[14] Paragraph (a)(4) circumscribes the factual analysis employed in other jurisdictions with comparable proportionality-based approaches in the interests of balancing considerations of proportionality with those of efficient judicial administration. It is therefore not the case that these other approaches are "based on a rationale that the RCC disavows." USAO, App. C at 234. The RCC approach, like these other approaches, seeks to further the interests of proportionality; the only difference is that paragraph (a)(4) does not go quite as far given the sizeable administrative costs associated with fact-and-law-driven merger analyses.

- The RCC incorporates OAG's first recommendation, but not OAG's second recommendation. Specifically, RCC § 22E-214(d)(1) and accompanying commentary now reference "statutory maximum *term of incarceration*," based on the rationale offered by OAG. In contrast, RCC § 22E-214(b) does not incorporate an additional exception for legislative intent-based departures from the rule of priority. As a matter of policy, it is unclear that "a much higher maximum fine" provides an appropriate basis for merging an offense subject to a greater statutory maximum sentence of incarceration. And, as a matter of statutory interpretation, it is even less clear that the language proposed by OAG would actually support OAG's preferred outcome in such cases. Finally, as a matter of legislative drafting, the language proposed by OAG would add significant complexity to RCC § 22E-214(b).
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C at 230-231, recommends revising RCC § 22E-214(d)(2) to clarify the treatment of two merging offenses with the same statutory maximum penalty one of which has a mandatory minimum sentence. OAG states that: "While subsection (d)(1) would require that a judge not sentence a person for a mandatory minimum sentence when that conviction merges with an offense that has a higher overall maximum penalty, (d)(2) would seem to permit a judge to ignore a mandatory minimum sentence when that offense merges with an offense that has the same statutory maximum penalty." Specifically, the current language referenced by OAG reads: "When two or more convictions for different offenses arising from the same course of conduct merge, the offense that remains shall be…If the offenses have the same statutory maximum, any offense that the court deems appropriate." In contrast, OAG recommends this latter language be amended to read: "If the offenses have the same statutory maximum penalty, the offense with a mandatory minimum sentence. If there is no mandatory minimum sentence, whichever offense the court deems appropriate."*

- The RCC does not incorporate OAG's recommendation. The CCRC language allows judges to use their discretion as to which of any two offenses with the same statutory maximum is the most apt offense under the circumstances. The existence of a statutory minimum or mandatory minimum does not necessarily indicate a greater seriousness for an offense than an offense with the same maximum but no minimum. To the extent that the Council may, at any time, opt to apply a statutory or mandatory minimum to a particular offense, that decision may reflect procedural or other concerns that are distinct from the seriousness of the offense. Finally, judicial discretion allows consideration of sub-statutory, persuasive authorities as to the most serious offense, such as, for example, the District's voluntary sentencing guidelines.

(4) *OAG, App. C at 229 n. 3, and USAO, App. C at 234, offer similar, but distinct, revisions to RCC § 22E-214(e)(2), which currently reads: "The judgment appealed from has been decided." OAG originally recommended this language; however, it now "believes that there is a better formulation of this concept,"*

which more clearly accounts for the fact that "[a]n appellate court does not technically decide a judgment; it decides an appeal." With that in mind, and "[g]iven the lead-in language in section (e), OAG suggests that this phrase be tweaked to read, 'The appeal of the conviction has been decided.'" USAO, in contrast, "recommends that, in paragraph (e)(2), the words 'has been decided' be replaced with the words 'becomes final.'" USAO states that "[r]eplacing 'has been decided' with 'becomes final' would more accurately define what we believe is the RCC's intended time when the appeal has ended." USAO highlights two reasons in support. "First, the 'judgment' is by the trial court, and is the subject (not the result) of the appeal, so it already 'has been decided.'" Second, "as to the direct appeal, 'has been decided' is unclear as to, e.g., whether it refers to when (1) the DCCA issues its opinion; (2) when the time for seeking further review has ended; (3) when any further review has ended, or (4) when the mandate issues." "Presumably," USAO states, "subsection (e) is meant to allow multiple convictions to stand while the direct appeal plays out to its conclusion." With that in mind, "[b]ecomes final' would convey that the intended deadline is the end of the direct appeal."

- The RCC incorporates USAO's recommendation, such that paragraph (e)(2) now reads: "The judgment appealed from becomes final." This revision is supported by USAO's rationale; however, it also appears to adequately address OAG's concerns.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends revising RCC § 22E-214(d)(1) to omit the phrase "among the offenses in question" as superfluous. Read in context, it is already clear that paragraph (d)(1) is referring to the "offenses in question," so removing this language increases the brevity (and therefore accessibility) of the RCC.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends amending paragraph (a)(1) to clarify that one offense must be "necessarily" established by the other offense.*

- This change clarifies and does not substantively change the revised statute.

(7) *The CCRC recommends replacing the phrase "lesser kind of culpability" with "lower culpable mental state under RCC § 22E-206."*

- This change clarifies and does not substantively change the revised statute.

(8) *The CCRC recommends striking the alternative elements provision as potentially confusing. In many instances, the "elements upon which a defendant's conviction is based" are unknown because the jury delivers a general verdict.*

- This change clarifies the revised statute.

(9) *The CCRC recommends amending the rule of priority to state that the "conviction" that remains is the "conviction for…," as opposed to the "offense" that remains.*

- This change clarifies and does not substantively change the revised statute.

RCC § 22E-215. De Minimis Defense.

(1) *OAG, App. C at 220-222, recommends incorporating into RCC § 22E-215 "a requirement that in bench trials the judge must issue a written opinion stating his or her reasoning in determining that the requirements of this defense is met."*

- The RCC incorporates OAG's recommendation, while also adding further specificity to it, through a new subsection (e), which reads: "The court shall state its specific findings of fact and law in open court or in a written decision or opinion regarding: (1) The availability of this affirmative defense in a jury trial or bench trial; and (2) The applicability of this affirmative defense in a bench trial." In general policy terms, the proposed reason-giving requirement finds support in both national legislative practice and legal commentary surrounding *de minimis* provisions.[15] However, the particular manner in which subsection (e) is implemented is both rooted in and supported by current District practice.[16]

[15] *See, e.g.,* Model Penal Code § 2.12 ("The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.") (citing subsection (3), which authorizes a *de minimis* dismissal when the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense"); *Id.*, cmt. at 404 ("Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants."); *see also* ROBINSON, at 1 CRIM. L. DEF. § 67 ("The requirement of written reasons may be useful in many situations, but it seems particularly useful where, as here, the court is stating what it believes to be the legislature's intent. These statements permit the legislature to easily review the court's interpretation and to take legislative action to overrule it if the court's interpretation is incorrect."); *compare id.* at 1 CRIM. L. DEF. § 67 ("A few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground.") (collecting state statutes).

[16] Specifically, subsection (e) requires the court to "state its specific findings of fact and law in open court or in a written decision or opinion." This phrase is drawn from, and intended to be construed in accordance with, the D.C. Superior Court Rules of Criminal Procedure. *Id.*, Rule 23(c) ("In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its *specific findings of fact in open court or in a written decision or opinion.*") (italics added); *see, e.g., Saidi v. United States*, 110 A.3d 606, 612 (D.C. 2015) ("[S]pecial findings in a non-jury criminal trial inform an appellate court of the specific grounds relied on by the trial judge in reaching a verdict and enable the appellate court to undertake its review of the record with a clear understanding of the bases of the trial judge's decision.") (citations omitted).

Through such language, subsection (e) is also intended to further many of the same policy interests that underwrite the District's current approach to special findings. As the DCCA has observed:

> Special findings [] serve an important access to justice function and advance the goal of procedural fairness in the criminal justice system. A clear statement by a trial judge explaining the ruling in a case informs the parties of the reasons underlying the court's decision and provides critical assurance to an unsuccessful litigant that positions advanced at trial have been considered fairly and decided on the merits in accordance with governing law. The resulting increase in transparency promotes acceptance of the court's ruling and fosters compliance with its requirements.

Saidi, 110 A.3d at 612 (citing *United States v. Snow*, 484 F.2d 811, 812 (D.C. Cir. 1973) ("The requirement that a trial judge prepare findings which will cast light on his reasoning is not a trivial matter. It is an

- This revision does not further change current District law,[17] and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends incorporating into RCC § 22E-215 a new subsection (d), which establishes that: "This affirmative defense is unavailable in a situation reasonably envisioned by the legislature in forbidding the charged offense." This revision is responsive to a general point offered by OAG in its comments:*

> [A]ny de minimis defense provision has to be crafted in such a way that it is clear to the trier of fact that there must be something special concerning the individual circumstances of a defendant's actions when he or she commits an offense and not that the offense itself only criminalizes behavior that the trier of fact may believe is in and of itself, de minimis. It is up to the legislature to determine what behavior is criminal; the trier of fact should not be able to second guess that determination.

Also consistent with OAG's comment, the CCRC recommends revising the commentary to further expand upon the meaning of the new subsection (d) as follows:

> This clarifies that a *de minimis* defense will only provide a basis for escaping liability in unusual circumstances, which go beyond what the legislative intent underlying passage of a given criminal statute can fairly be understood to reach. In contrast, where the defendant's conduct is merely a typical instance of a statutory violation of a particular offense, it can be assumed that the legislature has itself made an authoritative judgment that such behavior is "[]*sufficiently* blameworthy to warrant the condemnation of a criminal conviction under the circumstances."[18]

Finally, the CCRC recommends adding to this new commentary the following statement: "The threshold determination presented by subsection (d) is a matter for judicial resolution." This importantly clarifies that where the court

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important element of fairness to the accused…The existence of a rationale may not make the hurt pleasant, or even just. But the absence, or refusal, of reasons is a hallmark of injustice.")).

[17] Which is to say: because there's no formally-recognized *de minimis* defense in the District, there's no current District law to change by subjecting this new legislative defense—the recognition of which clearly would change current District law—to a special findings requirement.

[18] An accompanying footnote further illustrates that:

> Consistent with this reasoning, a de minimis defense would be unavailable under subsection (d) where, in the absence of mitigating circumstances: (1) a person charged with drug possession knowingly exercises control over a non-negligible amount of a controlled substance for the purpose of recreational use; or (2) a person charged with fare evasion intentionally jumps over a turnstile for the purpose of evading payment of his or her metro fare.

determines that the circumstances presented by a given case were "reasonably envisioned by the legislature in forbidding the charged offense," the factfinder should not be instructed on, or (in a bench trial) consider, the de minimis defense.

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends expanding the Commentary's Explanatory Note accompanying RCC § 22E-215 to provide more detailed explanations—including references to foundational principles, use of illustrative examples, and citations to supporting legal authority—on the de minimis defense. These explanations address, among other issues, questions raised by OAG in its comments.*[19]

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

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[19] For example, OAG, App. C at 221, asks: (1) whether the "expressly identified factors the factfinder must consider [are] to be treated as pure questions of fact, or are any of them partially questions of law (e.g., whether a particular societal objective is 'legitimate')?"; and (2) "[w]hen a de minimis defense is raised, how does a judge decide what evidence can be excluded"?

Building on pre-existing commentary which already partially addresses these questions, the Explanatory Note now further clarify that:

> [The expressly identified] factors are largely objective, rather than subjective, in nature. For example, in considering the "triviality" of the harm caused or threatened by the defendant's conduct or the extent to which the defendant's conduct furthered or was intended to further "legitimate" societal objectives, the factfinder should consider the community's conception of triviality and the value that the community places upon particular types of activities, in contrast to the defendant's view of harmfulness or the value that the defendant subjectively placed on particular kinds of activities. *See, e.g.*, RCC § 22E-206, Explanatory Note (discussing comparable blameworthiness analysis in the context of recklessness and negligence liability); Eric A. Johnson, *Beyond Belief: Rethinking the Role of Belief in the Assessment of Culpability*, 3 OHIO ST. J. CRIM. L. 503, 506 (2006) (same); *see also* David M. Treiman, *Recklessness and the Model Penal Code*, 9 AM. J. CRIM. LAW 281, 334 (1981) ("To determine whether a risk is justifiable [the requisite] balance must be based on societal values, not the actor's personal gain"). Along similar lines, whether the defendant is "responsible" for an individual or situational factor that hindered his or her ability to follow the law hinges on an objective understanding of responsibility, in contrast to a subjective one. *See, e.g.*, RCC § 22E-209(d) and accompanying Explanatory Note (establishing principles for distinguishing between intoxication that is, and is not, self-induced).
>
> In light of this analysis, it would be appropriate for the court to limit the presentation of evidence or argumentation in support of a *de minimis* defense when it conflicts with the proper construction of these factors as a matter of law. For example, in a case where the defendant, a white supremacist, premeditatedly and openly shoplifts chewing gum from a minority-owned store for the purpose of making the store's owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), the court would be justified in constraining the factfinder from considering evidence offered by the defendant in support of the benefits of preserving racial or religious segregation. Likewise, if the defendant knowingly and voluntarily takes PCP before committing an assault, the court could preclude the defendant from arguing that an intoxicated state *for which he is not responsible* rendered him less blameworthy for committing that assault (i.e., given that the defendant is, in fact, *responsible* for that intoxicated state).

(4) *The CCRC recommends striking the burden of proof subsection as unnecessary in light of the revisions to RCC § 22E-201, which now specifies the burden of proof for all exclusions, defenses, and affirmative defenses in the RCC.*

- This change improves the consistency of the revised statute.

Chapter 3. Inchoate Liability.

RCC § 22E-301. Criminal Attempt.

(1) *USAO, App. C at 234-237, offers three revisions to the culpability of attempt liability. First, USAO "recommends that, in subsection (a)(1), the word 'Planning' be replaced by the words 'With the intent.'" In support of eliminating the term "planning" from subsection (a)(1), USAO states that "a person's 'plan' or 'planning' is not required by the controlling case law on attempt." USAO further notes that "inclusion of a separate element requiring the defendant to have engaged in 'planning' [inappropriately] implies that the person must have thought through or contemplated his or her actions before acting." Second, USAO recommends that "subsection (a)(2) be removed."*[20] *In support of eliminating paragraph (a)(2), USAO states that "the proposed provision [] adds an additional culpability requirement that does not exist in current law." USAO further notes that "[i]f the "intent" language recommended by USAO is adopted, there is no need to have an additional mens rea requirement by requiring that the person 'have the culpability required by that offense.'" Third, USAO "recommends removing subsection (b)." In support of eliminating subsection (b), USAO states that the proposed provision is "both confusing and adds an additional culpability requirement that does not exist in current law." Specifically, "[t]his language is duplicative of the intent language included in subsection (a)(1), which under USAO's proposal requires that the defendant act 'With the intent to engage in conduct constituting that offense.'" Viewed collectively, under USAO's recommended revisions, the culpability of attempt liability would read in its entirety: "With the intent to engage in conduct constituting that offense." USAO explains that "[t]his intent language is an accurate statement of the law, and USAO believes that it is most appropriate to codify the existing attempt law than to add in this additional language."*

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[20] On June 19, 2019, USAO submitted a revision to its earlier comments, which states:

> RCC § 22E-301-Criminal Attempt 1. USAO is no longer recommending that subsection (a)(2) be removed, but continues to rely on all of its previous recommendations. Consistent with the discussion at the CCRC Advisory Group meeting on June 5, 2019, subsection (a)(2) is an appropriate statutory provision, as it provides a level of *mens rea* for an attempted offense.

This CCRC response focuses on the original version of the comment; however, the revised version of the comment raises similar issues. For example, even if subsection (a)(2) is preserved, it is still unclear under USAO's proposal whether reckless or negligent attempt liability (as to result elements), which is barred in nearly every jurisdiction in America, would exist under the RCC. (*See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.) It is also unclear how to interpret USAO's new recommendation to preserve subsection (a)(2) in RCC § 22E-301 in light of USAO's continued recommendation to *delete* identical language from the RCC general provisions on general solicitation and conspiracy liability under RCC §§ 22E-302 and 303.

- The RCC does not incorporate USAO's recommended deletions.[21] The phrase "With the intent to engage in conduct constituting that offense," which USAO recommends as the sole legislative statement of the culpability of criminal attempts under the RCC, is open to multiple interpretations, including one that would create extremely expansive general attempt liability, and one that would create extremely narrow general attempt liability.[22]
- However, to address USAO's concerns regarding the term "planning," the RCC clarifies in commentary that the term has the same substantive meaning as "intent," and thus does not entail proof of premeditation or deliberation.
- The communicative and potential[23] policy problems presented by USAO's recommended formulation can be appreciated by the following hypothetical, which is drawn from the RCC commentary. Police stop a demolition operator just in the nick of time from destroying an apparently abandoned building that, unbeknownst to this cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the operator is subsequently prosecuted for attempting to commit a manslaughter offense, which prohibits anyone from: "Recklessly killing a person, negligent as to whether that person is over 65 years of age."
- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that defendant planned to engage in conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[24] Second, it must be proven that the defendant intended to cause the result element of the target offense, the death of a person.[25] And third, it must be proven that the defendant possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[26] This clear statement follows directly from the current RCC language, and is generally consistent with the attempt policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless demolition operator cannot be convicted of attempting to commit manslaughter.
- Under USAO's recommended formulation, in contrast, the government's burden of proof is susceptible to multiple constructions. The phrase "an

[21] *But see infra* (clarifying that "planning" does not necessarily entail proof of premeditation or deliberation through commentary, in accordance with USAO's comments).
[22] *See infra* (discussing first and third constructions of USAO's proposed formulation).
[23] *See infra* (discussing third construction of USAO's proposed formulation, which would not necessarily create any policy problems).
[24] RCC § 22E-301(a)(2).
[25] RCC § 22E-301(b).
[26] RCC § 22E-301(a)(1).

intent to engage in conduct constituting that offense" mirrors the first of the three requirements explicitly addressed by the RCC approach (i.e., "planning" to engage in conduct constituting an offense). However, USAO's recommended formulation is silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.

- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare intent to engage in conduct that would culminate in the results and/or circumstances of the target offense to suffice for attempt liability. If adopted, such an approach would reduce the culpability requirement for all attempt offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.[27] Beyond that, this approach would support convicting the otherwise blameless demolition operator depicted in the above fact pattern.[28]
- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[29] This approach has little support in District law and national legal trends.[30] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing an attempt conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). As to circumstance elements, in contrast, such an approach would narrow liability beyond that provided for in nearly every American jurisdiction by *requiring* for an attempt conviction *at least* recklessness as to a circumstance. Although lacking

[27] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

[28] This is so because the operator clearly did possess the only culpable mental state that USAO's formulation would explicitly require: intending to engage in conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

[29] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").

[30] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

support in national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. And, at the very least, this collective treatment of result and circumstance elements would preclude the blameless operator discussed above from liability for attempted manslaughter.

- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of intent. Per this construction, USAO's proposal is that there be a single, categorical intent requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "an intent to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in nearly every jurisdiction in America.[31] With respect to circumstance elements, in contrast, this approach entails culpability elevation by requiring intent as to circumstance elements, whereas the RCC and current District law would allow for the culpable mental state requirement governing the target offense to suffice. Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless operator discussed above from liability for attempted manslaughter.[32]
- These three potential constructions of USAO's proposed formulation highlights the importance of clearly addressing the relationship between the culpability of an attempt and the objective elements of an offense through a general legislative formulation such as that currently offered by RCC § 22E-301. And they also highlight the clarificatory import of the "planning" requirement incorporated into subsection (a)(2) in particular, which effectively distinguishes between an attempter's non-culpable objective to engage in *conduct* constituting the target offense, and an attempter's culpability—i.e., purpose, intent, recklessness, or negligence—as to the result and circumstance elements of the target offense. That being said, in light of USAO's comments, the RCC does

[31] *See* the commentary accompanying RCC § 22E-301 for a more extensive analysis of relevant legal trends.

[32] Note, however, that even under the third construction, USAO's recommendation to delete RCC § 22E-301(a)(2), which requires that the person act "With the culpability required by that offense," risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. For example, two intentional *completed* killings may be graded quite differently on the basis that one was committed in the presence of mitigating circumstances (e.g., provocation/manslaughter) whereas the other was not (e.g., no provocation/murder). The same distinctions should accordingly be made in the context of attempted intentional homicide; however, USAO's proposed revisions would seem to ignore them, by simply requiring an "intent to engage in conduct constituting that offense," without recognition of broader aspects of culpability.

recommend clarifying in commentary that the term "planning" (1) is not substantively different than "intending" and (2) does not necessarily entail proof of premeditation or deliberation.[33]

(2) *USAO, at App. C at 236, recommends that, in subsection (a)(3), the words "completing" and "completion" be replaced with the words "committing" and "commission." USAO states that "[t]his change makes the language less confusing for offenses such as robbery, that continue until the 'taking away' or 'asportation' of the stolen property is complete." USAO notes that "[t]he current comments to the jury instructions for Attempt also reflect this view that 'committing' is clearer in this context than 'completing.'"*

- The RCC does not incorporate USAO's recommended revisions. An earlier draft of RCC § 22E-301(a) utilized the terms "committing" and "commission"; however, those terms were replaced so as to "avert confusion about the point at which the target offense has been

[33] Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

> This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*
>
> In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense"; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense").
>
> For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

'committed.'"[34] In addition, the CCRC notes that the revised robbery offense does not incorporate an asportation requirement.

(3) USAO, *App. C at 236-237, "opposes repealing the 'assault with intent' ("AWI") class of crimes, contrary to the CCRC's suggestion." Specifically, USAO states that the RCC general attempt statute "does not provide liability for all of the situations in which AWI liability attaches, and AWI liability is a frequent theory of liability where attempt liability would not exist." To illustrate, USAO offers the following example:*

> *[I]f a person were to attack someone while saying they wanted to have sex with them, they could be found guilty of assault with intent to commit sexual assault. If no clothing were removed or there were no other steps taken in furtherance of the sexual assault, the defendant may not have come 'dangerously close' to committing the crime of sexual assault, but his conduct would merit criminalization as AWI sexual assault. Without the possibility of AWI liability, this crime could only be prosecuted as a simple assault and threat, which does not represent the full nature of the conduct.*

USAO additionally notes that "under current law, AWI an offense is sometimes punished more severely than an attempt to commit that same offense."

- The RCC does not incorporate USAO's recommended revisions for two reasons. First, as a matter of liability, RCC § 22E-301(a) criminalizes all conduct captured by AWI offenses. And second, as a matter of punishment, the proportionate approach to grading incorporated into RCC § 22E-301(c) fairly addresses AWI conduct.
- The elements of AWI offenses are captured by the elements of general attempt liability under subsection (a). With respect to *mens rea*, for example, "there is no meaningful difference between" the culpable mental state requirement governing both general attempt liability and AWI offenses.[35] In contrast, there is a potentially meaningful difference between the conduct requirement of an AWI offense, an assault, and that of general attempt liability under subsection (a), dangerous proximity to

[34] PDS, App. C at 048 (requesting change, and providing quoted rationale).

[35] *Flanagan v. State*, 675 S.W.2d 734, 749 (Tex. Crim. App. 1982) ("point[ing] out that there is no meaningful difference between [assault with intent to murder and] attempted murder.").

Under current District law, both categories of offenses require proof of "specific intent." *See, e.g., Nixon v. United States*, 730 A.2d 145, 148 (D.C. 1999); *Riddick v. United States*, 806 A.2d 631, 639 (D.C. 2002); *Snowden v. United States*, 52 A.3d 858, 868 (D.C. 2012); *Robinson v. United States*, 50 A.3d 508, 533 (D.C. 2012); *Jones v. United States*, 124 A.3d 127, 132–34 (D.C. 2015) (Beckwith, J., concurring) (discussing, among other cases, *Sellers v. United States*, 131 A.2d 300 (D.C.1957); *Wormsley v. United States*, 526 A.2d 1373 (D.C. 1987); and *Fogle v. United States*, 336 A.2d 833, 835 (D.C. 1975)); *compare* D.C. Crim. Jur. Instr. § 4.110-12 (jury instructions on AWI offenses) *with* D.C. Crim. Jur. Instr. § 7.101 (jury instruction on criminal attempts).

An extensive discussion of the meaning of "with intent" under both current District law and the RCC is provided in the Commentary accompanying RCC § 22E-206. *See* Explanatory Note and Relation to Current District Law on Purpose, Knowledge, and Intent.

completion. However, that difference illustrates the comparative breadth of general attempt liability, namely, it is well established in both case law and commentary that the dangerous proximity standard can be satisfied *prior* to reaching the present ability requirement of assault necessary for an AWI conviction.[36]

- Within the District, this distinction is most clearly illustrated by the DCCA's decision in *Jones v. United States*, 386 A.2d 308, 312 (D.C. 1978), which held that an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under the dangerous proximity standard.[37] The commentary accompanying RCC § 22E-301(a) explicitly endorses this construction of the dangerous proximity standard, while providing numerous other examples, which clearly illustrate that AWI offenses are necessarily subsumed by general attempt liability under subsection (a).[38]

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[36] As the Maryland Court of Appeals has observed:

> Because the overt act necessary for an attempt is frequently an assault, the two crimes have a significant overlap. But the overlap is not complete, because an overt act can qualify as an attempt and yet not rise to the level of an assault. For example, an attempted poisoning would qualify as attempted murder, but it would not be an assault, especially if the poison did not come in contact with the victim. *See Bittle v. State*, 78 Md. 526, 28 A. 405 (1894). An aborted attempt to bomb an airplane would not be an assault, but it would be attempted murder. *See People v. Grant*, 105 Cal.App.2d 347, 233 P.2d 660 (1951). [] A person who fires a shot at an empty bed where he mistakenly believes the victim is sleeping has committed attempted murder, but not an assault. *State v. Mitchell*, 170 Mo. 633, 71 S.W. 175 (1902).

Hardy v. State, 301 Md. 124, 129, 482 A.2d 474, 477 (1984); *see, e.g.*, R. PERKINS, *Criminal Law* 578 (2d ed. 1969) ("The law of assault crystallizing at a much earlier day than the law of criminal attempt in general, is much more literal in its requirement of 'dangerous proximity to success' (actual or apparent) than is the law in regard to an attempt to commit an offense other than battery.")

It is notable that, contrary to national trends, the DCCA has indicated that the dangerous proximity test can, at least in certain instances, be more or less the same as the conduct requirement of an AWI offense. *Frye v. United States*, 926 A.2d 1085, 1099 (D.C. 2005) ("Short of some assaultive conduct or some other specific effort to inflict harm on the victim, it is difficult to discern any overt act which would cross the threshold from mere preparation to an actual attempt for [aggravated assault]."). However, there is no indication—either in District law or otherwise—that the dangerous proximity test is *narrower* than the conduct requirement for an AWI offense.

Note also that, in some instances, evidence of dangerous proximity may corroborate intent in a significant way as compared to AWI offenses, which may allow a factfinder to infer intent based on stereotypes.

[37] Thus, although District case law has not yet addressed USAO's specific sex crime fact pattern, it seems clear based on this DCCA opinion that a person who has succeeded in physically assaulting someone while stating an intention to commit rape has committed attempted rape under current District law.

[38] Specifically, a footnote in the Explanatory Note states:

> So, for example, an armed bank robber arrested blocks away from his intended target has committed an attempt to commit armed bank robbery under this standard. *See Jones*, 386 A.2d at 312 (upholding attempt liability on such facts). Along similar lines, the dangerous proximity standard could also be established in the following illustrative contexts: (1) the attempted murder prosecution of a person whose pistol accidentally slips

- With respect to punishment, both current District law and national legal trends support the conclusion that the proportionate approach to grading attempts incorporated into RCC § 22E-301(c) fairly addresses the seriousness of AWI conduct.
- The DCCA has observed that the District's varied AWI offenses, enacted in 1901, were "created to allow a court to impose a more appropriate penalty for an assaultive act that results from an unsuccessful attempt to commit a felony or some other proscribed end."[39] At the time, these policies were necessary to supplement the "relatively trivial sanctions" afforded by criminal attempt offenses employed at common law.[40] Since then, however, the modern trend—rooted in the recommendations of the Model Penal Code—has been to grade criminal attempts more severely/proportionately, while simultaneously eliminating AWI offenses.[41] Specifically, and as the DCCA approvingly observed in *Perry v. United States*: "[T]he drafters of the Model Penal Code eliminated crimes of the 'assault-with-intent-to' variety because they recognized that '[m]odern grading of attempt according to the gravity of the underlying offense has rendered laws of this…type unnecessary…"[42]
- Given that the RCC similarly adopts the modern approach of proportionately grading attempts according to the gravity of the underlying offense, the same rationale supports elimination of AWI offenses in the District.[43]

(4) *The CCRC recommends substantially expanding a footnote in the Explanatory Note addressing impossible attempts to clarify that the phrase "the situation [] as the person perceived it" under RCC § 22E-301(a)(3)(A)(ii) is not intended to authorize punishing someone for attempting to achieve a non-criminal objective*

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from that person's hand and breaks as he or she, with the intent to kill, is walking towards the front door of the victim's residence; (2) the attempted felony assault prosecution of a person who suffers a debilitating heart attack minutes before he or she plans to walk across the street and repeatedly beat, with the intent to cause significant bodily injury, a neighbor mowing her front lawn; and (3) the attempted arson prosecution of a person who is arrested at the site of a building she intends to burn down upon exiting her vehicle with flammable materials in her trunk.

[39] *Perry v. United States*, 36 A.3d 799, 809 (D.C. 2011).

[40] Model Penal Code § 211.1 cmt. at 181-82. At common law, as the *Perry* court observes, "attempts to commit serious offenses like rape and murder, which may have come very close to completion and thus provided evidence of extreme dangerousness on the part of the actor, were not graded at a level that appropriately measured the seriousness of the actor's conduct." *Perry*, 36 A.3d at 809 (quotations and citation omitted).

[41] *See* Model Penal Code § 211.1 cmt. at 181-82.

[42] 36 A.3d 799, 811 (D.C. 2011) (quoting Model Penal Code cmt. § 211.1).

[43] LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 16.2. ("virtually all modern codes" have followed suit based on the recognition that "the problem [AWI offenses were created to solve] has been resolved by grading the crime of attempt according to the seriousness of the objective crime.") Note: the drafters of the 1978 D.C. revision recommended following a similar course. That is, having treated criminal attempts as "an offense of the class next below that of the crime attempted," they abandoned AWI offenses. 1978 D.C. CODE REV. § 22-201(c).

mistakenly believed to be criminal.[44] *This revision is consistent with informal comments received from OAG, which highlight that the relevant phrase could be construed to criminalize attempts to commit imaginary offenses in the absence of further clarity in the Commentary.*

(5) *The CCRC recommends reorganizing subsection (a) so that paragraph (a)(3) is not empty, consistent with the District's legislative drafting manual.*

- This change improves the logical organization of the revised statute and does not substantively change its meaning.

(2) *The CCRC recommends clarifying that the person must intend "all" of the result elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(6) *The CCRC recommends replacing the word "punishment" with "penalty."*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

[44] That footnote now adds, in relevant part:

> Note that the phrase 'the situation [] as the person perceived it,' for purposes of the subjective approach incorporated into RCC § 22E-301(a)(3)(A)(ii), does *not* include a defendant's (inculpatory) mistaken belief that his or her (innocent) conduct is criminalized. *See infra* note 18 (explaining that the legality principle precludes convicting someone of an imaginary crime, and, therefore, pure legal impossibility remains a viable theory of defense under the RCC)."

RCC § 22E-302. Solicitation.

(1) *USAO, App. C at 237-238, offers two revisions to the culpability of solicitation liability. First, USAO "recommends that, in subsection (a), the words 'acting with the culpability required by that offense' be removed." In support of this revision, USAO states that the relevant language "adds an additional culpability requirement that does not exist in current law," and which "is both confusing and not an accurate statement of the current law." Further, USAO explains that "applying this additional [culpability] requirement to various offenses could lead to problematic results," such as, for example, in the situation of a defendant "charged with solicitation to commit first-degree murder," which "requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder." Instead, "the solicitation itself could be used to help prove that the murder was committed with premeditation and deliberation." Second, USAO recommends "removing subsection (b)." USAO recommends deleting subsection (b)"[f]or many of the same reasons as discussed with respect to subsection (a)," namely, "subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law." Further, "[b]ecause the conduct solicited must, in fact, constitute a completed or attempted offense, there is a level of intent implied into the solicitation itself, rendering this language superfluous." Viewed collectively, USAO's recommended revisions would have paragraph (a)(1) state the culpability of solicitation in its entirety: "Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]…"*

- The RCC does not incorporate USAO's recommended revisions. The purpose requirement in paragraph (a)(1), which USAO's deletions would leave as the sole legislative statement of the culpability of criminal solicitation under the RCC, is open to multiple interpretations, including one that would create extremely expansive general solicitation liability and one that would create extremely narrow general solicitation liability.[45]
- The communicative and potential policy problems presented by USAO's recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. Thereafter, at 1:45pm on the 15th, the police stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from:

[45] *See infra* (discussing first and third constructions of USAO's proposed formulation).

"intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances."

- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely requested the operator to engage in specific conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[46] Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.[47] Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[48] And fourth, it must be proven that the solicitation occurred in the absence of mitigating circumstances.[49] This clear statement follows directly from the current RCC language, and is generally consistent with the solicitation policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of soliciting aggravated murder.
- Under USAO's recommended deletions, in contrast, the government's burden of proof is susceptible to multiple constructions. The remaining culpability phrase "Purposely commands, requests, or tries to persuade another person to engage in [conduct constituting an offense]" simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction, the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to solicit conduct that would culminate in the results and/or circumstances of the target offense to suffice for solicitation liability. If adopted, such an approach would reduce the culpability requirement for all solicitation offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form

[46] RCC § 22E-302(a)(1).
[47] RCC § 22E-302(b).
[48] RCC § 22E-302(b).
[49] This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant act "with the culpability required by the [target offense]." *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify).

of culpability, above and beyond that required by the target offense.[50] Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.[51]

- Under the second construction, the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[52] Applying recklessness to all result and circumstance elements of the target offense has little support in District law and national legal trends.[53] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a solicitation conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.
- Under the third construction, the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO's proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "a purpose to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.[54] With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.[55] Although lacking support in District law or national legal trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and

[50] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[51] This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.

[52] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").

[53] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[54] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

[55] *See* the commentary accompanying RCC § 22E-302 for a more extensive analysis of relevant legal trends.

circumstance elements would preclude the blameless contractor discussed above from liability for solicitation to commit aggravated murder.[56]

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a solicitation and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-302.

(2) *USAO, App. C at 238, "recommends that, in subsection (a)(1), the word 'specific' be removed."*[57] *USAO states that, "[a]s used here, the word 'specific' implies that the defendant must specify how the offense will be carried out to be found guilty of solicitation." To illustrate, USAO notes that, "if a defendant instructed another person to murder a complainant, the defendant need not tell the other person whether it should specifically be by firearm, by knife, or by another specified means to be found guilty of solicitation of murder." Instead, USAO states that "it is and should be sufficient to be liable for solicitation that the defendant instructs another person to carry out any conduct that would result in a murder."*

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[56] Note, however, that even under the third construction, USAO's recommendation to delete from the prefatory clause the phrase "With the culpability required by that offense" risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant "charged with solicitation to commit first-degree murder," which "requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to solicit the murder for the defendant to be guilty of solicitation to commit first-degree murder." The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of solicitations; however, USAO's proposed revisions would seem to ignore them, by simply requiring the purposeful solicitation of homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 22E-210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

[57] With USAO's changes, RCC § 22E-302(a)(1) would provide: "(1) Purposely commands, requests, or tries to persuade another person 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 . . ."

- The RCC does not incorporate USAO's recommended revision. The specific conduct standard furthers important free speech principles and would likely be satisfied by the fact pattern presented by USAO.
- Given the centrality of speech to persuasion/promotion, solicitation liability implicates a criminal defendant's First Amendment rights.[58] And while the U.S. Supreme Court recently clarified that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection,"[59] it also reaffirmed the "important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality."[60] The specific conduct standard incorporated into paragraph (a)(1)—which is derived from the Model Penal Code approach to solicitation[61]—respects this distinction by requiring that the defendant solicit another person to engage in "*specific* conduct" constituting an offense.[62]
- To satisfy this standard, it is *not* necessary that the defendant have gone into great detail as to the manner in which the crime encouraged is to be committed. All that must be proven is that the defendant's communication, when viewed in the context of the knowledge and position of the intended recipient, carries meaning in terms of some concrete course of conduct that, if carried to completion, would constitute a criminal offense.[63]
- In light of this explanation (which is also articulated in the accompanying RCC commentary), the specific conduct standard presumably would be satisfied if—per USAO's hypothetical—"a defendant instructed another person to murder a [specific] complainant." And there is certainly no need

[58] *See, e.g.*, Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981 (2016); Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095 (2005).

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

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

[61] *See, e.g.*, Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added).

[62] *See, e.g.*, Model Penal Code § 5.02(1) ("A person is guilty of solicitation to commit a crime if," *inter alia*, he or she "commands, encourages, or requests another person to engage in *specific conduct* that would constitute such crime . . .") (italics added). This is consistent with accomplice liability under section 210, which similarly employs a "specific conduct" standard where complicity is based on encouragement. RCC § 22E-210(a)(2) ("Purposely encourages another person to engage in specific conduct constituting that offense."); *see, e.g.*, Model Penal Code § 2.06(3)(a)(i) ("A person is an accomplice of another person in the commission of an offense if," *inter alia*, he or she "*solicits* such other person to commit it[.]") (italics added).

[63] *E.g.*, Model Penal Code § 5.02 cmt. at 376; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.1. So, for example, general, equivocal remarks—such as the espousal of a political philosophy recognizing the purported necessity of violence—would not be sufficiently concrete to satisfy section 302. Commentary on Haw. Rev. Stat. Ann. § 705-510. Nor would a general exhortation to "go out and revolt." *State v. Johnson*, 202 Or. App. 478, 483 (2005).

under the RCC approach, that the defendant in a solicitation of murder case—again, per USAO's hypothetical—"tell the other person whether it should specifically be by firearm, by knife, or by another specified means to be found guilty of solicitation of murder." That said, the specific conduct standard *would* preclude holding the defendant liable for attempting to persuade others of the overarching virtues of killing other people in general.[64]

(3) *USAO, App. C at 238, recommends that, in subsection (c), the word "plans" be replaced by the word "intends."*[65] *Specifically, "USAO believes that the word 'plans' suffers from the problems set forth above in the Attempt comments, and that 'intent' is a better descriptor of the required mental state."*

- The RCC does not incorporate USAO's recommended revision for the same reasons discussed in the disposition of USAO's comment on attempt liability. However, the RCC commentary on attempt liability does incorporate new language addressing USAO's concerns in both contexts.[66]

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[64] *See generally Williams*, 553 U.S. at 300 (distinguishing statements such as "I believe that child pornography should be legal" or even "I encourage you to obtain child pornography" with the recommendation of a particular piece of purported child pornography).

[65] With USAO's changes, § 22E-302(c) would provide:

"(c) *Uncommunicated Solicitation.* It is immaterial under subsection (a) that the intended recipient of the defendant's command, request, or efforts at persuasion fails to receive the message provided that the defendant does everything he or she ***intends*** to do to transmit the message to the intended recipient."

[66] Specifically, a pre-existing passage in the relevant Explanatory Note has been revised and expanded to read:

> This planning requirement is to be distinguished from the voluntariness requirement under section 203. *See* RCC § 22E-203(a) ("No person may be convicted of an offense unless the person voluntarily commits the conduct element necessary to establish liability for the offense."). The voluntariness requirement, which implicates what is sometimes referred to as a "*present* conduct intention," can be "satisfied simply by showing that the actor did in fact intend to perform the bodily movements that he performed." Robinson, *supra* note 2, at 864. In contrast, the planning requirement, which implicates what is sometimes referred to as a "*future* conduct intention," "serves to show that the actor is planning to do more than what he has already done." *Id.*
>
> In this sense, the term "planning" as employed in this section is substantively identical to the term "intent" under RCC § 22E-206(c), and thus should not be read to incorporate additional requirements such as premeditation or deliberation (i.e., a person who, having been provoked, is stopped by police immediately prior to firing his weapon in retaliation has "planned" to kill). Paragraph (a)(1) could have just as easily been drafted to state "intending to engage in conduct constituting [an] offense"; however, this would fail to clearly distinguish between the planning requirement and the culpability requirement derived from the target offense. *See* RCC § 22E-301(a)(2) (defendant must act "[w]ith the culpability required by [the target] offense").
>
> For example, an actor may plan to carry out a course of conduct that, if completed, would cause the prohibited result of death without being culpable at all—as would be the case where a demolition operator is stopped just before destroying an apparently abandoned building that, unbeknownst to the operator, is occupied by a person who would have died in the ensuing destruction. Alternatively, that same demolition operator may have sought to cause that result culpably, e.g., if the operator knew that a person was residing in the building and acted with the intent to kill. In both versions of

(4) *USAO, App. C at 238-239, "recommends that, throughout these provisions, the word 'defendant' be changed to the word 'actor.'" This revision "is not meant to be substantive, and is meant to align the language in these sections with the language used throughout the RCC."*

- The RCC does not incorporate USAO's recommended revision. The CCRC believes that the term "defendant" is more accessible and clear than "actor" given the different kinds of actors referenced in the RCC's general inchoate and legal accountability provisions.

(5) *The CCRC recommends that the term "a crime of violence" be replaced with the words "an offense against persons as defined in Subtitle II of Title 22E."*

- The term "crime of violence" is not yet defined in the RCC, and specifying that solicitation only applies to offenses against persons in Subtitle II improves the clarity of the revised statute.

(6) *The CCRC recommends clarifying that the person must intend "all" of the result and circumstance elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends replacing the word "punishment" with "penalty."*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(8) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

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the hypothetical, the question of whether the operator acted with the culpable mental state requirement of murder (i.e., whether the operator intended to kill the occupant) is a separate and distinct question from whether the operator "planned to engage in conduct constituting" murder (i.e., whether the operator planned to demolish the building, which was in fact occupied). Use of the term "planning," as opposed to "with intent," in paragraph (a)(1) helps to distinguish these concepts. *See infra* notes 5-8 and accompanying text (discussing culpability required by target offense).

RCC § 22E-303. Conspiracy.

(1) *USAO, App. C at 239-240, offers two revisions to the culpability of conspiracy liability. First, "USAO recommends that, in subsection (a), the words 'acting with the culpability required by that offense' be removed." In support of this revision, USAO states that "[t]he proposed provision adds an additional culpability requirement that does not exist in current law." USAO further explains that "[t]o provide an additional mens rea requirement by referring to the culpability required by the underlying offense makes the statute more confusing." USAO also notes that "applying this additional requirement to various offenses can lead to problematic results," such as, for example, in the situation of a defendant "charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation." Second, USAO recommends "removing subsection (b)." In support of eliminating subsection (b), USAO points to "many of the same reasons as discussed with respect to subsection (a)," namely, "subsection (b) is both confusing and adds an additional culpability requirement that does not exist in current law." Specifically, USAO states that, "[t]o be guilty of a conspiracy, the defendant and another person need not necessarily intend to cause any result elements or intend for any circumstance elements required by that offense; rather, they must simply intend to enter into the agreement to commit the charged offense." USAO acknowledges that "[i]t is implicit that, by intending to enter into an agreement to commit the charged offense, [the parties] desire the offense to take place." However, USAO believes "this subsection makes the conspiracy language more confusing than if the Conspiracy section were to simply track the legal elements set forth above." Viewed collectively, USAO's recommended revisions would have paragraph (a)(1) state the culpability of conspiracy in its entirety as: "Purposely agree to engage in or aid the planning or commission of conduct [constituting an offense]."*

- The RCC does not incorporate USAO's recommended revisions. The purpose requirement in paragraph (a)(1), which USAO's deletions would leave as the sole legislative statement of the culpability of criminal conspiracy under the RCC, is open to multiple interpretations, including one that would create extremely expansive general conspiracy liability, and one that would create extremely narrow general conspiracy liability.[67]
- The communicative and potential[68] policy problems presented by USAO's recommended formulation can be appreciated by the following modified demolition hypothetical (see *supra*, attempts), which is drawn from the RCC commentary. On May 14, the general contractor for a large development project hires a demolition operator to destroy an apparently abandoned building on Tuesday, May 15, at 2:00pm. (Note: both parties agree to the arrangement.) Thereafter, at 1:45pm on the 15th, the police

[67] *See infra* (discussing first and third constructions of USAO's proposed formulation).
[68] *See infra* (discussing third construction of USAO's proposed formulation, which would not necessarily create any policy problems).

stop the demolition operator from destroying the building, which, unbeknownst to either the general contractor or the cautious operator, is occupied by an elderly homeless person who stealthily snuck into the building and would have died in the ensuing demolition had the operator been able to carry out his planned course of conduct. Assume the contractor is subsequently prosecuted for the solicitation of aggravated murder, which prohibits anyone from: "intentionally killing a person, negligent as to whether that person is over 65 years of age, in the absence of mitigating circumstances."

- Under the current RCC language, the government's burden of proof as to the requisite culpability is clear. First, it must be proven that the contractor purposely agreed with the operator to facilitate conduct that, if carried out, would have resulted in the victim's death (i.e., the demolition of the building).[69] Second, it must be proven that the contractor intended to cause the result element of the target offense, the death of a person.[70] Third, it must be proven that the contractor possessed, at minimum, negligence as to the circumstance element of the target offense, that the victim be older than 65.[71] And fourth, it must be proven that the agreement occurred in the absence of mitigating circumstances.[72] This clear statement follows directly from the current RCC language, and is generally consistent with the conspiracy policies employed in every jurisdiction in America. It also ensures the appropriate outcome as applied to the above facts, namely, that the blameless contractor cannot be convicted of conspiracy to commit aggravated murder.
- Under USAO's recommended deletions, in contrast, the government's burden of proof is susceptible to multiple constructions. The remaining culpability phrase "agree to engage in or aid the planning or commission of conduct [constituting an offense]" simply addresses the first of the four requirements explicitly addressed by the RCC approach. It is therefore silent on the requisite state of mind that must be proven as to the result and circumstance elements of the target offense (i.e., death or age of the victim). Three potential constructions of the proposed language exist.
- Under the first construction the result and circumstance elements of the target offense are not subject to any culpability requirement at all. In effect, this would allow for proof of a bare purpose to agree to bring about conduct that would culminate in the results and/or circumstances of the

[69] RCC § 22E-303(a)(1).
[70] RCC § 22E-303(b). The operator must have also possessed this intent, as well as the other mental states discussed *infra*; however, for purposes of simplicity, this entire response merely refers to the contractor's state of mind.
[71] RCC § 22E-303(b).
[72] This is due to the requirement in the prefatory clause of subsection (a), which requires that the defendant and another person act "with the culpability required by the [target offense]." *See* RCC § 22E-201(d)(3) ("'Culpability requirement' includes . . . Any other aspect of culpability specifically required by an offense."); *id.*, at Explanatory Note (noting that "premeditation, deliberation, and absence of mitigating circumstances" would so qualify).

target offense to suffice for conspiracy liability. If adopted, such an approach would reduce the culpability requirement for all conspiracy offenses to what practically amounts to strict liability. This, in turn, would constitute an unprecedented policy shift both inside and outside the District given that every jurisdiction in America requires: (1) at minimum, proof of culpability this is at least as demanding as that required by the target offense; and (2) for many offenses (i.e., those that require proof of negligence or recklessness as to result elements) proof of an elevated form of culpability, above and beyond that required by the target offense.[73] Beyond that, this approach would support convicting the otherwise blameless contractor depicted in the above fact pattern.[74]

- Under the second construction the result and circumstance elements of the target offense are subject to a default requirement of recklessness, per the RCC's explicit rule for implying a recklessness culpable mental state when no other culpability requirement (or strict liability) is specified.[75] This approach has little support in District law and national legal trends.[76] With respect to result elements, for example, it would expand liability beyond that provided for in nearly every American jurisdiction by allowing a conspiracy conviction to rest on mere recklessness as to a result. And, as discussed at length in the Explanatory Note, this general approach brings with it detrimental policy consequences (e.g., by turning endangerment activity into multiple serious felonies). At the very least, however, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.
- Under a third construction the result and circumstance elements of the target offense are subject to a requirement of purpose. Per this construction, USAO's proposal is that there be a single, categorical purpose requirement as to every objective element of the target offense, without regard to the level of culpability governing the completed version (i.e., "a purpose to *commit the actus reus* of the target offense"). With respect to result elements, this approach appears to be consistent with current District law, and it reflects the approach taken in most jurisdictions in America.[77] With respect to circumstance elements, in contrast, this approach entails culpability elevation beyond that required by any jurisdiction.[78] Although lacking support in District law or national legal

[73] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[74] This is so because the contractor clearly did possess the only culpable mental state that the singular purpose requirement would explicitly require: intending to bring about conduct—i.e., the demolition of the building—which, if carried out, would have resulted in the death of the elderly homeless person.
[75] *See* RCC § 22E-207(c) ("*Determination of When Recklessness Is Implied.* A culpable mental state of "recklessly" applies to any result element or circumstance element not otherwise subject to a culpable mental state under RCC § 22E-207(a), or subject to strict liability under RCC § 22E-207(b).").
[76] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[77] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.
[78] *See* the commentary accompanying RCC § 303 for a more extensive analysis of relevant legal trends.

trends, this treatment of circumstance elements is supported by important policy considerations, such as the increased risk of false positives for inchoate conduct. Finally, this collective treatment of result and circumstance elements would preclude the blameless contractor discussed above from liability for conspiracy to commit aggravated murder.[79]

- These three potential constructions highlight the importance of explicitly addressing the relationship between the culpability of a conspiracy and the objective elements of an offense through a general legislative formulation such as that currently depicted in RCC § 22E-303.

(2) *OAG, App. C at 231-232, recommends replacing the term "conspiracy" in the overt act requirement, RCC § 22E-303(a)(2), with "agreement." OAG states that the reference to "conspiracy" in the overt act requirement "suffer[s] from being a circular definition." Further, "because subsection (a)(1) refers to the person and at least one other person 'Purposely agree[ing]…', the use of the word 'agreement' in (a)(2) [flows] more clearly from (a)(1)." Finally, OAG points out that "the previous version of RCC § 22E-303(a)(2)" used "agreement" instead of "conspiracy."*

- The RCC incorporates OAG's recommendation, such that paragraph (a)(2) substitutes the term "agreement" for "conspiracy," for the reasons referenced by OAG.

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[79] Note, however, that even under the third construction, USAO's recommendation to delete from the prefatory clause the phrase "With the culpability required by that offense" risks treating less culpable forms of homicide more severely, while ignoring important distinctions in blameworthiness. Specifically, USAO points to the situation of a defendant "charged with conspiracy to commit first-degree murder, first-degree murder requires premeditation and deliberation." Here, "[t]he government need not prove premeditation to engage in the agreement for the defendant to be guilty of conspiracy to commit first-degree murder." The CCRC disagrees with this policy statement.

It is well-established in District law, national legal trends, and broader Anglo-American jurisprudence that a premeditated purposeful murder, committed in the absence of mitigating circumstances, is more culpable/should be graded more severely than a purposeful murder that is not premeditated and is committed in the presence of mitigating circumstances. The same considerations of proportionality that support these trends carry over to the grading of conspiracies; however, USAO's proposed revisions would seem to ignore them, by simply requiring a purposeful conspiracy to commit homicide, without recognition of broader aspects of culpability.

As LaFave explains in the comparable context of accomplice liability:

> To determine the kind of homicide of which the accomplice is guilty, it is necessary to look to his state of mind; it may have been different from the state of mind of the principal and they thus may be guilty of different offenses. Thus, because first degree murder requires a deliberate and premeditated killing, an accomplice is not guilty of this degree of murder unless he acted with premeditation and deliberation. And, because a killing in a heat of passion is manslaughter and not murder, an accomplice who aids while in such a state is guilty only of manslaughter even though the killer is himself guilty of murder. Likewise, it is equally possible that the killer is guilty only of manslaughter because of his heat of passion but that the accomplice, aiding in a state of cool blood, is guilty of murder.

LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 13.2(c); *see generally* RCC § 210(c): Explanatory Note (discussing similar point in the context of accomplice liability).

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *OAG, App. C at 232, recommends "redrafting [RCC § 22E-303 (b)(1) to] read, '[i]ntend to cause any result required by that offense.'" OAG notes that, while the current version of RCC § 22E-303 (b)(1) says conspirators must "[i]ntend to cause any result element required by that offense," it is nevertheless the case that "one does not cause a result element; one causes a result."*

- The RCC does not incorporate OAG's recommendation. "Result element," not "result," is statutorily defined in Chapter 2 of the RCC, which is what is "required by [an] offense" under RCC § 22E-303(b)(1). Further, it does make sense to speak of causing a "result element," particularly given that one must "plug" in the referent, which is generally understood to be sound drafting practice. For example, the "result element" of murder is "death," which is a consequence that a person can (and indeed must) intend to cause to be convicted of the offense.

(4) *USAO, App. C at 240, "recommends that, in the heading of subsection (d), the words 'object of conspiracy is' be changed to the words 'object of conspiracy is to engage in conduct.'" USAO states that "[t]his change is not intended to be substantive, but to clarify the language used in this heading." In addition, "[t]he proposed edit also aligns the language of the heading of the subsection with the language in the subsection."*

- The RCC incorporates USAO's recommended revisions, such that the heading of subsection (d) now reads: "Jurisdiction When Object of Conspiracy is to Engage in Conduct Located Outside the District of Columbia," for the reasons referenced by USAO.
- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends changing the heading of RCC § 22E-303(f) from "Legality of Conduct in Other Jurisdiction Irrelevant" to "Legality of Conduct in Other Jurisdiction No Defense." This revision better reflects a substantive change made to the relevant statutory provision in the Cumulative Update, and is consistent with informal comments received from PDS.*

(6) *The CCRC recommends revising paragraphs (b)(1) and (b)(2) to clarify that the person must intend "all" of the result and circumstance elements of the offense, instead of "any" one element.*

- This change improves the clarity and consistency of the revised statute.

(7) *The CCRC recommends amending the phrase "can be established" to "are proven," to clarify that the government prove the elements of the conspiracy occurred.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

(8) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

RCC § 22E-304. Exceptions to General Inchoate Liability.

(1) *USAO, App. C at 240, "recommends that, in subsection (a)(1), the word 'victim' be changed to the words 'intended victim.'" "USAO agrees with the general principle that certain victims should not be deemed guilty of conspiracy or solicitation."*[80] *At the same time, "[h]owever, there are instances where individuals who could be considered a victim should be deemed guilty of conspiracy or solicitation." In support, USAO offers the following illustration:*

> *[I]f Person A and Person B conspired to shoot Person C, and Person B was shot in the process and sustained injuries, Person B should not be freed from liability for conspiracy under the principle that he could be considered a 'victim,' where Person C was the only intended victim. Likewise, if Person D paid Person E to kill Person F, and Person D sustained injuries while Person E was shooting Person F, Person D should not be freed from liability for solicitation under the principle that he could be considered a "victim," where Person F was the only intended victim.*

Based on this analysis, "USAO believes that eliminating liability only for an 'intended victim' would remedy these situations and clarify the law."

- The RCC does not incorporate USAO's recommended revision because the issue identified is already addressed by the proposed statutory language, RCC § 22E-304(a)(1). Under USAO's examples, there is no plausible claim that the injuries sustained by Persons B and D qualify them as "a victim of the *target offense*." The victim of the *target offense* in the first hypothetical is clearly Person C (and not B), while in the second hypothetical it is clearly Person E (and not D).

(2) *USAO, App. C at 241, recommends redrafting paragraph (a)(2), which currently reads: "The person's criminal objective is inevitably incident to commission of the target offense as defined by statute." USAO suggests revising this language to state: "The offense, as defined by statute, is of such a nature as to necessarily require the participation of two people for its commission." This "alternative proposal" stems from USAO's "belie[f] that the current wording of (a)(2) is confusing," and, as such, "is intended to be a clarification, not a substantive modification." USAO also "believes [this alternate proposal to be] a more accurate statement of Wharton's Rule, as set forth in the comments to the current jury instructions."*

- The RCC does not incorporate USAO's recommended revision. USAO's alternative proposal would constitute a substantive modification of paragraph (a)(2), which would also be a misstatement of Wharton's Rule as construed by the DCCA.

[80] "For example," as USAO states, "a child should not be deemed guilty of child sexual abuse, even if that child was a willing participant in the conduct that led to the adult's criminal liability."

- The current RCC approach bars solicitation and conspiracy liability where the defendant's "criminal objective is inevitably incident to commission of the target offense as defined by statute." As applied, this merely precludes holding (for example) the purchaser in a drug sale criminally liable for conspiring in the commission of drug distribution because the purchaser's criminal objective—the *acquisition* of controlled substances—is inevitably incident to the *distribution* of controlled substances.[81]
- Under USAO's recommended revision, in contrast, a conspiracy (or solicitation) to commit drug distribution (or other target offenses such as bribery or trafficking in stolen property) could never be charged because the acts of distribution (or bribery or trafficking in stolen property) "is of such a nature as to necessarily require the participation of two people for its commission."
- USAO's recommended approach is substantively consistent with the most expansive interpretation of Wharton's Rule; however, this interpretation has been subject to significant criticism.[82] Under the narrower and more defensible reading, in contrast, Wharton's Rule merely "supports a presumption" that, "absent legislative intent to the contrary," charges for conspiracy and a substantive offense that requires "concerted criminal activity" should "merge when the substantive offense is proved."[83]
- This latter approach is recommended by most commentators.[84] And it appears to most clearly reflect current District law, under which: "Wharton's Rule [merely] bar[s] convictions for both the substantive offense and conspiracy to commit that same offense," so, "[e]ven if the rule applies, initial dismissal of the conspiracy count is not required because the purpose of the rule is avoidance of dual punishment."[85]
- This is also the approach followed by the RCC through the combination of section 304(a)(2), as currently drafted, in combination with the RCC's general merger provision.[86]

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[81] In contrast, paragraph (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).

[82] *See, e.g.*, Model Penal Code § 5.04(2) cmt. at 481 ("[Such an approach] 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."); LAFAVE, *supra* note 1, at 2 SUBST. CRIM. L. § 12.4(c)(4).

[83] *Iannelli v. United States*, 420 U.S. 770, 785–86 (1975).

[84] *See, e.g.*, LAFAVE, at 2 SUBST. CRIM. L. § 12.4(c)(4) ("To the extent [Wharton's Rule simply] avoids cumulative punishment for conspiracy and the completed offense, [the doctrine] makes sense."); Model Penal Code § 5.04(2) cmt. at 481 ("[Wharton's] 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.").

[85] *Pearsall v. United States*, 812 A.2d 953, 962 & n.11 (D.C. 2002).

[86] *See* RCC § 22E-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"); *id.*, Explanatory Note ("For example, where D, a drug dealer, is convicted of both conspiracy to commit drug

(3) *The CCRC recommends replacing subsection (b) with a prefatory clause at the beginning of the provision that states, "Unless otherwise expressly specified by statute," consistent with other RCC General Part provisions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

distribution and drug distribution, and those convictions arise from the same course of conduct (e.g., a single drug deal with purchaser X), the conspiracy charge would merge with the drug distribution charge, since the latter, by effectively requiring an agreement to distribute as a precursor, 'reasonably accounts' for the former.").

RCC § 22E-305. Renunciation Defense to General Inchoate Liability

(1) *USAO, App. C at 241, "recommends removing § 22E-305 in its entirety." USAO offers this recommendation based on its "belie[f] that this section does not accurately reflect the state of the law." Specifically, "[c]ompletion of the target offense is never required for the offenses of attempt, conspiracy, and solicitation." USAO acknowledges that, [i]f the target offense is not completed, the defendant should not be held directly liable or liable under a theory of accomplice liability for the completed act." At the same time, "[h]owever[,] the fact that the offense was not completed does not affect his already completed culpability for attempt, conspiracy, and solicitation." In support, USAO offers the following illustration:*

> *[I]f a defendant solicits another person to commit murder, and then, just before the murder, the defendant instructs the other person not to commit the murder, the defendant should still be liable for solicitation to commit murder. He should not be guilty of the underlying charge of murder, which he could have been directly charged with had the murder been completed, but his renunciation of the underlying offense does not affect the solicitation, which had already been completed.*

That being said, however, "[i]f the CCRC is inclined to codify a defense in this section, USAO recommends that the RCC codify a withdrawal defense." Importantly, though, "[u]nder the withdrawal defense [recommended by USAO] a defendant cannot rely on a withdrawal defense to attempt to escape liability for participation in a conspiracy once an overt act has been committed."

- The RCC does not incorporate USAO's recommended revisions. The renunciation defense codified in section 305 is supported by national legal trends and compelling policy considerations. It also fills an important gap in District law in a manner that is generally consistent with District law.
- A "majority of American jurisdictions recognize some form of renunciation defense to an attempt to commit an offense," while "[n]early every jurisdiction permits some form of renunciation defense to a charge of criminal solicitation" and "to a charge of conspiracy."[87]
- Widespread recognition of "renunciation as an affirmative defense to inchoate crimes" is often said to be driven by "two basic reasons":

  > First, renunciation indicates a lack of firmness of that purpose which evidences criminal dangerousness. The same rationale underlies the reluctance to make merely "preparatory" activity a basis for liability in criminal attempt: the criminal law does not seek to condemn where there is an insufficient showing that the defendant has a firm purpose to bring about the conduct or result which the

[87] PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2019); *see, e.g.*, Daniel G. Moriarty, *Extending the Defense of Renunciation*, 62 TEMP. L. REV. 1 (1989).

> penal law seeks to prevent. Where the defendant has performed acts which indicate, *prima facie*, sufficient firmness of purpose, the defendant should be allowed to rebut the inference to be drawn from such acts by showing that the defendant has plainly demonstrated the defendant's lack of firm purpose by completely renouncing the defendant's purpose to bring about the conduct or result which the law seeks to prevent.
>
> Second, it is thought that the law should provide a means for encouraging persons to abandon courses of criminal activity which they have already undertaken. In the very cases where the first reason becomes weakest, this second reason shows its greatest strength. That is, in the penultimate stage, where purpose is most likely to be firmly set, any inducement to desist achieves its greatest value.[88]

- The current state of District law concerning the renunciation defense is unclear. The D.C. Code does not codify any general defenses to criminal conduct, including renunciation. There also does not appear to be any District case law directly addressing the issue in the context of attempt, solicitation, or conspiracy. At the same time, some District authority relevant to the renunciation defense exists in the context of general inchoate crimes, providing modest support for its recognition.[89]

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[88] Commentary on Haw. Rev. Stat. Ann. § 705-530 (citing Model Penal Code § 5.01 cmt. at 361); *see, e.g.*, Moriarty, *supra*, at 5-6 (observing that a renunciation defense is "[a] cost-effective technique to . . . concentra[ting] our resources on those who seem most likely to commit crime, and to target our measures of social defense at those persons who are most dangerous."); Moriarty, *supra*, at 5 ("Just as the degree structure of criminal [provides] greater deterrence for the higher degrees of crime [through more severe punishments], 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.").

Perhaps a better explanation of the renunciation defense's recognition, though, is "[r]etributively oriented," namely, that voluntary and complete renunciation "makes us reassess our vision of the defendant's blameworthiness." Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 612 (1981). As numerous legal authorities have recognized:

> 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.

Hernandez-Cruz v. Holder, 651 F.3d 1094, 1103 (9th Cir. 2011) (quoting WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 11.4 (3d ed. Westlaw 2019) which in turn quotes Robert H. Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308, 310 (1937)); *see, e.g.*, PAUL H. ROBINSON & JOHN DARLEY, INTUITIONS OF JUSTICE & THE UTILITY OF DESERT 247-57 (2014) (finding strong support in public opinion for renunciation defense).

[89] In the attempt context, District courts apply a conduct requirement that, in drawing the line between preparation and perpetration, seems to imply the absence of renunciation. This so-called probable desistance test requires proof of conduct which, "*except for the interference of some cause preventing the carrying out of the intent*, would have resulted in the commission of the crime." *E.g.*, *Wormsley v. United*

- In the absence of District authority directly addressing the viability of a renunciation defense to the general inchoate crimes of attempt, conspiracy, and solicitation, the most relevant aspect of District law is the intersection between withdrawal and accomplice liability. The DCCA appears to recognize that a complete withdrawal defense is available to those being prosecuted as aiders and abettors.[90] Which is to say, an accomplice that "take[s] affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation" cannot be convicted of the crime for which he or she has been charged with aiding and abetting.[91]
- Recognition of a withdrawal defense to accomplice liability is congruent with recognition of a renunciation defense to general inchoate crimes. This is clearest in the context of conspiracy and solicitation liability given that the elements of accomplice liability are nearly identical—indeed,

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States, 526 A.2d 1373, 1375 (D.C. 1987) (quoting *Sellers v. United States*, 131 A.2d 300, 301-02 (D.C. 1957)) (emphasis added); *see also In re Doe*, 855 A.2d 1100, 1107 and n.11 (D.C. 2004) (quoting *Wormsley* but noting this formulation is "imperfect" in the sense that "failure is not an essential element of criminal attempt"). As various commentators have observed, this formulation of attempt liability appears to be part and parcel with a renunciation defense in the sense that a "voluntary abandonment demonstr[ates] that the agent would not have 'committ[ed] the crime except for' extraneous intervention." R.A. DUFF, CRIMINAL ATTEMPTS 395-96 (1996); *see, e.g.*, Model Penal Code § 5.01 cmt. at 357-58; LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 11.5. Which is to say, the fact that a defendant genuinely repudiates his or her criminal plans establishes that, with or without external interference, the outcome would have been the same: failure to consummate the target offense.

In the conspiracy context, the DCCA has addressed an issue closely related to renunciation: withdrawal. Withdrawal, unlike renunciation, does not speak to when an actor is relieved from conspiracy *liability*. Instead, it addresses when an actor may be relieved from the *collateral consequences* of a conspiracy. PAUL H. ROBINSON, 1 CRIM. L. DEF. § 81 (Westlaw 2018) (collecting authorities). 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." LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. Or the defendant "may want to prove his withdrawal so as to show that as to him the statute of limitations has run." LAFAVE, *supra*, at 2 SUBST. CRIM. L. § 12.4. On these kinds of collateral issues, DCCA case law recognizes a withdrawal defense, under which the defendant "must take affirmative action to disavow or defeat the purpose, or definite, decisive and positive steps which indicate a full and complete disassociation." *Bost v. United States*, No. 12-CF-1589, 2018 WL 893993, at *28 (D.C. Feb. 15, 2018) (quoting *Harris v. United States*, 377 A.2d 34, 38 (D.C. 1977) (citing *Hyde v. United States*, 225 U.S. 347, 369 (1911); *United States v. Chester*, 407 F.2d 53, 55 (3rd Cir. 1969)); *see, e.g.*, *Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994); *Baker v. United States*, 867 A.2d 988, 1007 (D.C. 2005). And, "[i]n the event that a defendant claims that he or she withdrew from the conspiracy and the evidence warrants such an instruction," the criminal jury instructions indicate that the burden is on the "government to prove that the defendant was a member of the conspiracy and did not withdraw it." COMMENTARY ON D.C. CRIM. JUR. INSTR. § 7.102.

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

[91] *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.").

soliciting or conspiring with another person to commit a crime are two ways of aiding and abetting its commission.[92] But it is also true in the context of attempts, given the broader sense in which holding someone criminally responsible as an aider and abettor effectively "constitute[s] a form of inchoate liability."[93] And, perhaps most importantly, the elements of a withdrawal defense are not only similar to, but are necessarily included within, the more stringent elements of a renunciation defense, which typically requires *non-consummation* of the target offense under circumstances manifesting a *voluntary* and *complete* repudiation of criminal intent.[94] Arguably, then, the failure to recognize a renunciation defense to general inchoate crimes would be "inconsistent with the doctrine allowing an analogous defense in the complicity area."[95]

(2) *The CCRC recommends incorporating the term "Renunciation" into the heading of RCC § 22E-305(b), such that it now reads: "Scope of Voluntary and Complete* Renunciation*." This revision describes the operative principle more clearly and is consistent with informal comments received from OAG.*

- This revision does not change current District law, and it improves the clarity and consistency of the revised statutes.

(3) *The CCRC recommends striking the burden of proof subsection and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

(4) *The CCRC recommends including a subsection for definitions.*

- This change improves the consistency of the revised statute and does not substantively change its meaning.

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[92] *See, e.g.*, *Tann v. United States*, 127 A.3d 400, 499 n.11 ("Generally, it may be said that accomplice liability exists when the accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.") (quoting LAFAVE, supra note 1, at 2 SUBST. CRIM. L. § 13.2); *United States v. Simmons*, 431 F. Supp. 2d 38, 48 (D.D.C. 2006), *aff'd sub nom. United States v. McGill*, 815 F.3d 846 (D.C. Cir. 2016) ("Convictions for first degree murder while armed . . . may be based on evidence that he solicited and facilitated the murder.") (citing *Collazo v. United States*, 196 F.2d 573, 580 (D.C. Cir. 1952)); *see also* Adam Harris Kurland, *To "Aid, Abet, Counsel, Command, Induce, or Procure the Commission of an Offense": A Critique of Federal Aiding and Abetting Principles*, 57 S.C. L. REV. 85 (2005); Model Penal Code § 2.06(3).

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

[94] As one commentator phrases the distinction:

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

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

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

Chapter 4. Justification Defenses.

RCC § 22E-408. Special Responsibility Defenses.[96]

(1) *USAO, App. C at 274, recommends that subsection (a)(1)(B) be rewritten to codify current* in loco parentis *law.*[97] *USAO states that the provision, "person acting in the place of a parent per civil law" is confusing and should be eliminated. USAO recommends that subsection (a)(1)(B) be rewritten as follows: "(B) The actor is either: (i) A parent or legal guardian of the complainant; or (ii) A person who has put himself or herself in the situation of a lawful parent or legal guardian, without going through the formalities necessary for legal adoption, by both assuming parental status and by discharging the duties and obligations of a parent toward a child…"*

- The CCRC does not incorporate this recommendation because it may result in disproportionate penalties, would be inconsistent with other RCC provisions, and may be confusing by addressing guardians in this manner (without definition). The revised statute uses a term defined in RCC 22E-701: ""Person acting in the place of a parent under civil law" means both a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption, and any person acting by, through, or under the direction of a court with jurisdiction over the child." This short, defined term more clearly states what constitutes a "guardian" and is used in multiple RCC provisions without repeating the longer phrasing suggested by USAO. The RCC also broadens availability of the defense beyond those having a formal parental or guardian status to others who may be recognized under civil law (in contrast to the USAO recommendation to limit the defense to those who "*both assuming parental status and by discharging the duties and obligations of a parent toward a child*"). However, the RCC still limits availability of the defense to those who are responsible for the health, welfare, or supervision of the complainant.

(2) *USAO, App. C at 274-275, recommends that, in subsection (a)(1)(D), the words "under all the circumstances" be replaced by the words "under all the circumstances, including the child's age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, and any other relevant factors."*[98] *USAO states that it is clearer to point out some of the most relevant considerations in this analysis.*

- The RCC partially incorporates this recommendation by revising the commentary to specifically note with regard to the phrase "under all the

[96] Previously titled "Special Responsibility for Care, Discipline, or Safety Defense."
[97] Criminal Jury Instructions for the District of Columbia, No. 4.121 (5th ed. Rev. 2018).
[98] *See* Criminal Jury Instructions for the District of Columbia, No. 4.120 (5th ed. Rev. 2018). USAO also suggests including the word "size," which is not included in the jury instructions.

circumstance" that "The determination of whether a person's actions are reasonable in manner and degree "under all the circumstances" may include a complainant's "age, size, health, mental and emotional development, alleged misconduct on this and earlier occasions, the kind of punishment used, the nature and location of the injuries inflicted, or other relevant factors." The RCC defense requires simply that, "under all the circumstances" the actor's conduct be reasonable in manner and degree. The determination of reasonableness in manner and degree may or may not be aided by the listed circumstances such as age.

(3) *The CCRC recommends adding to the persons who may claim a special responsibility defense persons who are reasonably mistaken that they have the effective consent of a relevant person with legal authority. In the parental defense this change expands the defense to include a person who "reasonably believes that they are acting with the effective consent of a parent or person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant," instead of the prior language referring only to "Someone acting with the effective consent of such a parent or person." Similarly, this change expands the persons who may claim a guardian defense to a person who "reasonably believes that they are acting with the effective consent of a court-appointed guardian to the complainant" instead of the prior language referring only to "Someone acting with the effective consent of such a guardian." Also, this change expands the persons who may claim an emergency health professional defense to a person who "reasonably believes that they are acting at a licensed health professional's direction," replacing the prior language referring only to "a person acting at a licensed health professional's direction." It appears unjust to deny this defense to a nurse or other person acting under a reasonable mistake that they have the effective consent of a relevant person with legal authority.*

- *This change improves the proportionality of the revised statutes.*

(4) *The CCRC recommends adding "in fact" to specify that there is no culpable mental state for elements of the special responsibility defenses where none were previously specified in the draft defenses, not including subparagraphs (c)(5)-(c)(7) of the emergency health professional defense (discussed below).*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(5) *The CCRC recommends a culpable mental state of acting "with intent" apply to subparagraphs (c)(5)-(c)(7) of the emergency health professional defense. This requires proof that the actor believed to a practical certainty that the medical procedure was administered or authorized in an emergency, that no person who was permitted under District law to consent to the medical procedure on behalf of the complainant could be timely consulted, and that there was no legally valid standing instruction by the complainant declining the medical procedure.*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(6) *The CCRC recommends replacing "wishing to safeguard the welfare of the complainant" in the emergency health professional defense with "desiring to*

safeguard the welfare of the complainant." This revision uses terminology that tracks the definition of a "purposeful" culpable mental state described elsewhere in the revised statutes.

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(7) *The CCRC recommends that the special responsibility offenses be available for conduct under: Forced Labor or Services (RCC § 22E-1601); Trafficking in Labor or Services (RCC § 22E-1603); and Chapter 18 offenses, other than Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B) and (a)(1)(E) or subparagraphs (b)(1)(B) and (b)(1)(E) and Arranging a live performance of a minor (RCC § 22E-1809).*

(8) *The CCRC recommends that the special responsibility offenses not be available for conduct under: Creating or trafficking an obscene image of a minor (RCC § 22E-1807) when charged under subparagraphs (a)(1)(B), (a)(1)(E), (b)(1)(B) or (b)(1)(E); and Arranging a live performance of a minor (RCC § 22E-1809).*

(9) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

RCC § 22E-409. Effective Consent Defense.

(1) *The CCRC recommends adding "in fact" to specify that there is no culpable mental state for elements of the effective consent defense where none were previously specified in the draft defense.*

- This revision does not further change current District law, and it improves the clarity and consistency of the revised statutes.

(2) *The CCRC recommends striking the burden of proof paragraph in the defense provision and instead specifying the burden of proof for all defenses in RCC § 22E-201.*

- *This change improves the consistency of the revised statutes and does not further change District law.*

Chapter 6. Offense Classes, Penalties, & Enhancements.

[No comments addressed or updates to Chapter 6 are included in this report.]

RCC § 22E-701. Generally Applicable Definitions.

"Act"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Ammunition"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Amount of damage"

(1) *The CCRC recommends codifying a definition of "amount of damage" that applies to the RCC criminal damage to property offense (RCC § 22E-2503). This is in response to a recommendation OAG made for the RCC criminal damage to property offense. The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701.*

- This change improves the clarity and consistency of the revised criminal damage to property offense.

"Assault weapon"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Attorney General"

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language "Attorney General for the District of Columbia" is substituted in the statutory text.*

- This change clarifies, but does not substantively change, the revised code.

"Audiovisual recording"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Block"

(1) *OAG, App. C at 245-246, seeks clarification of the definition of the term "block," posing the question, "Why is rendering a space impassable without unreasonable hazard 'blocking' but rendering impassable with an unreasonable hazard is not?"*

- The RCC incorporates this recommendation to clarify the definition of "block." The definition is amended to state, "'Block' and other parts of speech, including 'blocks' and 'blocking,' mean render safe passage

through a space difficult or impossible." This change clarifies the meaning of the revised definition.

(2) *OAG, App. C at 246, notes that although the Explanatory Note says, "similar language" to this definition "is used in the current crowding, obstructing, or incommoding statute," current D.C. Code § 22-1307 does not include any language comparable to the revised definition.*

- The RCC incorporates this recommendation to clarify the explanatory note for the definition of "block." The relevant sentence is revised to state, "The RCC definition of 'blocks' is new; the term is not currently defined in Title 22 of the D.C. Code (although a similar word, 'obstruct,' is used in the current crowding, obstructing, or incommoding statute).[99]" This change clarifies the revised commentary.

"Bodily injury"

(1) *OAG, App. C at 246, recommends revising the definition of* ***"bodily injury"*** *to specifically include "scratch, bruise, abrasion" so that the definition reads "'bodily injury' means physical pain, illness, scratch, bruise, abrasion, or any impairment of physical condition." As currently drafted, OAG states that the language "impl[ies] that something actually has to be impaired."*

- The RCC partially incorporates this recommendation by specifying "physical injury" in the definition, as opposed to specific physical injuries, so that the revised definition reads "physical pain, physical injury, illness, or any impairment of physical condition." In addition, the commentary to the definition lists a scratch, a bruise, and an abrasion as examples of physical injury. This change improves the clarity of the revised statutes.

(2) *USAO, App. C at 276, recommends revising the definition of "****bodily injury****" to include "a contusion, an abrasion, a laceration, or other physical injury" so that the definition reads "'bodily injury' means physical pain, illness, a contusion, an abrasion, a laceration, or other physical injury, or any impairment of physical condition." USAO states that including these injuries clarifies the statute, avoids potential future litigation, and is consistent with the RCC definitions of "significant bodily injury" and "serious bodily injury."*

- The RCC partially incorporates this recommendation by specifying "physical injury" in the definition, as opposed to specific physical injuries, so that the revised definition reads "physical pain, physical injury, illness, or any impairment of physical condition." In addition, the commentary to the definition lists a contusion, an abrasion, and a laceration as examples of physical injury. This change improves the clarity of the revised statutes.

[99] D.C. Code § 22-1307.

"Building"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Bump stock"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Business yard"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Check"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Circumstance element"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Class A contraband"

(1) *USAO, App. C at 277, recommends adding a catch-all provision to include any item that is "otherwise designed or intended to facilitate an escape." USAO explains that inclusion of this provision will make it easier to prosecute possession of homemade implements.*

- The RCC does not incorporate this recommendation. Subsection (G) of the revised definition broadly includes any tool—whether machine-made or handmade—that is "created or specifically adapted for picking locks, cutting chains, cutting glass, bypassing an electronic security system, or bypassing a locked door." However, criminalizing possession of any item that is *intended* to facilitate an escape would broadly include objects that have not yet been adapted, objects that are not objectively useful, and objects that have other legitimate purposes. Consider, for example, a person who intends to escape by writing a note to a corrections officer, begging for compassionate release. Under USAO's proposed language, that person commits a contraband offense the moment she obtains a pencil or a piece of paper. As the commentary to the definition of "Class A Contraband" explains, "The revised language creates a more objective basis for identifying contraband—rather than making the subjective intent to facilitate escape the sole criterion for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense."

(2) *USAO, App. C at 277, recommends criminalizing possession of civilian clothing because it can be used to facilitate an escape.*

- The RCC does not incorporate this recommendation. A person who possesses civilian clothing may be subject to disciplinary action[100] but not an additional conviction. Wearing "a law enforcement officer's uniform, medical staff clothing, or any other uniform" is punishable as first degree correctional facility contraband.[101] Wearing civilian clothing together with department-issued inmate clothing—e.g., undergarments, tennis shoes—is unlikely to facilitate an escape. Wearing a full civilian clothing outfit to impersonate a visitor may constitute an attempted escape.[102]

(3) *USAO, App. C at 277, recommends including stun guns in the definition.*

- The RCC does not incorporate this recommendation because the definition already includes stun guns by including any "dangerous weapon," which is defined in RCC § 22E-701 to include stun guns.

(4) *USAO, App. C at 277, recommends including controlled substances and marijuana in the definition of Class A Contraband. Alternatively, USAO recommends adding an intermediate class of contraband for controlled substances and marijuana, graded less severely than weapons and escape implements but more severely than alcohol and drug paraphernalia. USAO explains that these drugs affect the physical and mental stability of incarcerated people and are a potential touchstone for conflict.*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. The RCC recommends marijuana and controlled substances constitute Class B contraband rather than Class A contraband, carrying a potential punishment for Second Degree Correctional Facility Contraband rather than First Degree Correctional Facility Contraband.
- In the First Draft of Report #37 (July 12, 2019), the CCRC recommended that the RCC criminalize simple possession and trafficking of controlled substances. Any person who possesses a controlled substance—as an inmate or otherwise, for personal use or to use as currency—is subject to prosecution under RCC §§ 48-904.01a (regardless of weight) and 48-904.01b (depending on weight). Subsequently, in the First Draft of Report #41 (October 3, 2019), the CCRC recommended penalty classifications for drug offenses and first and second degree correctional facility contraband. Under the RCC penalty classifications, an incarcerated person who possesses any amount of a controlled substance could be charged with second degree correctional facility contraband and subject to a Class A penalty, which is significantly more severe than the corresponding Class C or Class D penalties for a civilian possessing any amount of a controlled substance under RCC § 48-904.01a. Where the amount of a controlled substance possessed by an incarcerated person is such as to indicate an

[100] *See, e.g.,* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).
[101] RCC § 22E-701 ("Class A contraband").
[102] RCC § 22E-301 (Criminal Attempt); RCC § 22E-3401 (Escape from a Correctional Facility or Officer).

intent to distribute, such conduct may be prosecuted under RCC § 48-904.01b, which may be more severely punished than second degree correctional facility contraband depending on the nature of the controlled substance.

- The inclusion of controlled substances in the RCC definition of Class B Contraband ensures more severe punishment for incarcerated persons who merely possess a controlled substance or marijuana (as compared to civilians) but does not equate possession of such drugs with possession of weapons and tools for escape. In addition, anyone incarcerated may be subject to disciplinary action for possession of a controlled substance or marijuana.[103]

(5) *USAO, App. C at 277, recommends reclassifying portable electronic communication devices as Class A contraband. USAO states, "Cell phones can be used by inmates to coordinate escape or violent actions against correctional officers."*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty. Consistent with current D.C. Code § 22-2603.01(3)(A)(iii), the revised correctional facility contraband offense[104] punishes possession of a portable electronic communication device as Class B contraband. Cell phones have many uses other than facilitating an escape or violence. Though prohibited and subject to criminal punishment in the RCC as Second Degree Correctional Facility Contraband, behaviors such as listening to music, reading the news, conducting legal research, and corresponding with acquaintances do not pose a danger commensurate with the danger posed by weapons and other escape implements. In addition, a person who uses a cell phone to coordinate an escape or an act of violence may be guilty of aiding,[105] attempting,[106] soliciting,[107] or conspiring,[108] to commit the underlying offense of escape from a correctional facility or officer,[109] assault,[110] or rioting.[111]

(6) *The CCRC recommends replacing the phrases "capable of" and "designed or intended" in subsections (F) – (I) with the phrase "designed or specifically adapted for." The revised language creates a more objective basis for identifying contraband—rather than making the person's subjective intent the sole criterion*

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[103] *See* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).
[104] RCC § 22E-3403.
[105] RCC § 22E-210.
[106] RCC § 22E-301.
[107] RCC § 22E-302.
[108] RCC § 22E-303.
[109] RCC § 22E-3401.
[110] RCC § 22E-1202.
[111] RCC § 22E-4301.

for whether any object is Class A contraband—and is consistent with language in the revised possession of tools to commit property crime offense.

- This change improves the clarity, consistency, and proportionality of the revised definition.

"Class B contraband"

(1) *The CCRC recommends replacing the phrases "capable of" and "designed or intended" with the phrase "designed or specifically adapted for." This clarifies that an everyday item that could foreseeably be used unlawfully (e.g., spoon or straw) is not contraband* per se.

- This change improves the clarity, consistency, and proportionality of the revised definition.

"Close relative"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Coercive threat"

(1) *The CCRC recommends deleting the words "explicit or implicit" from the definition of "coercive threat." Instead, specific offenses that include coercive threats will specify whether explicit and implicit coercive threats are included.*

- This change improves the clarity of the revised statute.

(2) *PDS at App C. 268-269, recommends redrafting the commentary to clarify that coercive threats predicated on exposing secrets only includes threats to reveal secrets that would have constituted blackmail.*

- The RCC incorporates this recommendation by amending the commentary to clarify the scope of coercive threats as recommended by PDS. However, the commentary also will clarify that there is at least one type of secret that constitutes a coercive threat that arguably would not have constituted traditional blackmail. "Coercive threat" includes exposing a secret, publicizing an asserted fact, or distributing a photograph, video, or audio recording that tends to *perpetuate* hatred, contempt, ridicule, or other significant injury to personal reputation. For example, threats to publish sexually explicit photos of an adult film performer may still constitute a coercive threat, even though similar photos are already publicly available. It is unclear whether these types of threats would constitute blackmail under current District law. This change clarifies the RCC commentary.

(3) *USAO, at App C. 277, recommends changing the term "coercive threat" to "coercion" and separately addressing in the definition both a "threat" and "an act."*

- The RCC does not adopt USAO's proposed language separating a threat from an act because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other

conduct. This RCC approach is consistent with the plain language meaning of "threaten" as including menacing a person with a weapon.[112] To separately address an "act" that is "intended to induce the complainant's compliance" may suggest that threats ordinarily do *not* include acts such as gestures, or that a significant difference is intended between a threat that is verbal or non-verbal.[113] The RCC consistently uses threats to include non-verbal conduct.

(4) *USAO, at 278-279, recommends that the term "coercion" should categorically include* facilitate[ing] or control[ing] *a person's access to an* addictive or controlled *substance." USAO also recommends removing the requirements that the substance is a controlled substance, or that the person owns the substance.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Subparagraph (F) of the RCC definition of "coercive threat" includes as one type a threat to: "Restrict a person's access to a controlled substance that the person owns." This language is narrowly tailored to exclude otherwise legal, socially acceptable activities. In contrast, the USAO recommendation to include facilitating or controlling a person's access to addictive substances in the definition of "coercive threats" may improperly criminalize consensual agreements involving addictive substances. For example, the revised forced labor or services offense is defined as causing a person to engage in labor or services by means of a coercive threat. If "coercive threat" were to include facilitating a person's access to an addictive substance, providing beer in exchange for a friend's held in moving a couch would appear to constitute forced labor depending on whether alcohol is deemed an "addictive" substance, an undefined term. Similarly, everyday conduct of a pharmacist dispensing prescription medications would constitute "coercion" under the USAO definition.

(5) *USAO, at 278, recommends categorically including "fraud or deception" in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and authorize disproportionate penalties. The RCC decouples fraud and deception from a definition of "coercion" because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to deception alongside a coercive threat as a way of defeating a person's effective consent. The RCC separately defines the term "deception" and also defines "effective consent" as consent other than consent induced by physical force, a coercive threat, or deception. The RCC codifies a separate definition

[112] See Merriam-Webster online dictionary definition of "threaten" (providing as one of the definitions "to cause to feel insecure or anxious" and listing as the first example of a use of the word, "The mugger threatened him with a gun.") (last visited 12-29-19).

[113] For example, it is unclear what work the phrase "intended to induce" is doing in the USAO's proffered language—for example is "induce" different from "cause" or "intended" imply there is a separate culpable mental state in the definition?— and whether or how such requirement differs from a verbal threat.

because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through fraud or deception. For example, second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat. Under the USAO's suggestion, which appears to be based on a definition of "coercion" limited to human trafficking, using any deception to induce a person to engage in a sexual act would appear to constitute second degree sexual assault.

(6) *USAO at App. C. 278, recommends that the use of force be included in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear and may authorize disproportionate penalties. The RCC decouples force from a definition of "coercion" because it is conceptually and factually distinct, but the RCC also consistently and appropriately refers to physical force alongside a coercive threat as a way of defeating a person's effective consent. The RCC defines "effective consent" as consent other than consent induced by physical force, a coercive threat, or deception. Including the use of force is unnecessary, and may make the revised definition less clear. The RCC codifies a separate definition because in many contexts, there are meaningful distinctions between obtaining consent through coercive threats, and through physical force. For example, the RCC second degree sexual assault is defined as causing a person to engage in or submit to a sexual act by a coercive threat, whereas first degree sexual assault is defined in terms of use of physical force or certain threats to kill or kidnap. This framework tracks the grading in the current D.C. Code sexual abuse statutes. Under the USAO's suggestion, which appears to be based on a definition of "coercion" limited to human trafficking, it is unclear if using force to induce a person to engage in a sexual act would constitute first or second degree sexual assault. Moreover, the "coercive threat" definition includes a threat that any person will engage in conduct that constitutes any offense against persons. The definition does not require that threats be issued verbally or explicitly; gestures or other forms of conduct may suffice. In any case in which a person coerces another person through the use of force, there is at least an implicit threat of additional or continued use of force.

(7) *USAO, at App. C. 278, recommends including in the definition of "coercion": "Knowingly participate in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business" in the definition of "coercion."*

- The RCC does not incorporate this recommendation because it would make the revised statutes less clear. The USAO recommendation, apparently drawn from the human trafficking context but recommended for the general definition of coercion, does not appear to add to the scope of the definition beyond a very specific type of deception. And, as

addressed above, the RCC provides liability in many offenses for deception, which undermines effective consent. In addition to deception, when a person coerce another by making that person believe he or she is property of another, other forms of coercive threats also may have also been used. In particular, people who have been led to believe they are property of another would also presumably believe that failure to comply with their ostensible "owner's" demands would result in some form of bodily injury, or other "harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply"—types of coercive threats specifically addressed in the revised definition.

"Commercial Sex Act"

(1) *The CCRC recommends adding a definition of the term "commercial sex act" to RCC § 22E-701.*

- The RCC incorporates this recommendation by defining "commercial sex act" in RCC § 22E-701 to mean "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person." This change clarifies the revised statute.

"Comparable Offense"

(1) *USAO, App. C at 286, notes the term "comparable offense" appears to be superfluous, as the term is no longer used in the RCC.*

- The RCC does not incorporate this recommendation because, as of the First Draft of Report #39 (August 5, 2019), the definition of "comparable offense" now appears in RCC § 22E-4105, possession of a firearm by an unauthorized person.

"Complainant"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Consent"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Conduct element"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Controlled substance"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Correctional facility"

(1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal's Service to the definition of "correctional facility," so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*

- The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense[114] to include an escape from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.

"Court"

(1) *The CCRC recommends striking this definition as unnecessary and potentially confusing. Where applicable, the language "the Superior Court for the District of Columbia" is substituted in the statutory text.*

- This change clarifies, but does not substantively change, the revised code.

"Culpable mental state"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Culpability requirement"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Dangerous Weapon"

(1) *OAG, App. C at 246, recommends clarifying that the phrase "with a blade over 3 inches in length" modifies the word "knife" but does not modify the word "sword" or the word "razor."*

- The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019), by reordering the list of sharp force trauma instruments in the definition of "dangerous weapon." The relevant paragraph has been revised to state, "(C) A knife with a blade longer than 3 inches, sword, razor, stiletto, dagger, or dirk." This change clarifies the meaning of the revised definition.

(2) *OAG, App. C at 246, recommends revising the sentence in the commentary (p. 205) that states, "The RCC definition, by contrast, clarifies that a person's integral body parts, including teeth, nails, feet, hands, etc., categorically cannot*

[114] RCC § 22E-3401(a).

constitute a dangerous weapon." OAG explains the word "integral" does not appear in the statutory language and is unclear.

- The RCC already incorporated this recommendation in the First Draft of Report #39 (August 5, 2019) by striking the confusing term "integral." The relevant sentence has been revised to state, "The RCC definition, by contrast, clarifies that a person's body parts, including teeth, nails, feet, hands, etc., categorically cannot constitute a dangerous weapon." This change clarifies the meaning of the revised definition.

(3) *USAO, App. C at 397-398, recommends revising the definition to include stationary objects, contrary to current District law in* Edwards v. United States.[115] *USAO explains that the RCC "should recognize the moral equivalence of injuring someone with a stationary or non-stationary object."*[116]

- The RCC does not incorporate this recommendation because it may result in confusion and disproportionate penalties. The RCC assault statute[117] and other offenses that provide enhanced penalties for committing the crime by displaying or using a dangerous weapon seek to provide additional punishment beyond the degree of injury suffered, in limited cases of great concern. Including stationary objects in the definition of dangerous weapon, however, would greatly expand the category of "dangerous weapon" and result in some counterintuitive and disproportionate outcomes. For example, it is not clear how offenses such as carrying a dangerous weapon[118] would be construed if all stationary objects constitute dangerous weapons. Including stationary objects could also make conduct such as a push that causes a person to trip and fall on a hard surface punishable not according to the degree of injury sustained, but equivalent to the display or use of a firearm or knife.

"Deceive" and "Deception"

(1) *USAO, at App. C. 280, recommends deleting subsection (e), which excludes puffing statements, from the definition.*

- The RCC does not incorporate this recommendation because it would make the definition less clear and complete, and may authorize disproportionate penalties. The revised statute in subsection (e) codifies that in cases involving *only* puffing statements as the purported basis of deception, criminal penalties are not warranted. In the civil and criminal contexts, courts have long recognized that puffery does not constitute fraud.[119] Omitting puffing statements from the definition of deception would risk criminalizing a broad array of statements that, while technically misleading, do not warrant criminal sanction. For example, a

[115] 583 A.2d 661 (D.C. 1990).
[116] "Morally, running a victim into a spike is as culpable as stabbing him with a dagger." *Id*. at 667.
[117] RCC § 22E-1202.
[118] RCC § 22E-4102(c).
[119] *See generally*, David A. Hoffman, *The Best Puffery Article Ever*, 91 Iowa L. Rev. 1395, 1402 (2006).

diner manager who places a sign in the window stating "world's best coffee," could be subject to criminal liability if the coffee is not actually the best coffee in the world.

- The USAO expresses concern that the exception for puffery would preclude liability in security fraud cases, stating that "defendants commonly present their victims with false promises of out-sized investment returns." However, as specified in the RCC, material misrepresentations may still serve as the basis for securities fraud. For example, an executive who overstates a company's earnings in order to deceive investors may still be found guilty of fraud. On the other hand, if puffing statements are included in the definition of deception, securities fraud could conceivably include an executive who falsely promises that "this company will change the world."

"Demonstration"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Deprive"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Detection device"

(1) *The CCRC substitutes the phrase "location tracking capability" for "electronic monitoring," to clarify the type of monitoring included in the definition. This revision makes the definition more closely resemble the definition of "monitoring equipment or software."*

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

"District official"

(1) *OAG, App. C at 246-247, recommends excluding specified District of Columbia Excepted Service employees and Council employees from the definition of "**District official.**" The RCC definition of "District official" is identical to the definition of "public official" in D.C. Code § 1-1161.01(47). This D.C. Code definition of "public official" establishes who must file a public financial disclosure statement under District Board of Ethics and Government Accountability rules.*[120] *OAG states that while pay and ethics rules "may be useful for determining who must file a public financial disclosure statement . . . there is no reason why these people are deserving of more protection than other government employees." With OAG's revisions, the RCC definition of "District official" would be limited to paragraphs (A) – (H) of the D.C. Code definition of*

[120] D.C. Code § 1-1162.24.

"public official,"[121] *and paragraphs (I) and (J) of the D.C. Code definition of "public official," pertaining to specified District of Columbia Excepted Service employees and Council employees,*[122] *would be deleted.*

- The RCC incorporates this recommendation by limiting the RCC definition of "District official" to paragraphs (A) – (H) of the D.C. Code definition of "public official" in D.C. Code § 1-1161.01(47). This change improves the clarity, consistency, and proportionality of the revised statutes.

"Domestic partner"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Domestic partnership"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Dwelling"

(1) *The CCRC revises the definition to include communal areas secured from the general public, in light of the DCCA's recent opinion in* Ruffin v. United States.[123]

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

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[121] D.C. Code § 1-1161.01(47) ("'Public official' means: (A) A candidate; (B) The Mayor, Chairman, and each member of the Council of the District of Columbia holding office under Chapter 2 of this title; (C) The Attorney General; (D) A Representative or Senator elected pursuant to § 1-123; (E) An Advisory Neighborhood Commissioner; (F) A member of the State Board of Education; (G) A person serving as a subordinate agency head in a position designated as within the Executive Service; (G-i) Members of the Washington Metropolitan Area Transit Authority Board of Directors appointed appointed by the Council pursuant to § 9-1107.01(5)(a); (G-ii) A Member or Alternate Member of the Washington Metrorail Safety Commission appointed by the District of Columbia pursuant to Article III.B. of the Metrorail Safety Commission Interstate Compact enacted pursuant to D.C. Law 21-250; (H) A member of a board or commission listed in § 1-523.01(e).").

[122] D.C. Code § 1-1161.01(47) ("(I) A District of Columbia Excepted Service employee, except an employee of the Council, paid at a rate of Excepted Service 9 or above, or its equivalent, who makes decisions or participates substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or acts in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and any additional employees designated by rule by the Board of Ethics and Government Accountability who make decisions or participate substantially in areas of contracting, procurement, administration of grants or subsidies, developing policies, land use planning, inspecting, licensing, regulating, or auditing, or act in areas of responsibility that may create a conflict of interest or appearance of a conflict of interest; and (J) An employee of the Council paid at a rate equal to or above the midpoint rate of pay for Excepted Service 9.").

[123] 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

"Effective consent"

(1) *The CCRC recommends revising the definition of "**effective consent**" to include "an express or implied coercive threat," as opposed to merely "a coercive threat." With this revision, the definition of "effective consent" would read "consent other than consent induced by physical force, an express or implied coercive threat, or deception." Rather than rely on the commentary, the RCC is codifying "express or implied" directly in statutes to specify that "threats" includes express or implied threats.*

- This change improves the clarity and consistency of the revised statutes.

"Elderly person"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Factual cause"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Fair market value"

[No new Advisory Group comments received, or CCRC recommended changes.]

"False knuckles"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Financial Injury"

(1) *PDS, App. C at 270, objects to expanding the definition of "financial injury" to include any natural person as long as the expenditure is "reasonably necessitated by the criminal conduct," on grounds that it is overly broad and vague. PDS offers a hypothetical in which the neighbor of a stalking victim elects to install an improved security system. PDS recommends amending the revised definition to read, "'Financial injury' means the reasonable monetary costs, debts, or obligations incurred by a natural person who is the complainant, a member of the complainant's household, a person whose safety is threatened by the criminal act, or a person who is financially responsible for the complainant as a result of a criminal act…"*

- The RCC does not incorporate this recommendation because it would leave a gap in liability for indirect injury caused to persons other than the complainant. The RCC definition is intended to include expenses that are *reasonably* incurred by a third party as a result of the criminal conduct, even if the third party is not "financially responsible for the complainant as a result of" the criminal conduct. For example, a friend, family

member, or social services provider may voluntarily pay for temporary safe housing on behalf of a victim who is indigent.

"Firearm"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Firearms instructor"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Gun offense"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Halfway House"

(1) *OAG, App. C at 247, recommends including a cross-reference to D.C. Code § 24-241.01 in the statutory language, to clarify the meaning of the phrase "work release program."*

- The RCC incorporates this recommendation by amending the definition to state, "'Halfway house' means any building or building grounds located in the District of Columbia used for the confinement of persons participating in a work release program *under D.C. Code § 24-241.01*." (Emphasis added.) This change clarifies the meaning of the revised definition.

"Healthcare provider"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Health professional"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Identification number"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Image"

(1) *USAO, App. C at 452, recommends amending the definition to include images in any "other format," to accommodate future technologies.*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised definition and does not substantively change its meaning.[124]

"Imitation dangerous weapon"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Imitation firearm"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Innocent or irresponsible person"

[No new Advisory Group comments received, or CCRC recommended changes.]

"In fact"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Intentionally"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Intoxication"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Knowingly"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Large capacity ammunition feeding device"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Law enforcement officer"

(1) *The CCRC recommends revising subparagraph (H) of the definition of "**law enforcement officer**" to refer to the officers specified in "subparagraphs (A)-(G)" of the definition instead of "subparagraphs (A), (B), (C), (D), (E), and (F)." Subparagraph (H) of the definition follows the catch-all provision in the definition of "law enforcement officer" in the current murder of a law*

[124] The word "including" indicates the list of formats is not exhaustive.

enforcement officer statute, and that catch-all provision includes Metro Transit police officers.[125]

- This change improves the clarity and consistency of the revised definition.

(2) *USAO, App. C at 280, recommends adding "deputy marshals" to subsection (H) of the definition of "**law enforcement officer.**" Subsection (H) includes within the definition of "law enforcement officer" any "federal, state, county, or municipal officer" that performs "functions comparable to those performed by the officers" specified in the RCC definition. USAO states that "[a]lthough they may already be included" in the definition, "Deputy U.S. Marshals . . . are essential law enforcement officers in the District who frequently interact with defendants, as they operate cellblocks in D.C. Superior Court."*

- The RCC does not incorporate this recommendation because it introduces ambiguity into the definition. Deputy U.S. Marshals already are included in the general language in subparagraph (H) and other federal law enforcement positions are not specifically referenced. As is discussed in the commentary to the RCC definition, the RCC definition of "law enforcement officer" largely follows the definitions of "law enforcement officer" in the current assault on a police officer statute (D.C. Code § 22-405) and murder of a police officer statute (D.C. Code § 22-2106). These definitions do not specify any federal law enforcement officers. Singling out Deputy U.S. Marshals in the RCC definition may suggest that other federal law enforcement officers are excluded. The commentary has been revised to note, however, that subparagraph (H) includes Deputy U.S. Marshals, among others.

"Legal cause"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Live broadcast"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Live exhibition"

[No new Advisory Group comments received, or CCRC recommended changes.]

[125] D.C. Code § 22-2106(b) ("For the purposes of subsection (a) of this section, the term: (1) "Law enforcement officer" means: (A) A sworn member of the Metropolitan Police Department; (B) A sworn member of the District of Columbia Protective Services; (C) The Director, deputy directors, and officers of the District of Columbia Department of Corrections; (D) Any probation, parole, supervised release, community supervision, or pretrial services officer of the Court Services and Offender Supervision Agency or The Pretrial Services Agency; (E) Metro Transit police officers; and (F) Any federal, state, county, or municipal officer performing functions comparable to those performed by the officers described in subparagraphs (A), (C), (D), (E), and (F) of this paragraph, including but not limited to state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial service officers.").

"Machine gun"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Meeting"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Monitoring equipment or software"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Motor vehicle"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Negligently"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Obscene"

(1) *USAO, App. C at 453, recommends striking the phrase "in sex" as redundant.*
- The RCC does not incorporate this recommendation because it may reduce the clarity of the revised statutes. The revised definition incorporates the phrase "prurient interest in sex" from the United States Supreme Court's decision in *Miller v. California*.[126] Some modern English dictionaries define "prurient" to broadly include other immoderate or unwholesome interests and desires.[127]

(2) *The CCRC recommends amending part (B) of the definition to state "Is patently offensive," so that it is grammatically correct.*
- This change does not substantively change the definition or District law.

"Objective element"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Offense element"

[No new Advisory Group comments received, or CCRC recommended changes.]

[126] 413 U.S. 15 (1973).

[127] Merriam-Webster.com, *"prurient"*, 2020, *available at* https://www.merriam-webster.com/dictionary/prurient.

"Omission"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Open to the general public"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Owner"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Payment card"

(1) *USAO, at App. C. 281, recommends adding the words "whether tangible or digital" to the definition of "payment card."*
   a. The RCC incorporates this recommendation by adding the phrase suggested by USAO. This change improves the clarity of the revised criminal code.

"Person" for property offenses.

(1) *OAG, App. C at 257, comments that, while it "has no comments concerning the text of the definition," it is "concerned about its placement in subtitle III." First, OAG states that "people who are unfamiliar with the RCC with look to RCC § 22E-701 if they have a question about how the term 'person' is defined for property offenses, rather than to the beginning of subtitle III," particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, "if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 for the definition of a 'person.'" Finally, "by placing the definition in RCC § 22E-701 the definitions paragraph that is associated with each substantive offense can refer the reader to RCC § 22E-701 for the definition of 'person' along with the other applicable definitions."*
   - The RCC incorporates these comments by moving the definition of "person" for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase "Notwithstanding the definition of "person" in D.C. Code § 45-604". This change improves the clarity of the revised statutes.

"Person acting in the place of a parent per civil law"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Person with legal authority over the complainant"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Personal identifying information"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Physically Following"

(1) *OAG, App. C at 247, recommends either incorporating or separately defining the meaning of the phrase "close proximity," which is described in the commentary to refer to "the area near enough for the accused to see or hear the complainant's activities and does not require that the defendant be near enough to reach the complainant."*

- The RCC partially incorporates this recommendation by amending the definition to state, "'Physically following' means maintaining close proximity to a complainant, near enough to see or hear the complainant's activities as they move from one location to another." The commentary clarifies that the government is not required to prove that a person is able to make physical contact with the target of the following. This change clarifies the revised definition.

"Physically monitoring"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Pistol"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Position of trust with authority over"

(1) *The CCRC recommends including in subsection (A) of the definition of "position of trust with or authority over" "or an individual with whom such a person is in a romantic, dating, or sexual relationship." With this change, subsection (A) of the definition would read "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption, or an individual with whom such a person is in a romantic, dating, or sexual relationship." Subsection (A) of the current D.C. Code definition of "significant relationship"*[128] *and subsection (A) of the RCC definition include a "parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or*

[128] D.C. Code § 22-3001(10)(A) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption.").

adoption." Subsection (A) establishes a "per se" list of relatives, including these relatives' spouses or domestic partners, regardless of whether these individuals have any responsibility for the complainant. Subsection (C) of the current D.C. Code definition of "significant relationship"[129] *and subsection (C) of the previous RCC version include the spouse, domestic partner,* or *"paramour" of "the person who is charged with any duty for the health, welfare, or supervision of the complainant." To the extent that the specified relatives in subsection (A), for example, a parent, also have a responsibility for the complainant, subsection (A) and subsection (C) overlap for those relatives, and also for those relatives' spouses or domestic partners. However, subsection (C) includes a "paramour" of the person with a responsibility for the health, welfare, or supervision of the complainant and subsection (A) does not. This apparent discrepancy means that the "paramour" of a biological parent that has a responsibility for the complainant would be included in subsection (C) of the definition, but the "paramour" of a biological parent who has no responsibility for the complainant in subsection (A) would not. There is no DCCA case law interpreting the definition of "significant relationship." The RCC definition includes the "paramour" of a biological parent, regardless of the parent's relationship with the complainant in the "per se" list of individuals specified in subsection (A) and also includes the "paramour" of the other individuals in subsection (A).*

- This change improves the clarity of the revised definition and removes a possible gap in liability. The RCC commentary to the definition has been updated to reflect that this is a possible change in law.

(2) *The CCRC recommends replacing "legal or de facto guardian" in subsection (B) of the definition of "position of trust with or authority over" with "person acting in the place of a parent per civil law," a defined term in RCC § 22E-701. "A legal or de facto guardian" is undefined in the current sexual abuse statutes and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. The RCC consistently uses the term "person acting in the place of a parent per civil law," as defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised definition. The RCC commentary to this definition has been updated to reflect that this is a clarificatory change in law.

(3) *The CCRC recommends replacing "paramour" in subsection (B) of the definition of "position of trust with or authority over" with an individual with whom a specified person is "in a romantic, dating, or sexual relationship." "Paramour" is undefined in the current sexual abuse statutes, not everyday language, and there is no DCCA case law interpreting its scope in the current sexual abuse statutes. "Romantic, dating, or sexual relationship" is identical to the language*

[129] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include "The person *or the spouse, domestic partner, or paramour* of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act." (emphasis added).

in the current D.C. Code definition of "intimate partner violence"[130] *and is used throughout the RCC.*

- This change improves the clarity and consistency of the revised statutes. The RCC commentary to this definition has been updated to reflect that this is clarificatory change in law.

(4) *The CCRC recommends replacing what was previously subsection (C) of the definition of "position of trust with or authority over" ("The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant") with a revised subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") and revised subsection (E) ("A person responsible under civil law for the health, welfare, or supervision of the complainant."). In the previous subsection (C) of the RCC definition, the scope of a person "charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the offense" was unclear and, interpreted broadly, former subsection (C) would include the spouses, domestic partners, and significant others of any individual with any duty or responsibility for the health, welfare or supervision of the complainant, such as doctors, taxi drivers, etc. Substantively identical language exists in the current D.C. Code definition of "significant relationship" and there is no DCCA case law interpreting it.*[131] *The CCRC recommends deleting what was previously subsection (C). A revised subsection (B) ("A person acting in the place of a parent per civil law, the spouse or domestic partner of such a person, or an individual with whom such a person is in a romantic, dating, or sexual relationship") limits spouses, domestic partners, and significant others to those of a person acting in the place of a parent per civil law. Subsection (E) of the revised definition ("A person responsible under civil law for the health, welfare, or supervision of the complainant.") continues to provide liability for any individual that has a duty under civil law for the health, welfare, or supervision of the complainant.*[132]

- This language improves the clarity, consistency, and proportionality of the revised definition. The commentary to the RCC definition of "position of trust with or authority over" has been updated to reflect that this is a possible change in law.

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[130] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[131] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

[132] Subsection (E) of the revised definition does not specify "at the time of the offense" like current subsection (C) of the definition of "significant relationship" does because the RCC sexual abuse of a minor statute requires that the sexual act or sexual contact occur "while [the actor] is in a position of trust with or authority over the complainant." The language is surplusage.

(5) *The CCRC recommends making "Any person, more than 4 years older than the complainant, who resides intermittently or permanently in the same dwelling as the complainant" its own subsection (C) rather than part of subsection (B). This is a category of individual that is a person in a "position of trust with or authority over" that is unrelated to the requirements of parent, guardian, etc. in subsection (B).*

- This change improves the clarity of the revised definition.

(6) *The CCRC recommends replacing "more than 4 years older" than the complainant with "at least 4 years older" than the complainant in subsection (C) of the RCC definition of "position of trust with or authority over." The current definition of "significant relationship"*[133] *and the previous RCC version of the definition of "position of trust with or authority over" includes certain individuals "more than 4 years older than the complainant." This is a difference of a day in liability compared to the current child sexual abuse statutes*[134] *and several RCC sex offenses that require "at least" a four year age gap between the defendant and a minor complainant.*[135] *There is no DCCA case law interpreting the current definition of "significant relationship" or the intended scope of "more than 4 years older." The revised definition requires a gap of "at least four years older," the same age gap that is in other RCC sex offenses, such as sexual abuse of a minor (RCC § 22E-1302).*

- The change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The RCC commentary to the definition of "position of trust with or authority over" reflects that this is a clarificatory change.

(7) *The CCRC recommends replacing "care" with "health, welfare" in the catch-all provision of the definition of "position of trust with or authority over" and making it a separate subsection (E). With this revision, subsection (E) of the definition would specify a "person responsible under civil law for the health, welfare, or supervision of the complainant" and this language would no longer be part of subsection (D) of the definition. The RCC consistently uses the phrase "person responsible under civil law for the health, welfare, or supervision of the complainant," and the language is in subsection (B) of the current D.C. Code*

[133] D.C. Code § 22-3001(10)(B) (defining "significant relationship" to include "A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim.").

[134] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, 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."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, 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."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[135] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be included in the current definition of "significant relationship" because the actor is not "more than four years older" than the complainant.

definition of "significant relationship."[136] *Making this provision a separate subsection clarifies that the individuals listed in subsection (D) of the definition do not have to have a responsibility under civil law for the health, welfare, or supervision of the complainant. The current D.C. Code definition of "significant relationship" is open-ended and defines the term as "includ[ing]" the specified individuals or "any other person in a position of trust with or authority over" the complainant.* [137] *There is no DCCA case law interpreting the definition of "significant relationship" and it is unclear whether a job title or specified relationship to the complainant is sufficient, or if a substantive analysis of the relationship between the actor and the complainant is required.*

- This change improves the clarity of the revised definition and its consistency with other RCC statutes. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.

(8) *USAO, App. C at 282, recommends revising subsection (D) of the definition of "position of trust with or authority over" to specifically include a "contractor." USAO states that adding "contractor" "provides a more comprehensive definition of those responsible for the care and supervision of children at schools and other institutions" and that "[m]any organizations do not hire all of their employees directly; rather, they enlist contractors as part of that staffing." USAO states that contractors "have the same interactions with children and responsibilities as many of the direct employees do, it makes no sense to distinguish them for purposes of liability."*

- The RCC incorporates this recommendation by specifically including reference to a "contractor" in the revised definition. A contractor may have extensive or significant contact with the minors at a school or other institution, similar to an employee or volunteer. This change clarifies and may eliminate a gap in liability in the revised statutes. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(9) *USAO, App. C at 282, recommends deleting "under civil law" from the catch-all provision in the definition of "position of trust with or authority over" (now subsection (E)). With this revision, the catch-all provision would read "or other person responsible for the health, welfare, or supervision of the complainant." USAO states that "under civil law" is "unnecessarily confusing, and needlessly requires a comprehension of civil law to interpret criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or

[136] D.C. Code § 22-3001(10)(C) (defining "significant relationship" to include the "person . . . who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act.").

[137] D.C. Code § 22-3001(10)(D) ("Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, *or any other person in a position of trust with or authority over a child or a minor.*") (emphasis added).

supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(10) *The CCRC recommends deleting "a school, church, synagogue, mosque" from "a school, church, synagogue, mosque, or other religious institution" in subsection (D) of the definition of "position of trust with or authority over." With this revision subsection (D) will specify a "religious institution." Including specific types of religious institutions is unnecessary and inconsistent with the general references to school, athletic program, etc. in the rest of the subsection.*

- This change improves the clarity of the revised definition. The commentary to the definition specifies that subsection (D) includes a school, church, synagogue, or mosque and that this is a clarificatory change to law.

(11) *The CCRC recommends requiring "has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant" in subsection (D) of the revised definition of "position of trust with or authority over" and deleting the phrase "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff." With this revision, subsection (D) of the revised definition would read "Any employee, contractor, or volunteer of a school, religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program that has significant contact with the complainant or exercises supervisory or disciplinary authority over the complainant." Subsection (D) of the current D.C. Code definition of "significant relationship" specifies "any employee or volunteer" of a school, specified institution, etc., "including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor."*[138] *There is no DCCA case law interpreting the definition of "significant relationship." It is unclear in the current D.C. Code subsection (D) whether "any other person in a position of trust with or authority over" a complainant modifies the preceding list of specified individuals and requires a substantive analysis of the relationship between the actor and the complainant, or if an actor holding a specified job title is sufficient. In current law and in the RCC, whether an actor that is 18 years of age or older is in a "position of trust with or authority over" or a "significant relationship" with the complainant is the basis of criminalizing otherwise consensual conduct with a complainant that is over the age of 16 years, but under*

[138] D.C. Code § 22-3001(10)(D) (defining "significant relationship" to include "Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

the age of 18 years. Requiring the actor to have significant contact with the complainant or to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal.

- This change improves the clarity, consistency, and proportionality of the revised statute. The RCC commentary to this definition has been updated to reflect that this is a possible change in law.

"Possess"

(1) *USAO, App. C at 398, recommends revising the commentary to strike language stating, "Evidence of knowledge of an item's location is required, but not necessarily sufficient, to demonstrate constructive possession." USAO states that, "[i]f a person cannot find an object for a moment, but is clear that the object belongs to the person and to no one else, then that person is deemed to constructively possess that object."*

- The RCC partially incorporates this recommendation by clarifying the revised commentary. Under current District law, a person does not constructively possess an object that they have (temporarily or permanently) lost because they do not have the present *ability* to exercise dominion and control over that object.[139] However, a person may be said to know the location of an object if they are generally aware of its whereabouts, even without knowing its exact position. For example, a person who is practically certain that their keys are *somewhere* in a set of drawers constructively possesses their keys. The RCC commentary is updated to clarify this point and to cite the example given.

"Prohibited Weapon"

(1) *The CCRC removes this definition from RCC § 22E-701 because it is no longer used in the RCC.*

"Property"

*(1) USAO, App. C at 281, recommends revising the definition of "**property**" to include "money," "captured or domestic animals," and "documents evidencing ownership in or of property" to "better align the proposed definition with the Proposed Federal Criminal Code and the Model Penal Code, as well as to*

[139] *See* Crim. Jur. Instr. for D.C. 3.104 (2019) ("[A] person may exercise control over property not in his or her physical possession if that person has both the *power* and the intent at a given time to control the property. This is called 'constructive possession.' Mere presence near something or mere knowledge of its location, however, is not enough to show possession." (Emphasis added.)).

account for common fact-patterns in D.C. criminal cases (which include theft of money and domestic pets).”

- The RCC partially incorporates this recommendation by adding “money” and “any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed” to subparagraph (E) and “animal” to subparagraph (B). The RCC does not incorporate the modifier “captured or domestic” for an animal as it raises the question of when an animal is “captured,” and suggest that an animal must be captured to be something of “value,” as is required by the definition. This change improves the clarity and consistency of the revised definition. The commentary to the RCC definition of “property” has been updated to reflect that these are clarificatory changes to current law.

*(2) The CCRC recommends deleting “Debt” in subparagraph (E) of the definition of “**property**.”*

- As noted above, the revised definition has been updated to include “money” and “any paper or document that evidences ownership in or of property, an interest in or a claim to wealth, or a debt owed.” “Debt” is included in the current definition of “property.”[140] The term is not defined statutorily and there is no DCCA case law interpreting it. It is unclear, however, how “debt” can be “anything of value” that is required by the definition of “property.” This change improves the clarity and consistency of the revised definition by specifying types of property that satisfy the definition’s requirement of “anything of value.” The commentary to the RCC definition of “property” has been updated to reflect that this is a possible change in current law.

“Property of another”

[No new Advisory Group comments received, or CCRC recommended changes.]

“Protected person”

(1) OAG, App. C at 247, recommends revising the lead-in language to the definition of “protected person” so that it refers to a “complainant” instead of a “person.” OAG states that the definition otherwise consistently uses the term “complainant.”

- The RCC incorporates this recommendation by replacing “person” with “complainant” in the lead-in language of the definition. This change improves the clarity and consistency of the revised definition.

(2) The CCRC recommends in subsection (B) of the definition of “protected person” requiring that the actor is under 65 years of age. With this change, subsection (B) of the definition requires that the complainant is “65 years of age or older, when, in fact, the actor is under 65 years of age and at least 10 years younger

[140] D.C. Code § 22-3201(3).

than the complainant." This change was proposed in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),[141] *but the revised statutory text for the definition omitted the requirement. This change preserves subsection (B) of the definition, and the enhanced gradations in RCC offenses that use the term, for predatory behavior targeting older complainants. It is also consistent with subsection (A) of the definition, which requires that the actor be at least 18 years of age when the complainant is under 18 years of age.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *USAO, App. C at 281, recommends removing the requirements for the age of the actor and the age gaps between the actor and the complainant in subsection (A) of the definition of "protected person." With this change, subsection (A) would require only that the complainant is under the age of 18 years, without the additional requirements that the actor is at least 18 years of age and at least four years older than the complainant. USAO states that this change is "consistent with current law" in D.C. Code § 22-3611 (penalty enhancement for committing certain crimes against minors), "which focuses solely on the age and vulnerability of the complainant." USAO compares the current penalty enhancement to the RCC sexual abuse of a minor statute and current child sexual abuse statutes, which generally require at least a four year age gap between the actor and the complainant for liability. USAO states that unlike the RCC sexual abuse of a minor statute and current child sexual abuse offenses, where the four year age gap is "the only thing that makes Sex Abuse of a Minor a crime at all," the penalty enhancements "are already criminal, regardless of any age disparity." There is no discussion specific to the requirement that the actor be at least 18 years of age.*

- The RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised definition. The current penalty enhancement for crimes against minors requires that the defendant be at least 18 years of age[142] and that there be at least a two year age gap between the defendant and a complainant under the age of 18 years.[143] As is discussed in the RCC commentary to the definition of "protected person," the RCC increased the required age gap from two years to four years to match the required age gap in several current and RCC sex offenses. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants.

(4) USAO, App. C at 281, recommends removing the required 10 year age gap between an actor that is 65 years of age or older and a younger complainant from

[141] First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report), Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

[142] D.C. Code § 22-3611(c)(1) (defining "adult" for the purposes of the minor enhancement as "a person 18 years of age or older at the time of the offense.").

[143] D.C. Code § 22-3611(a), (c)(3) ("Any adult, being at least 2 years older than a minor . . . ." and defining "minor" as "a person under 18 years of age at the time of the offense.").

subsection (B) of the definition of "protected person" so that the subsection requires that the complainant be under 65 years of age or older (subsection B)). USAO states that this change is "consistent with current law" in D.C. Code § 22-3601 (penalty enhancement for committing certain crimes against senior citizens), "which focuses solely on the age and vulnerability of the complainant."

- The RCC does not incorporate USAO's recommendation because the 10 year age gap improves the proportionality of the revised definition. The age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants.

"Protection order"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Public body"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Public conveyance"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Public safety employee"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Purposely"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Rail transit station"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Recklessly"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Restricted explosive"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Restricted pistol bullet"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Result element"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Sadomasochistic abuse"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Safety"

(1) *The CCRC removes this definition from RCC § 22E-701 because it was included in error. This definition of "safety" applies only to the revised offenses of stalking*[144] *and electronic stalking.*[145]

"Sawed-off shotgun"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Secure juvenile detention facility"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Self-induced intoxication"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Serious bodily injury"

*(1) USAO, App. C at 282-283, recommends revising the definition of "**serious bodily injury**" to include as subparagraph (D) a "protracted loss of consciousness." USAO agrees that under current DCCA case law, a brief loss of consciousness alone may not be sufficient for "serious bodily injury," even though the current statutory definition of "serious bodily injury" includes "brief loss of consciousness." However, USAO states that a "protracted loss of consciousness would qualify as a serious bodily injury under current law."*

- The RCC incorporates this recommendation by codifying as subparagraph (D) a "Protracted loss of consciousness." The commentary has been revised to note that this is a clear change to the current statutory definition of "serious bodily injury" and that "protracted" in this subparagraph is intended to have the same scope as "protracted" in subparagraphs (B) and (C) of the definition. This change improves the clarity of the revised definition and its consistency with the RCC definition of "significant bodily injury."

[144] RCC § 22E-1801.
[145] RCC § 22E-1802.

"Services"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Sexual act"

(1) *OAG, App. C at 247-248, recommends revising subsection (C) of the definition of "sexual act" to state "an actor's body part, including a hand or finger" to make clear that body parts other than a hand or a finger are sufficient.*

- The RCC incorporates this recommendation by replacing "a hand or finger" with "any body part." The RCC uses "any body part," as opposed to the "actor's" body part to include within the definition instances when the complainant or a third party does the penetration. The commentary to the RCC definition has been updated to reflect that this is a possible change in law. This change improves the clarity of the revised statute and removes a possible gap in liability.

(2) *USAO, App. C at 283-84, recommends replacing the word "desire" with "intent" in subsection (C) of the definition of "sexual act" and what is now sub-subparagraph (B)(ii) of the definition of "sexual contact" so that the definitions require "with the intent to" sexually harass, etc., instead of "with the desire to." USAO states that "intent" is used in the current definitions of "sexual act" and "sexual contact." USAO states that "desire" is "ambiguous" and "intent" should be used because it is defined in the RCC and used throughout the RCC.*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the revised statutes. "Intent" is a defined culpable mental state in RCC § 22E-206, and per the rule of construction in RCC § 22E-207, applies to every element that comes after it unless a different culpable mental state or strict liability is specified. If "intent" is included in an RCC offense through the definition of "sexual act" or "sexual contact," that would complicate the interpretation of culpable mental states in that offense and future drafting. Moreover, while the current D.C. Code definitions of "sexual act" and "sexual contact" both refer to "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," the meaning of "intent" in that language is undefined and unclear as to whether the meaning is more similar to the RCC § 22E-206 definition of "purpose" as "conscious[] desire" or "intent" as "practically certain." The RCC references to "desire" in the definitions of sexual act and sexual contact track the higher culpable mental state in the RCC definition of "purpose" without triggering the rule of construction in RCC § 22E-207 that would complicate offense drafting and interpretation. The commentary to the RCC definition has been updated to reflect that this is a possible change in law.

(3) *USAO, App. C at 283, states that it agrees with the definition of "sexual act" to the RCC definition of "sexual contact." USAO states that this "makes a sexual*

contact a lesser-included of a sexual act [and] is an appropriate way to codify this principle."

"Sexual contact"

(1) *USAO, App. C at 283-284, recommends replacing "degrade" in the definition of "sexual contact" with "abuse, humiliate, harass, degrade" so that the definition requires acting with "intent to abuse, humiliate, harass, degrade, sexually arouse, or sexually gratify any person." USAO states that this language tracks the sexual intent language in subsection (C) of the RCC definition of "sexual act." In addition, USAO states that "[s]exual assault prosecutions often rely on the 'abuse, humiliate, harass, or degrade' intent language" because "[a]bsent evidence of the defendant having an erection or outwardly manifesting sexual pleasure . . . the government may not be able to prove that the defendant's actions were sexually arousing or gratifying" but the government "would be able to show that, at a minimum, the defendant intended to humiliate or harass the victim." USAO gives as an example a scenario where the "defendant grabs the buttocks of a stranger" and the "victim . . . likely feel[s] sexually violated." USAO states that this should be prosecuted as a sex offense.*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute and may authorize disproportionate penalties. After the Advisory Group submitted written comments on the First Draft of Report #36 – Cumulative Update to RCC Chapters 3, 7, and the Special Part, but before the CCRC reviewed them, the RCC definitions of "sexual act" and "sexual contact" were revised so that subsection (C) of the definition of "sexual act" and the definition of "sexual contact" required the same "desire to sexually abuse, humiliate, harass, degrade, abuse, or gratify any person."[146] The definitions, and, by extension, the RCC offenses that use these terms, are limited to penetration and contact that is sexual in nature. It is disproportionate to include in the RCC sex offenses and similarly serious RCC offenses, like the human trafficking offenses in RCC Chapter 16, conduct that is not proven to be sexual in nature. The RCC provides liability for non-sexual conduct in the revised assault statute (RCC § 22E-1201) or offensive physical contact statute (RCC § 22E-1205).
- Notably, the ALI's most recent revised definition of "sexual contact" requires the purpose of "sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person."[147] In addition, as was noted in the CCRC's First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018), only a small minority of reformed jurisdictions include a non-sexual intent in their definitions of

[146] Subsection (C) of the current D.C. Code definition of "sexual act" and the current definition of "sexual contact" both require an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(8)(C), (9).
[147] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(c).

"sexual contact" or a similar term.[148] The ALI's revised definition of "sexual act" does not require an additional intent, but does exclude penetration "when done for legitimate medical, hygienic, or law-enforcement purposes."[149]

"Significant bodily injury"

(1) *USAO, App. C at 284, recommends changing "temporary loss of consciousness" in the definition of "**significant bodily injury**" to either "brief loss of consciousness" or "any loss of consciousness." USAO states that "temporary" is "vague" because "[u]nless a victim dies or falls into an irreversible coma, any loss of consciousness is, by definition, temporary."*

- The RCC incorporates this recommendation by replacing "temporary loss of consciousness" with "brief loss of consciousness." This change improves the clarity of the revised definition and its consistency with the RCC definition of "serious bodily injury."

(2) *The CCRC recommends revising the definition of "**significant bodily injury**" to replace "caused by" with "sustained during" in the final sentence of the definition. With this revision, the definition would include in the list of "per se" significant bodily injuries "a contusion, petechia, or other bodily injury to the neck or head sustained during strangulation or suffocation." In the previous version of this definition, "caused by" created ambiguity by suggesting that RCC causation requirements applied (RCC § 22E-204).*

- This change improves the clarity of the revised definition. The commentary to the RCC definition of "significant bodily injury" has been updated to state that there is no requirement that the strangulation or suffocation cause the contusion or other bodily injury to the neck or head.

(3) *USAO, App. C at 284-285, recommends changing "a contusion or other bodily injury to the neck or head caused by strangulation or suffocation" in the definition of "**significant bodily injury**" to "a contusion, petechia, or other bodily injury to the neck or head, including the eyes or face, caused by strangulation or suffocation." This would add "petechia" as a specified type of bodily injury*

[148] Pages 41-45 of the CCRC's First Draft of Report #26, Sexual Assault and Related Provisions (issued September 26, 2018) stated (with citations omitted for the purposes of this appendix):

> At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part (reformed jurisdictions) define "sexual contact" or a similar term that encompasses sexual touching. Twenty-one of these reformed jurisdictions specify an additional intent or purpose requirement or require that the contact can be reasonably construed for a specified intent or purpose. Of these 21 reformed jurisdictions, two jurisdictions include an intent or purpose to abuse and jurisdictions include an intent or purpose to humiliate. None of the 21 reformed jurisdictions specifically include an intent or purpose to "harass," but one of the jurisdictions requires an intent to "terrorize" and two additional reformed jurisdictions require an "aggressive" intent or the purpose of arousing or satisfying "aggressive desires."

[149] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.0(2)(a). This definition was approved by the membership in May 2017.

sustained during strangulation or suffocation and specify the "eyes and face" in addition to the "neck and head." USAO states that petechiae (plural of petechia) "often develop on a victim's face or neck as a result of strangulation or suffocation" and that although they may be included in "other bodily injury," the definition should specify petechiae to eliminate future confusion and litigation. Similarly, USAO states that "neck and eyes" are likely included in "head," but "specifically listing them reduces potential future confusion and litigation."

- The RCC partially incorporates this recommendation by including "petechia" in the list of specified injuries to the head or neck sustained during strangulation or suffocation.[150] The RCC does not specify "neck and eyes" because "head and neck" are already specified in the current RCC definition and it may lead to confusion over whether injuries to other parts of the "head and neck are included (e.g. the mouth or tongue). The commentary to the revised definition makes clear that "neck and eyes" are included in the scope of "neck and head."

(4) *The CCRC recommends revising the definition of "**significant bodily injury**" so that the second sentence listing the "per se" injuries begins with "In addition." This revision further clarifies that an injury that constitutes one of the "per se" injuries is sufficient for "significant bodily injury" independent of the first sentence.*

- This change improves the clarity of the revised statute.

(5) *USAO, App. C at 285-286, recommends including in the definition of "**significant bodily injury**" "a laceration for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives." The RCC definition of "significant bodily injury" includes as a per se significant bodily injury "a laceration that is at least one inch in length and at least one quarter inch in depth." USAO states that under current law, lacerations requiring stitches are sufficient proof of significant bodily injury and that there is no size requirement for these types of lacerations. USAO states that "a layperson will likely not know the size of his or her laceration" and "[e]ven if that layperson was able to measure the length of his or her own laceration, it would be nearly impossible for a layperson to measure the depth of his or her own laceration, particularly after stitches have been applied. USAO states that medical professionals "often do not even measure the depth of a laceration." USAO states that requiring a certain size of laceration means that "every case involving this type of significant bodily injury would require medical testimony" and that "medical testimony should not be required in every case to prove whether a significant bodily injury is present." Including the USAO proposed language, it says, would allow "a layperson to testify about the types of injuries he or she sustained."*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition by including comparatively less serious injuries in the list of "per se" significant bodily injuries. The list of "per se" significant bodily injuries in the RCC definition is reserved for

[150] As is discussed elsewhere in this Appendix, the RCC definition of "significant bodily injury" replaces "caused by" with "sustained during" in the strangulation or suffocation provision of the definition.

injuries that clearly meet the high threshold for "significant bodily injury" under DCCA case law. As is discussed in the commentary to the RCC definition, the RCC definition generally codifies the requirements of this case law— a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. It is possible that a laceration that receives stitches, sutures, etc. does not meet these requirements, so it is not a per se significant bodily injury. In addition, under both DCCA case law[151] and the RCC definition, the fact that medical treatment is received is not dispositive of whether it was "required." DCCA case law does not establish a per se rule that lacerations requiring stitches are sufficient for "significant bodily injury." The case law is limited to fact-specific determinations of a laceration, combined with other evidence of injury or treatment received.[152] Although lay persons and medical professionals may not have the measurements of a given laceration, such a laceration may still qualify under the first part of the RCC definition of "significant bodily injury." As with any other injury, medical professional testimony may be helpful or, in some cases, necessary to establish that an injury satisfies the definition.

"Significant Emotional Distress"

(1) *OAG, App. C at 248, recommends redrafting the sentence "It must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living." Although the sentence is taken from a judicial opinion, the meaning of the phrases "the like" and "commonly experienced" are unclear. OAG recommends substituting the phrase "similar feeling" for "the like" and further explaining the meaning of "commonly experienced" in commentary.*

- The RCC incorporates this recommendation by replacing the phrase "the like" with "similar feeling" and clarifying in commentary the meaning of "commonly experienced." The phrase "commonly experienced,"

[151] *See, e.g.*, *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015) ("Again, the standard is an objective one, and the fact that medical treatment occurred does not mean that medical treatment was required."); *Wilson v. United States*, 140 A.3d 1212, 1219 (D.C. 2016) ("Even assuming [the complaining witness] did receive some form of treatment in the hospital, therefore, the fact that medical treatment occurred does not mean that medical treatment was required." (internal quotation marks omitted) (citing *Teneyck v. United States*, 112 A.3d 906, 910 (D.C. 2015)).

[152] *See, e.g.*, *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015) (finding that an injury that was sustained in a "violent group attack" and "[a]s a result, in addition to bruises and abrasions, [the individual] suffered 'gashes to her face' going down to the 'white meat,' and was a bleeding 'mess'" and received nine stitches was sufficient for "significant bodily injury."); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010) ("Here, where the injury to the ear required four to six stitches and left a scar and where treatment was sought and administered with reasonable promptness, we have no difficulty in sustaining the trial court's conclusion that the injury [constituted "significant bodily injury"].).

borrowed from recent District case law,[153] is explained in the commentary as incorporating a reasonableness standard as to the experience of an average person. For example, per "commonly experienced" unhappiness is not to be assessed by the experience of a chronically depressed person. The word "commonly" is generally understood to mean "of or relating to a community at large."[154] Factfinders are often required to judge reasonableness and community standards.[155]

"Simulated"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Sound recording"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Speech"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Strangulation or suffocation"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Stun gun"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Transportation worker"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Value"

(1) *USAO, App. C at 286, recommends deleting subsection (C) from the definition of "**value**," which establishes a fixed dollar value for a payment card and for an unendorsed check. USAO states that this subsection is "plainly at odds with D.C. law" and, as the RCC commentary acknowledges, has not been adopted in other jurisdictions.*

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[153] *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

[154] Merriam-Webster.com, "*commonly*", 2018, *available at* https://www.merriam-webster.com/dictionary/commonly.

[155] *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973) (defining obscenity to require that the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest).

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the definition and risk disproportionate penalties. Under the current statutory definition of "value," the "value" of a payment card, check, or "other written instrument" is the amount of property "that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument."[156] The language "can be obtained" is inherently unclear[157] and there is no case law on the meaning of this phrase. A fixed amount provides a fairer and more efficient means of calculating the value of an unused payment card or blank check, and dispenses with litigation over the amount of credit or funds that "can be obtained" by a given card or bank account at the time of the property crime under a banking or credit card institution's policies and practices. The RCC approach also avoids disparate valuation of people's credit cards and checks based on their available credit or size of their bank account.[158] Determining the value of a payment card or check based on the value of property that *could* be obtained through its use may lead to penalties that are disproportionately severe relative to the actual harm because this language equates potential losses to actual losses. For example, stealing a credit card with a limit of $10,000 or a book of checks to an account with $10,000 available would be equivalent to stealing $10,000 in cash, even if the credit card or checks are never used. In the RCC, if the credit cards or checks are used to obtain property, the value of the property obtained determines the gradation of the relevant RCC offense, such as theft, fraud, etc. However, for stealing, without using, a credit card or blank check, the amount fixed by the statute applies per credit card or check. One benefit of this approach is that thefts and other crimes from wealthy persons (who are likely to have higher credit limits and checking balances) are not treated as more serious than equivalent

[156] D.C. Code 22-3201(7) ("'Value' with respect to a credit card, check, or other written instrument means the amount of money, credit, debt, or other tangible or intangible property or services that has been or can be obtained through its use, or the amount promised or paid by the credit card, check, or other written instrument.").

[157] For example, if a defendant steals a credit card with a credit limit of $10,000, the language could support a valuation of the credit card at $10,000 (the amount of property that "can be obtained through its use."). However, it is unclear how the credit card would be valued if, despite the $10,000 credit limit, the owner had charged $7,000 to the account, leaving only $3,000 of credit. If the defendant uses the credit card to buy a $500 pair of shoes, the proposed language could also support a valuation of the credit card at $500 (the amount of property that "has been . . . obtained through its use."). It is also unclear whether the "has been . . . obtained through its use" refers to the actions of the defendant or the owner of the credit card. In the context of a check, it is also unclear how banking institution policies and practices relating to overdraft protection should be considered when evaluating the amount that "can be obtained."

[158] For example, theft of a purse with two payment cards connected to accounts of $300 each would, if aggregated, provide a basis for theft of $600 under current law—graded as fourth degree theft in the RCC or a 180 day misdemeanor under current law. A purse with the same number of cards but in the name of a wealthier person who has credit limits of $15,000 each would, if aggregated, provide a basis for theft of $30,000—graded as third degree theft in the RCC or a 10 year felony under current law.

crimes from poor persons.[159] The RCC approach also generally accords with CCRC public opinion polling of District voters which indicates a marked difference between stealing a credit card with a $5,000 limit and stealing $5,000 cash. [160]

(2) *USAO, App. C at 286, recommends rewriting the definition of "**value**" to mean "the greater of" several alternatives that differ from the alternative means of valuation in the RCC definition.[161] USAO's proposed definition would be: "'Value' means the greater of: (A) The fair market value at the time and place of the offense; (B) The replacement cost of the property within a reasonable time after the offense; or (C) With respect to a credit card, check, or other written instrument, the amount of money, credit, debt or other tangible property or services that has been or can be obtained through its use." USAO states that this change "better align[s] the definition" with the Model Penal Code, current federal law, and the "fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009.*

- The RCC does incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The RCC definition of "value" requires that the fair market value of the property be used unless it "cannot be ascertained," in which case the RCC definition lays out alternative methods of valuation depending on the type of property at issue. Replacing "cannot be ascertained" with "the greater

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[159] The USAO comment states that its proposed language "better align[s] the definition of 'value' with the Model Penal Code, current federal law and the fairly recent amendments to the D.C. Omnibus Public Safety Amendment Act of 2009." The Model Penal Code provision on value does suggest taking the highest of reasonable methods of determining value but, the Model Penal Code—issued in 1962, before widespread use of payment cards—did not address payment cards or suggest that blank checks should be valued at the amount of the account to which they are tied. See MPC § 223.1. Consolidation of Theft Offenses; Grading; Provisions Applicable to Theft Generally ("The amount involved in a theft shall be deemed to be the highest value, by any reasonable standard, of the property or services which the actor stole or attempted to steal.").

[160] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 4.26 provided the scenario: "Stealing a credit card with an available limit of $5,000, but never using the stolen card." Question 4.26 had a mean response of 4.7, compared to a mean response of 6.2 in that survey for Question 4.24 provided the scenario: "Stealing property (other than a car) worth $5,000."

[161] The RCC definition of "value" is:

A. The fair market value of the property at the time and place of the offense; or

B. If the fair market value cannot be ascertained:

   1. For property other than a written instrument, the cost of replacement of the property within a reasonable time after the offense;
   2. For a written instrument constituting evidence of debt, such as a check, draft, or promissory note, the amount due or collectible thereon, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied; and
   3. For any other written instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation, the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the written instrument.

C. Notwithstanding subsections (A) and (B) of this section, the value of a payment card is $[X] and the value of an unendorsed check is $[X].

of" would require the prosecution in every instance to determine value using all methods of valuation before comparing the numbers, and may increase an actor's liability based on factors apparently irrelevant to the harm to the complainant. For instance, theft of a complainant's recalled and highly unusual car (or other object), if evaluated under a "replacement cost," may have a very high valuation because a replacement cannot be found or crafted, even though the complainant's only interest in the car is for transportation and the car has a very low fair market value because it has a dangerous defect. In addition, as noted above, the proposed language for determining the value of credit cards, checks, and other written instruments- the amount of property "that has been or can be obtained through its use"- does not provide a clear, consistent standard for the value of these written instruments.[162]

(3) *The CCRC recommends revising subparagraph (C) of the definition of "value" to specify that it refers to the value of a payment card "alone" or the value of an unendorsed check "alone." This clarifies that (C) establishes the value of a payment card or unendorsed check as an item of property, as opposed to it use in a property crime such as payment card fraud (RCC § 22E-2202) or check fraud (RCC § 22E-2203).*

- This change improves the clarity of the revised definition.

"Vulnerable adult"

[No new Advisory Group comments received, or CCRC recommended changes.]

"Written instrument"

[No new Advisory Group comments received, or CCRC recommended changes.]

[162] This language appears in the current definition of value (D.C. Code § 22-3201(7) and there is no DCCA case law interpreting it. For example, if a defendant steals a credit card with a credit limit of $10,000, the language could support a valuation of the credit card at $10,000 (the amount of property that "can be obtained through its use."). However, it is unclear how the credit card would be valued if, despite the $10,000 credit limit, the owner had charged $7,000 to the account, leaving only $3,000 of credit. If the defendant uses the credit card to buy a $500 pair of shoes, the proposed language could also support a valuation of the credit card at $500 (the amount of property that "has been . . . obtained through its use."). It is also unclear whether the "has been . . . obtained through its use" refers to the actions of the defendant or the owner of the credit card.

Chapter 11. Homicide.

Murder. RCC § 22E-1101.

(1) *OAG at App. C. 248-249, notes that the Commentary on the penalty enhancement for murder says "harm" "may include, but does not require[,] bodily injury," and that it "should be construed more broadly to include causing an array of adverse outcomes." OAG suggests that this language should be incorporated into the statute, perhaps as a definition of "harm" that would also help clarify other provisions too. OAG says the question is what, in addition to bodily injury, is encompassed in "harm," but does not recommend specific language.*

- The RCC does not incorporate this recommendation because defining too many terms, particularly frequently used terms, does not improve the clarity of the revised criminal code. The term "harm" as used in this statute accords with the ordinary use of the term, and does not warrant a specified definition.

(2) *USAO at App. C.287, recommends that felony murder be classified as first degree murder with separate provisions in first degree murder addressing both purposeful felony murder and non-purposeful felony murder. USAO says that "deterrence theories that have been recognized by the D.C. Court of Appeals and other courts [] support categorizing Felony Murder as First Degree Murder."*

- The RCC does not incorporate USAO's recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Killing another person with premeditation and deliberation, whether or not the actor was engaged in a felony, makes the actor liable for first degree murder under the RCC just as in the current D.C. Code. When a killing is committed with premeditation and deliberation while engaged in a felony, the RCC authorizes separate punishments for the killing (as first degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for first degree murder, ensuring each crime is accounted for. Similarly, purposely killing another person without premeditation and deliberation, or doing so knowingly or with extreme indifference to human life makes the actor liable for second degree murder under the RCC, whether or not the actor was engaged in a felony. When a killing is committed purposely, knowingly, or with extreme indifference while engaged in a felony, the RCC authorizes separate punishments for the killing (as second degree murder) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for second degree murder alone, ensuring each crime is accounted for. Consequently, to the extent that a prospective criminal guides his or her behavior by the

availability of increased penalties, the RCC first and second degree framework deters commission of another felony during a homicide, or a homicide during a felony by proportionately increasing the penalties based on the conduct.

- In addition, the RCC grades a negligent (i.e. accidental, unintended) killing of another person during the course of specified major felonies (e.g. sex assault, robbery, or kidnapping) as equivalent to a second degree murder. Normally, a negligent killing is punished in the D.C. Code[163] and the RCC as a low-felony offense. And where a person is killed negligently in the course of another felony, the RCC authorizes separate punishments for the killing (as negligent homicide) and the felony at issue, providing a cumulative punishment greater than (for serious felonies, much greater than) that for negligent homicide alone, ensuring each crime is accounted for. But, for a negligent killing during specified major felonies (e.g. sex assault, robbery, etc.), the RCC provides far greater penalties, as if the behavior were purposeful (but not with premeditation or deliberation) or knowing or with extreme indifference to human life. The RCC's major increase in liability for accidental, unintended deaths during specified felonies appropriately recognizes the seriousness of such conduct, even if the death was unintended.
- Under the USAO proposal, any accidental killing that occurs during an enumerated felony would be subject to the same penalty as an intentional murder committed with deliberation and premeditation. This is a disproportionately severe penalty when the actor was merely negligent and had no intent to cause the death of another, or did not act with extreme indifference to human life.. Punishing such killings during a felony equal to second degree murder as in the RCC also may be too severe based on polling of District residents,[164] but the RCC change is a significant decrease from the D.C. Code's treatment of such killings as equal to first degree murder. Beyond retributive measures of proportionality, the CCRC is not aware of any evidence that the penalty difference between second degree murder and first degree murder would deter behavior. To the contrary, general research on deterrence summarized by the Department of Justice's National Institute of Justice indicates there is little effect by increasing imprisonment penalties and, for homicide, there is no apparent deterrence effect of even the death penalty on homicide rates.[165]

(3) *USAO at App. C. 287, recommends removing the requirement for felony murder that the defendant act negligently in causing the death while committing an enumerated felony.*

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[163] See D.C. Code § 50–2203.01, Negligent homicide (punishable by up to 5 years imprisonment). This offense further requires that the actor caused the death of another through operation of a vehicle.

[164] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)."

[165] See, https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal there would be murder liability on the basis of strict liability—when the defendant was not even negligent in causing the death of another—meaning that murder punishment is imposed for even objectively reasonable mistakes and accidents. For example, if in the course of a robbery, the defendant causes a fatal car accident due to the negligence of another driver and despite following all traffic safety laws and regulations, murder liability would be imposed.
- The RCC provides second degree murder liability for causing the death of another during an enumerated felony, but imposes a minimal negligence requirement as to the conduct that causes death.

(4) *USAO at App. C. 288, recommends removing the requirement for felony murder that the lethal act be committed in furtherance of the underlying felony.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal, acts unrelated to the predicate felony but coincidentally occurring at the same time would be subject to murder liability. However, acts that are not taken in furtherance of the felony are not inherently dangerous, and do not merit heightened liability for murder based on a merely negligent culpable mental state.
- The RCC provides second degree murder liability for merely negligent conduct only when that conduct is an action in furtherance of the underlying felony. Under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(5) *USAO at App. C. 289, recommends including fifth degree robbery and felonies involving controlled substances as enumerated felonies for felony murder.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.

- Under the USAO proposal, robberies that do not involve a weapon or infliction of significant bodily injury and all felony drug trafficking crimes would be eligible for the felony murder exception. The RCC enumerated felonies, similar to those enumerated in the current D.C. Code murder statute, are limited to certain felonies that create an immediate and grave risk to human life.[166] However, as the current D.C. Code does not grade robbery, the RCC's grading of the offense raises the issue of whether some types of robbery are not as inherently dangerous as other types. First through fourth degree RCC robbery involve use of a weapon, or the infliction of significant or serious bodily injury. These forms of robbery are sufficiently dangerous to warrant being enumerated as predicate offenses for felony murder. Fifth degree robbery, however, covers unarmed robberies that only involve threats, physical force, or bodily injury. The type of bodily injury covered by fifth degree robbery is similar to simple assault under current law. Fifth degree robbery, while an offense against persons, does not create a similar inherent risk of death or serious bodily injury to warrant inclusion in the felony murder statute.
- Felony controlled substance offenses also do not inherently involve immediate and grave risks to human life. Criminalizing as murder accidental deaths that occur during the commission of a drug offense authorizes disproportionately severe penalties.
- The RCC continues to authorize serious penalties for killings that occur during unenumerated felonies, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(6) *USAO at App. C.290, recommends that a person should be liable for felony murder if the decedent was an accomplice to the underlying felony.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Felony murder is a narrow exception to the general rule that murder and manslaughter liability (as opposed to negligent homicide) requires an actor to be subjectively aware that the actor is causing the death of another person. Felony murder criminalizes accidental killings because of the inherent dangerousness of the underlying felonies.
- Under the USAO proposal an actor who accidentally kills an accomplice while committing an enumerated felony would be eligible for the felony

[166] Notably, the current list of enumerated felonies in the D.C. Code § 22–2101 murder statute does not include a wide array of serious felonies involving the use of force (e.g. third degree sexual abuse, or forced commercial sex).

murder exception. However, the enumerated offenses do not involve the same inherent risk of harm to fellow participants in the underlying offense as they do to the targets of crime. Applying murder liability to the accidental deaths of accomplices would be contrary to the normal culpable mental state requirements for murder liability and authorize disproportionately severe sentences.

- The RCC continues to authorize serious penalties for unintentional killings to any person, although the punishment may be less severe. Under the RCC an actor may still be held liable for recklessly killing someone with extreme indifference under RCC § 22E-1101, Second Degree murder in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct. Also, under the RCC an actor may still be held liable for negligently killing someone under RCC § 22E-1103, Negligent Homicide in addition to liability for any felony they are engaged in at the time, and sentenced consecutively for such conduct.

(7) *USAO at App. C.291, recommends that an accomplice to the underlying felony should be liable for felony murder based on the lethal act committed by a co-felon.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by equivalently punishing conduct of differing seriousness. The RCC murder and other statutes provide felony liability for killing a person, attempting to kill a person, and being an accomplice to (or committing) a felony crime—all of which may apply when a person is an accomplice to a felony in which the co-felon kills someone. However, the RCC does not recommend punishing a co-felon who is not the one who killed the victim and did not assist or encourage (or otherwise act as an accomplice to) the *killing* the same as person who actually committed the lethal act.
- In the USAO hypotheticals, any person who fires shots during a robbery but misses can still be prosecuted for attempted murder, the underlying robbery, and any applicable weapons offenses. The penalties for these offenses, which can be imposed consecutively, are proportionate as applied to a person who does not actually cause the death of another. In contrast, USAO's proposal would allow accomplices to be convicted of first degree murder even when they did not commit a lethal act and had no intent to kill. For example, a lookout for a robbery, who did not know or desire that anyone be injured or killed, could be held liable for murder if his co-felon unexpectedly kills another person during the course of the robbery. Murder liability could apply even if the accomplice actively tried to prevent the use of lethal force. Murder liability in these cases is disproportionately severe relative to the defendants' culpability.
- The RCC position is consistent with the treatment of murder outside the court's common law felony-murder doctrine. For example, USAO notes that if in the course of a robbery, two robbers both fire shots and the first robber hits and kills a person, the second robber should be subject to the same liability as the first robber. However, outside of the felony murder

context, it is well established that a person who unsuccessfully attempts to kill another person may only be convicted of attempted murder. If two people, with intent to kill, shoot at a person, and one shooter misses, he is not subject to the same liability as the shooter who actually hits and kills the person. USAO's recommendation would impose murder liability on defendants who did not actually kill anyone. USAO also notes that in some cases when there is more than one shooter, it may not be possible to determine who actually fired the fatal shot. While this is true, it does not justify holding a person liable for murder without proving that the person actually caused the death of another. Outside of the felony murder context, if multiple people fire shots resulting in the death of another, it may be similarly difficult to determine which person fired the fatal shot. In those cases, murder liability still requires proving that a particular person actually fired the fatal shot. It would be inconsistent to apply a higher standard of proof in cases in which the actors had intent to kill, than in the felony murder context, which does not require intent to kill.

- To date, the CCRC has not issued draft recommendations regarding *Pinkerton* liability, but in some cases the current *Pinkerton* liability rule would allow a person to be liable for the lethal act committed by another in furtherance of a conspiracy. The CCRC plans to review and issue a recommendation on *Pinkerton* liability in 2020 and, at that time the CCRC will review this matter further.

(8) *USAO at App. C.292, recommends removing the language "with extreme indifference to human life" from the murder and manslaughter statutes.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. Removing the "extreme indifference" language would be inconsistent with current District law regarding the requirements for "depraved heart" murder.[167]
- Under the USAO proposal the culpable mental state required for murder would be significantly lower than current law. Removing the "extreme indifference" language would eliminate the requirement that the actor disregarded an extreme risk of death. Depraved heart murder treats accidental killings as tantamount to intentionally taking the life of another. This is only justifiable in rare circumstances in which the actor consciously disregarded an *extreme* risk of death or serious bodily injury. This is reflected in DCCA case law, which consistently recognizes that depraved heart murder requires extraordinarily dangerous conduct.[168]

[167] Notably, a sizable minority of American jurisdictions do not recognize depraved heart murder at all, while the Model Penal Code and expert commentators have recommended precisely the language in the RCC. See § 14.4(a)Creation of risk, 2 Subst. Crim. L. § 14.4(a) (3d ed.)

[168] *E.g.*, *Powell v. United States*, 485 A.2d 596 (D.C. 1984) (the defendant led police on a high-speed chase in excess of 90 miles per hour, and turned onto a congested exit ramp causing a fatal collision.). The DCCA noted in *Comber v. United States*, 584 A.2d 26, 39 (D.C. 1990) (*en banc*) that "depraved heart malice exists only where the perpetrator was subjectively aware that his or her conduct created an *extreme* risk of death or serious bodily injury[.]" (emphasis added). As examples of sufficiently dangerous conduct, the DCCA listed "firing a bullet into a room occupied, as the defendant knows, by several people; starting a

Mere recklessness only requires that an actor disregards a substantial risk of death. Although it is not possible to draw a clear distinction between ordinary recklessness and recklessness with "extreme indifference to human life," some examples may illustrate difference. Causing a fatal crash by driving at 100 miles per hour on narrow residential streets would likely constitute recklessness with extreme indifference to human life. By contrast, causing a fatal crash by driving 10-15 miles per hour over the speed limit on a non-residential street absent other factors would be insufficient to prove "extreme indifference to human life." Removing the "extreme indifference" language and applying murder liability to recklessly causing death would authorize disproportionately severe penalties.

(9) *USAO at App. C. 292-293, recommends that the RCC codify that "mere words" categorically cannot be adequate provocation that mitigate murder to manslaughter.*

- The RCC does not incorporate this recommendation because it may be confusing and authorize disproportionate penalties. While there used to be a general rule in case law nationally that "words alone" cannot mitigate murder to manslaughter, the CCRC is not aware that rule has ever been codified.[169] And, recently, a number of courts that have examined the matter more closely have distinguished between "informational" and "insulting" words rather than provide a categorical bar.[170] Consistent with this modern trend, the RCC commentary notes that words may serve as a reasonable cause for extreme emotional disturbance, it is not intended that any manner of slights or insults will suffice. The mitigation defense only applies if the emotional disturbance had a "reasonable cause as determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be[.]" Words alone can serve as a mitigating factor only if a jury finds that the words were so heinous that they were a reasonable cause. The CCRC recognizes that these cases, if they arise at all, will be extraordinarily rare. Codifying a categorical "mere words" exception may not accurately reflect District case law, the focus of which has been on insulting or offensive language,[171] and as practically implemented may lead to

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fire at the front door of an occupied dwelling; shooting into ... a moving automobile, necessarily occupied by human beings ...; playing a game of "Russian roulette" with another person[.]"

[169] The matter is almost never addressed in statutes one way or another, but where it has been addressed the statute either recognizes that words may be mitigating (see, e.g. Minn. Stat. Ann. § 609.20) or precludes only "insulting words" (see, e.g. Alaska Stat. Ann. § 11.41.115).

[170] § 15.2(b)(6)Words, 2 Subst. Crim. L. § 15.2(b)(6) (3d ed.) ("The formerly well-established rule that words alone (or words plus gestures) will never do for reducing an intentional killing to voluntary manslaughter has in many jurisdictions changed into a rule that words alone will sometimes do, at least if the words are informational (conveying information of a fact which constitutes a reasonable provocation when that fact is observed) rather than merely insulting or abusive words." (internal citations omitted))"

[171] *See, e.g., High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009) ("Furthermore, Gaither's words to High could not have amounted to adequate provocation because, as we have long held, "[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation." Nicholson,

confusion over when conduct is "mere words" as compared to words accompanied by some prior conduct or gesture.

(10) *USAO at App. C. 293-294, recommends removing the voluntary intoxication provision from the murder statute, and instead rely on the general voluntary intoxication rule.*

- The RCC does not incorporate this recommendation because it may be confusing. As discussed above, the RCC follows current District law in referencing "extreme indifference to human life" in the revised murder and manslaughter statutes, a higher culpable mental state than mere "recklessness." The general voluntary intoxication rule under RCC § 22E-209, however, only addresses imputation of awareness of a *substantial* risk, as required for ordinary recklessness. Because "extreme indifference" requires awareness of an *extreme* risk of death or serious bodily injury, the general intoxication rule would not allow a fact finder to impute awareness of the requisite degree of risk. Without the revised murder statute's voluntary intoxication provision, there may be confusion as to whether the reference to mere reckless culpable mental states in the general part's intoxication provision applies to murder.

(11) *USAO at App. C. 294, recommends several edits to the mitigation defense provision in the revised murder statute that USAO says are not meant to be substantive.*

- The RCC partially incorporates this recommendation by changing subparagraph (f)(1)(B) to require a belief that deadly force was necessary to prevent *imminent* death or serious bodily injury *to the actor or another person*. These changes clarify the revised statute.
- The RCC does not incorporate the USAO recommended language specifying that the reasonable cause of the extreme emotional disturbance must be "*based on the conduct of another*." The suggested language may be (mis-)understood to categorically preclude the possibility of mitigation based on hearing information about another person's conduct, requiring the actor to prove the conduct underlying the information rather than the actor's reasonable belief in the information.
- This change will improve the clarity of the revised criminal code.

(12) *USAO at App. C. 294, recommends removing any other partial defense to murder as a mitigating defense.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The current D.C. Code murder statutes do not discuss what may constitute a mitigating factor, and while case law has recognized imperfect self-defense and extreme emotional disturbance as mitigating factors, there is no binding case law precluding any other defense. The USAO recommendation would foreclose any other

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supra, 368 A.2d at 565 (words do not constitute adequate provocation because they amount to "a trivial or slight provocation, entirely disproportionate to the violence of the retaliation"); accord West v. United States, 499 A.2d 860 (D.C.1985) (provocation not adequate where unarmed victim walked toward armed defendant while they merely exchanged unpleasant words).").

defense by omitting RCC language in RCC § 22E-1101(f)(1)(C) regarding "Any other legally-recognized partial defense which substantially diminishes either the actor's culpability or the wrongfulness of the actor's conduct." As described in the commentary, an example of conduct that may be considered under the RCC partial defense language would be an actor who kills another person when they have the unreasonable belief that the other person was about to sexually assault them. If lethal force may be justified under certain circumstances, even absent the fear of death or serious bodily harm, then an unreasonable belief that those circumstances existed could constitute a mitigating circumstance under the RCC. Critically, what is at stake here is not of whether there is any criminal liability, but a question of lowering liability from murder to manslaughter. The RCC language provides factfinders an opportunity to decide, based on the facts of the case, whether a legally-recognized partial defense substantially diminishes either the actor's culpability or the wrongfulness of the actor's conduct Omitting any other partial defenses to murder would risk disproportionately severe penalties.

- The commentary will be updated to clarify that this provision should be narrowly interpreted, and only circumstances that significantly reduce an actor's culpability in a manner equivalent to mitigating circumstances already recognized under current law will suffice.

(13) *USAO, App. C. 295, recommends revising the murder statute so that mitigating circumstances are inapplicable to premeditated murder and felony murder*.

- The RCC partially incorporates this recommendation. The RCC murder statute has been re-drafted so the mitigation defense will not apply to felony murder. However, the RCC does not incorporate the USAO recommendation to codify that no mitigation defense can apply to premeditated murder.
- While the DCCA has not specifically ruled whether mitigating circumstances may or may not lower a first degree murder charge involving premeditation to manslaughter, preserving mitigation for premeditated murder in some circumstances is consistent with DCCA case law. Given the DCCA's repeated holdings that premeditation and deliberation may be formed in mere moments,[172] it is possible for a person to intentionally cause the death of another with premeditation and deliberation while also under mitigating circumstances. For example, consider a person who hears an intruder in the hall outside his bedroom in the middle of the night. While hiding, the person makes the decision that if the intruder comes into the bedroom, he will kill the intruder. If the intruder enters seconds later, and the person kills the intruder, the person would have satisfied the elements for premeditated murder. However, it

[172] *See e.g. Perry v. United States*, 571 A.2d 1156, 1160 (D.C. 1990) (holding that evidence for premeditation and deliberation was sufficient when defendant wrestled gun away from police officer, and immediately shot the officer out of anger).

would be unjust to categorically preclude a self-defense claim in such circumstances. Similarly, it would also be unjust to categorically preclude an imperfect self-defense claim if the person unreasonably believed that lethal force was necessary.

(14) *USAO at App. C. 296, recommends that, "with the exception of the enhancements directly applicable to First and Second Degree Murder, as set forth below, all other enhancements be addressed with the general enhancements set forth in Chapter 6."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements "directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(15) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include an affirmative defense that "the accused was negligent as to the fact that the victim was a protected person at the time of the offense." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to the revised murder statute, this would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation, because it would authorize disproportionate penalties. Under USAO's proposal, the defense to the penalty enhancement requires that the actor was negligent as to the complainant's status as a protected person. This requires that the actor should have been aware of a substantial risk that the complainant *is* a protected person. A person who *reasonably* believed that the complainant was *not* a protected person is not negligent as to the complainant's status would therefore not satisfy the requirements of the proposed defense.
- The USAO's proposed defense would apply to actors who believe that the complainant *is* a protected person. Under the RCC, proof of a higher culpable mental state suffices to prove lower culpable mental states. Therefore, a person who desires or is practically certain that the complainant is a protected person would also be negligent as to whether the complainant is a protected person.
- Under USAO's proposal, the protected person enhancement would apply to *less* culpable actors, but not to *more* culpable actors. An actor who reasonably believes that the complainant is *not* a protected person is less culpable than an actor who believes, or desires, that the complainant *is* a protected person. However, under USAO's proposal, the enhancement would apply to the former buy not the latter.

(16) *USAO at App. C. 297, recommends that a prior conviction for murder should be included as an aggravating factor in the revised murder statute.*

- The RCC does not incorporate this recommendation because the RCC general recidivist enhancement's crime of violence provision already authorizes increased penalties for a person based on having committed a prior murder.

(17) *USAO at App. C. 297-298, recommends that killing a person capable of providing information to a law enforcement officer should be included as an aggravating factor in the revised murder statute. USAO argues that the obstruction of justice statute does not necessarily cover this conduct, and that even if it does, the statute of limitations may prevent a conviction for obstruction.*

- The RCC incorporates this recommendation by providing as an enhancement in subparagraph (d)(3)(i): Commits the murder with the purpose of harming the decedent because was or had been a witness in any criminal investigation or judicial proceeding, or the decedent was capable of providing or had provided assistance in any criminal investigation or judicial proceeding." The CCRC has not yet reviewed and revised the obstruction of justice statute, so it is unclear whether the conduct described in subparagraph (d)(3)(i) is criminalized as obstruction of justice. When it does so, it will consider whether to provide a statutory provision or commentary regarding merger of sentences for obstruction of justice and a murder conviction with the enhancement in subparagraph (d)(3)(i), or take other action to ensure proportionate punishments.

(18) *USAO at App. C. 298, recommends that premeditated murders that occur while the actor committed kidnapping, robbery, arson, rape, or sex offense should be included as an aggravating circumstance.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but does not necessarily authorize such punishment through just one crime when multiple crimes may be charged for the behavior. In the RCC a person who commits a premeditated murder while committing a separate offense may still be convicted of and sentenced consecutively for that separate offense. A separate conviction and penalty for both murder and the other serious felony adequately authorizes a proportionate penalty above the maximum for first degree murder.

(19) *USAO at App. C. 298-299, recommends that drive by or random shootings should be aggravating circumstances for murder.*

- The RCC incorporates this recommendation. This change improves the proportionality of the revised statute.

(20) *USAO at App. C. 299, recommends that the enhancement under RCC § 22E-1101 (d)(3), which relates to infliction of extreme physical pain or mental suffering, should not require that the suffering be for a "prolonged period of time immediately prior to the decedent's death."*

- The RCC does not incorporate this recommendation because it makes the statutory text less clear. As the DCCA has noted, all murders "are to some

degree heinous, atrocious, and cruel"[173] and the difficulty in distinguishing those murders that are especially heinous, atrocious, or cruel can lead to arbitrary and disproportionate results.[174] Omitting the requirement that the pain or suffering be for a prolonged period of time fails to distinguish between ordinary murders and those that warrant a more severe penalty. In most cases, murder requires a degree of violence sufficient to cause significant pain, with the exception of virtually instantaneous killings. The critical question is whether the extreme physical pain or mental suffering of the decedent was prolonged. Additional liability for prior acts of violence against the decedent—for example, an aggravated assault committed hours before the killing—is provided by other RCC criminal statutes, for which an actor may be consecutively sentenced.

(21) *USAO at App. C. 299-300, recommends removing RCC § 22E-1101(e), which provides for a bifurcated trial when an enhancement is charged that is based on prolonged pain or suffering, or mutilation or desecration of the decedent's body. USAO says that "the bifurcation ignores the practical effects that will result from longer trials and repeatedly calling the same witnesses during both phases." USAO also says that "in almost every case, it will be necessary to show the extensive injuries in proving intent, premeditation and deliberation, and in some cases, even in proving identity."*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. Regarding the first USAO argument, while it is true that a separate proceeding will require more time from court staff, attorneys, and witnesses, this cost is warranted to prevent the risk of unfair prejudice in determining whether the defendant is guilty of the offense. Second, while some evidence may be relevant to both stages of the bifurcated proceeding, some evidence will only be relevant to determining if the murder involved prolonged pain or suffering, or mutilation or desecration of the decedent's body. This evidence could be unfairly prejudicial in determining whether the defendant actually committed the murder.
- Conviction for aggravated murder makes a person liable for imprisonment throughout the remainder of their lives and is the most severe penalty authorized under District law. Bifurcation of those aggravated murder proceedings that may involve evidence that prejudices the factfinder's decision about murder adds additional cost but is warranted for this most severe punishment. The commentary to the American Law Institute's (ALI) recently issued recommendations has noted that while the Supreme Court to date has only required bifurcated trial proceedings in death

[173] *Long v. United States*, 83 A.3d 369, 381 (D.C. 2013), as amended (Jan. 23, 2014); see also *State v. Salazar*, 844 P.2d 566, 585–86 (Ariz. 1992) ("If there is some 'real science' to separating 'especially' heinous, cruel, or depraved killers from 'ordinary' heinous, cruel, or depraved killers, it escapes me. It also has escaped the court.").

[174] *See Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (noting that the words "outrageously or wantonly vile, horrible and inhuman" in the Georgia criminal code do not create "any inherent restraint on the arbitrary and capricious infliction of the death sentence.").

penalty cases, "state legislatures should consider the adoption of comparable procedural protections before LWOP [life without parole] penalties may be imposed."[175] The ALI sentencing commentary further notes that: "Bifurcated deliberations avoid over-long instructions at either stage, head off the possibility that 'sentencing instructions' may convey to the trial jury that the defendant's guilt has been assumed in advance, and avoid placing the defendant in the uncomfortable position of contesting guilt at trial while, in the alternative, arguing that he committed the crime in a manner that does not justify an enhanced penalty."[176]

(22) *The CCRC recommends amending RCC § 22E-1101(e) to specify that the same fact finder shall serve at both stages of the bifurcated proceeding.*

- This change resolves a procedural ambiguity as to whether a separate jury must be selected for the second stage of the bifurcated proceedings. This change clarifies the revised statute.

(23) *USAO at App. C. 300, recommends adding a "while armed" penalty enhancement.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. A murder committed by means of a dangerous weapon is punished more severely than another murder in the RCC because it will still be subject to liability under separate weapons offenses, with penalties that may be consecutive to the murder sentence. However, providing a more substantial enhancement for committing murder with a dangerous weapon would be disproportionate for several reasons. First, it is not clear that the seriousness of committing murder with a dangerous weapon merits enhancement as compared to murder committed by other means or with other enhancements. Unlike lesser offenses which, when committed with a dangerous weapon, carry a risk of killing a person that merits higher punishment, the punishment for murder already accounts for a completed killing. Also, as compared to deaths that involve torture or a minor complainant, it is not clear that use of a dangerous weapon (that may well speed the death) is of comparable seriousness. Second, as approximately 75% of murders are committed with a dangerous weapon,[177] providing a while-armed enhancement would effectively raise the statutory maximum for a large majority of murders. Third, from court records it appears that under current law (providing a while-armed enhancement for murder) few if any murders were actually enhanced above the statutory maximum they otherwise would have had absent the while-armed enhancement.[178] Fourth, the D.C. Voluntary

[175] American Law Institute Sentencing Recommendations at 162.
[176] American Law Institute Sentencing Recommendations at 501.
[177] From 2009 to 2018, 42 of 45 (87.5%) felony murder convictions, 135 of 151 (89.4%) of first degree murder convictions, and 202 of 301 (67%) of second degree murder convictions had a while armed enhancement. See Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.
[178] Data provided in by the D.C. Sentencing Commission is collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied.

Sentencing Guidelines recommend for current law no distinction between degrees of murder while-armed and those degrees unarmed.

(24) *PDS, at App. C. 269, recommends amending the commentary discussing the rule of imputation of awareness of risk required for depraved heart murder.*

- The RCC incorporates this recommendation by updating the commentary to clarify that in some cases, voluntary intoxication may weigh against finding that a person acted with extreme indifference to human life.

(25) *USAO at App. C. 420-421, "recommends ranking enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor, and enhanced 2nd degree sexual abuse of a minor as Class 1 felonies, and that Class 1 felonies have a maximum penalty of life imprisonment.*

- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as "life without parole." As the District

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According to this D.C. Sentencing Commission data, from 2010 to 2015 there were a total of 125 first degree "Murder I Armed" convictions that did not have any additional penalty enhancements. Of these 125 convictions, 11 received a life sentence, 9 received indeterminate sentences (under old, pre-2000 laws), and 105 received prison sentences that never exceeded the 60 year maximum authorized for unenhanced first degree murder. Thus, in more than 90% of first degree murder while armed convictions, the sentence was still within the maximum authorized for *unarmed* first degree murder, and the only exceptions were the 11 life sentences for Murder I - Armed . However, whether these 11 life sentences were actually unenhanced is not entirely clear. The Sentencing Commission data divides first degree murder into two categories, labeled "22DC2101-X" and "22DC2101-Y," though it is not clear what these court labels designate and the DC Courts do not have a "data dictionary" that explains their coding system. Notably, all 11 life sentences for first degree murder were under the 22DC2101-Y label. A different dataset obtained by the CCRC uses different coding labels for types of first degree murder that are differentiated by whether the charges were "felony murder" or "other than felony murder," suggesting that the Sentencing Commission "-X" and "-Y" variants of "Murder I Armed" are differentiated by whether a felony was committed in the case. For example, if the 22DC2101-Y label designates felony murder cases, it is possible that even though there is no "enhancement code" the "-Y" coding variant indicates an aggravator under D.C. Code § 22-2104.01(b)(1) for committing the murder in the course of kidnapping or abduction. Or, if the 22DC2101-Y label designates felony murder cases, the defendant could have been convicted of first degree murder and the separate felony and the sentences could run consecutively. Consequently, without further data and analysis of these 11 Murder I-Armed convictions, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 60 year authorized maximum for *unenhanced, unarmed* first degree murder.

The D.C. Sentencing Commission data shows that for the same time period there was a total of 178 second degree murder while armed convictions that had no other penalty enhancements. Of these 178 convictions, only 1 count received a life sentence, and no other convictions received a sentence of more than 40 years, the maximum authorized for *unarmed* second degree murder. The one count receiving a life sentence in the data had an unusual code of "1820" which suggests the sentence may have been under an older (pre-2000) District law, but the meaning is unclear. Consequently, without further data and analysis of this 1 Murder II-Armed conviction, it is unclear whether the while-armed aggravator was the sole reason for the punishment going above the 40 year authorized maximum for *unenhanced, unarmed* first degree murder.

The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the approximately 31 life sentences (by charge, not by case) imposed for murder offenses in Superior Court 2009-2018. For statistics on use of the while-armed enhancement in District murder convictions according to the CCRC dataset, see also Appendix D to Advisory Group Memorandum # 28: Statistics on Adult Criminal Charges and Convictions.

abolished parole in 2000, "life" sentences issued since then are functionally the equivalent of "life without parole" sentences.

- The RCC does not incorporate the recommendation to penalize enhanced second degree murder the same as enhanced first degree murder because it may authorize disproportionate penalties.[179] Under the RCC, enhanced second degree murder is penalized as a Class 3 felony. All but two of the penalty enhancements available for second degree murder involve facts that, if proven, would likely satisfy the premeditation and deliberation requirements for first degree murder.[180] The two enhancements that most reasonably may apply to second degree murder (but not constitute first degree murder) are subparagraph (d)(3)(A) (Commits the murder "reckless as to the fact that that the decedent is a protected person") and subparagraph (d)(3)(F) ("Knowingly mutilates or desecrates the decedent's body"). While such crimes are the most serious in terms of consequences, the lower culpable mental states involved in second degree murder do not merit a punishment equivalent to premeditated and deliberate first degree murders of a protected person or a person whose body is then mutilated or desecrated. As a Class 2/3 felony, a sentence for enhanced second degree murder still authorizes incarceration for most or all a person's adult life.

(26) *CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, "in addition to any penalty enhancements under this title applicable per Chapter 8 of this Title . . ." instead of "in addition to any penalty enhancements applicable per Chapter 8 of this Title[.]" Broadening the reference from Chapter 8 to include any general penalty enhancements facilitates*

(27) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]." Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as*

[179] The USAO recommendation to punish various sex crimes equivalent to enhanced first degree murder and/or enhanced second degree murder are addressed in the corresponding Appendix D1 entries for sex crimes.

[180] For example, sub-subsection ii ("Commits the murder with the purpose of harming the decedent because of the decedent's status as a law enforcement officer, public safety employee, or District official;") and vii ("In fact, commits the murder after substantial planning.").

superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

Manslaughter. RCC § 22E-1102.

(1) *USAO at App. C. 295, recommends retaining an extreme negligence form of involuntary manslaughter.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties. In the RCC, negligently causing the death of another remains criminalized as negligent homicide, per RCC § 22E-1103, but is no longer labeled manslaughter or punished the same as manslaughter. This change improves the proportionality of the revised homicide statutes by more finely grading homicide. Actors who are genuinely unaware of the risk they create, even extreme risks, are negligent and less culpable than those who are consciously aware of the risk they create as required for manslaughter.[181] Requiring awareness of risk, i.e. recklessness, for involuntary manslaughter is consistent with the modern approach under the MPC[182], and has been adopted by a majority of reformed jurisdictions[183], and the proposed Federal Criminal Code.[184] Support among District voters for grading the penalty for a negligent killing lower than a reckless killing is apparent in the CCRC public opinion surveys.[185]

(2) *USAO at App. C. 296, recommends that, "with the exception of the enhancements directly applicable to First and Second Degree Murder, as set forth below, all other enhancements be addressed with the general enhancements set forth in Chapter 6."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements

[181] LaFave, Wayne. Substantive Criminal Law § 15.4(a). Criminal Negligence. Stating that for the "quite serious crime of involuntary manslaughter, a felony in most jurisdictions, actual awareness of risk should be required, excepting perhaps, for reasons of policy, in the case where the defendant's only reason for not being aware of the risk is his state of voluntary intoxication." LaFave further notes that "[t]he modern view, evidenced by the position taken in most of the recent comprehensive criminal codes, is to require for involuntary manslaughter a consciousness of risk—i.e., "recklessness," as does the Model Penal Code."

[182] Model Penal Code § 210.3.

[183] Ala. Code § 13A-6-4; Ark. Code Ann. § 5-10-104; Colo. Rev. Stat. Ann. § 18-3-104; Conn. Gen. Stat. Ann. § 53a-55; Del. Code Ann. tit. 11, § 632; Haw. Rev. Stat. Ann. § 707-702; 720 Ill. Comp. Stat. Ann. 5/9-3; Kan. Stat. Ann. § 21-5405; Ky. Rev. Stat. Ann. § 507.040; Me. Rev. Stat. tit. 17-A, § 203; Mo. Ann. Stat. § 565.024; N.H. Rev. Stat. Ann. § 630:2; N.J. Stat. Ann. § 2C:11-4; N.Y. Penal Law § 125.15; N.D. Cent. Code Ann. § 12.1-16-02; Or. Rev. Stat. Ann. § 163.118; S.D. Codified Laws § 22-16-20; Tex. Penal Code Ann. § 19.04; Utah Code Ann. § 76-5-205; Wash. Rev. Code Ann. § 9A.32.060.

[184] Proposed Federal Criminal Code § 1602.

[185] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluations of various killings during felonies as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)." Question 3.26 provided the scenario: "A law enforcement officer cleans their gun, wrongly believing the gun to be unloaded. The gun accidentally discharges, killing someone standing nearby."). Question 3.26 had a mean response of 8, two classes below the 10.0 milestone corresponding to manslaughter, and the same as the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

"directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

(3) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include an affirmative defense that "the accused was negligent as to the fact that the victim was a protected person at the time of the offense." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to the revised manslaughter statute, this recommendation would change the penalty enhancement under subparagraph (d)(3)(A).*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(4) *USAO, at App. C. 421-422, recommends classifying voluntary manslaughter as a class 4 felony instead of a class 5 felony, and involuntary manslaughter as a Class 5 offense instead of a class 7 offense.*

- The RCC does not incorporate this recommendation because it would result in disproportionate penalties. While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 5 for voluntary manslaughter would correspond to according to 240 months or 216 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 6 for involuntary manslaughter would correspond to according to 180 months or 144 months in Models 1 and 2 in the First Draft of Report #41. The RCC's penalty recommendations for manslaughter reflect a significant decrease from the current D.C. Code statutory penalties of 30 years imprisonment for manslaughter of any sort, which are outdated and are far more severe than is proportionate under modern D.C. judicial practice.
    i. For all voluntary manslaughter sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for voluntary manslaughter was 120 months, including enhancements, and for involuntary manslaughter was 60 months, including enhancements. The 75th percentile (25% of sentences were greater) for voluntary manslaughter was 156 months, including enhancements, and for involuntary manslaughter was 72 months, including enhancements. Even the most severe (97.5%) Superior court sentences for voluntary manslaughter (207 months, including enhancements) and involuntary manslaughter (105.6 months, including enhancements) are a fraction of the enhanced burglary penalties authorized by current statute (360 months for

both) and within the Models 1 and 2 in the First Draft of Report #41.

ii. Polling of District voters also suggests that classifying involuntary manslaughter as a Class 7 offense appropriately accounts for the harm and culpability. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[186]

(5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (d)(3) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "The penalty classification for first degree murder and second degree murder may be increased in severity by one penalty class, in addition to any penalty enhancements under Chapter 8 of the Title[.]." Broadening the reference to include any general penalty enhancement, instead just enhancements under Chapter 8, facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

[186] Question 3.26 provided the scenario: "Unintentionally killing another driver while speeding and looking at a phone. The driver was aware that driving in such a manner could kill someone." Question 3.26 had a mean response of 8.5, less than one class above the 8.0 milestone corresponding to aggravated assault, currently a 10 year offense in the D.C. Code. The mean 8.5 response is 1.5 less than the milestone 10 offense, which corresponds to voluntary manslaughter. This gap is generally consistent with the RCC's recommendation of a two penalty class gap between voluntary and involuntary manslaughter.

In interpreting the public opinion results, note that there was only one question that specifically related to involuntary manslaughter. Moreover, due to survey design limitations, the survey question did not specify a culpable mental state, other than clarifying that the actor was aware of the risk. It is possible that results would vary if other hypotheticals were presented, and if survey respondents were provided with more nuanced descriptions of the requisite culpable mental state.

RCC § 22E-1103. Negligent Homicide.

(1) *USAO at App. C. 295, recommends retaining a civil negligence standard for the negligent homicide offense.*

- The RCC does not incorporate this recommendation because it may result in disproportionate penalties and would result in inconsistency in the culpable mental states applicable to homicide offenses. A civil negligence standard only requires a deviation from the ordinary standard of care, whereas the criminal negligence standard under the RCC requires that the actor should have been aware of a substantial risk of death, and that the failure to perceive the risk was clearly blameworthy. Using a civil negligence standard to apply felony homicide liability is disproportionately severe,[187] and is inconsistent with national legal trends.[188] No other offense in the RCC or current D.C. Code Title 22 (as far as the CCRC is aware) applies criminal liability, let alone felony liability, on the basis of civil negligence. Moreover, as neither civil nor criminal negligence require any subjective awareness of risk, lowering the culpable mental state is unlikely to produce any additional deterrent effect.

[187] Commentary to the Model Penal Code acknowledges that even under its heightened criminal negligence standard, criminal liability is controversial. "No one has doubted that purpose, knowledge, and recklessness are properly the basis for criminal liability, but some critics have opposed any penal consequences for negligent behavior." Commentary to MPC § 2.02. Although the MPC disagree that negligence is categorically insufficient from criminal liability, the drafters note that even the heightened form of negligence codified in the MPC "should properly not generally be deemed sufficient in the definition of specific crimes[.]" The MPC does not codify a homicide offense predicated on tort negligence.

[188] Only six states provide homicide liability on the basis of civil negligence. Cal. Penal Code § 193; Conn. Gen. Stat. Ann. § 14-222a; Haw. Rev. Stat. § 701-107; Mass. Gen. Laws Ann. ch. 90; § 24G, Nev. Rev. Stat. Ann. § 193.150; Okla. Stat. Ann. tit. 47, § 11-903. The other forty-four jurisdictions do not have an analogous negligent homicide offense; require gross or criminal negligence; or require civil negligence plus an additional aggravating factor, such as intoxication, or violation of a state or local traffic law.

In its comment, USAO notes that Maryland recently adopted a Negligent Homicide offense, and states that it is "consistent with D.C.'s current law that criminalizes both gross negligence and civil negligence." However, this interpretation of the statute is not supported by the text of the statute or relevant case law. Maryland's Negligent Homicide statute requires that the person "cause the death of another as the result of the person's driving, operating, or controlling a vehicle or vessel in a criminally negligent manner." Md. Code Ann., Crim. Law § 2-210. The statute specifies that a person acts in a "criminally negligent manner" when "(1) the person should be aware, but fails to perceive, that the person's conduct creates a substantial and unjustifiable risk that such a result will occur; and (2) the failure to perceive constitutes a gross deviation from the standard of care that would be exercised by a reasonable person." *Id.* The Maryland Court of Special Appeals noted that the Maryland General Assembly provided guidance in interpreting this statute by stating that "the term 'gross deviation from the standard of care' was to 'be interpreted synonymously with the term 'gross deviation from the standard of care' under § 2.02(2)(d) of the Model Penal Code." *Beattie v. State*, 88 A.3d 906, 915 (Md. Ct. Spec. App. 2014). Commentary to MPC § 2.02 specifically states that "the requirements established [for criminal negligence] are considerably more rigorous than simple negligence as usually treated in the law of torts." MPC Commentary at 243, n. 31. Maryland's Negligent Homicide offense's *mens rea* requirement is virtually identical to that under the RCC's negligent homicide offense.

- USAO's comment is ambiguous as to whether the RCC's negligent homicide offense should require causing death of another by operating a motor vehicle. While a civil negligence standard is insufficiently culpable to warrant criminal liability under either scenario, a civil negligence standard would be especially problematic of the offense were broadened to include deaths caused by any means.

(2) *USAO at App. C. 296, recommends that, "with the exception of the enhancements directly applicable to First and Second Degree Murder, as set forth below, all other enhancements be addressed with the general enhancements set forth in Chapter 6."*

- No change to the RCC is required by this recommendation. The RCC General Part in Chapter 6 did not previously, and does not now, contain enhancements that are duplicative with the specific enhancements "directly applicable" to first and second degree murder. The RCC only includes three general penalty enhancements, none of which are duplicative of the enhancements in the murder statute: § 22E-606, Repeat Offender Penalty Enhancements; § 22E-607, Hate Crime Penalty Enhancement; and § 22E-608, Pretrial Release Penalty Enhancements.

Chapter 12. Robbery, Assault, and Threats.

Robbery. RCC § 22E-1201.

(1) *USAO, at App. C. 300-301, opposes removing the "stealthy seizure" form of robbery from the revised robbery statute. USAO says that this change creates ambiguity as to when a taking from a person constitutes robbery or mere theft.*

- The RCC partially incorporates this recommendation by adding as a distinct means of committing robbery "removing property held in the hand or arms of the complainant." This change clarifies that seizing an item from a person's grasp, even when non-painful and non-harmful (and so not covered by the revised statute's sub-paragraph (e)(4)(A) concerning "bodily injury") is sufficient for robbery liability. Cases such as suddenly snatching a phone from a person's grasp may involve such small and quick movements that it may be unclear whether the force used by the actor overpowered the complainant (and, consequently, whether the conduct is captured by the revised statute's sub-paragraph (e)(4)(C) concerning "using physical force that overpowers"). This change clarifies that ambiguity.
- However, the RCC does not recommend retaining the District's current statutory provision treating all "sudden or stealthy seizure or snatching" as robbery. Retaining the current statute's language would result in unnecessarily overlapping statutes and disproportionate penalties by categorically treating all pickpocketing and non-violent thefts from persons as the same as violent takings. For example, under the current statute it is robbery to quietly take property lying on a chair nearby the owner while the owner is in a conversation with a friend and does not see the taking. Treating this non-violent conduct as a felony offense, regardless of the value of the property, would be disproportionately severe. The RCC separately criminalizes takings from a person as fourth degree theft.

(2) *USAO, at App. C. 301-302, recommends codifying a separate carjacking statute, instead of including carjacking within the revised robbery statute.*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between offenses. Carjacking is a form of robbery in which the property taken is a motor vehicle. Just as neither the RCC nor the current D.C. Code codify a separate auto-theft offense, there is no need for a separate carjacking offense. Carjacking may involve taking property that is more valuable than the property seized in an ordinary robbery, but this distinction is reflected in the grading distinctions in the revised robbery statute.
- To the extent that carjacking may involve harm in addition to taking a motor vehicle by means of force or threats, separate RCC criminal offenses account for these additional harms. For example, if a person commits carjacking by driving away while a passenger is still in the car, the person could be convicted of both robbery and kidnapping, and the

sentences could be imposed consecutively. The RCC classifies robbery in which a motor vehicle is taken as fourth degree robbery. This penalty gradation properly accounts for the harm imposed by taking a motor vehicle by use of force or threats. Carjacking by displaying or using a dangerous weapon is subject to more severe penalties under the RCC. Committing robbery in which the property taken is a motor vehicle, by means of displaying or using a dangerous weapon is categorized as third degree robbery.

- Polling of District voters also suggests that the harm caused by carjacking is accounted for in the RCC's robbery statute. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[189]
- The RCC's fourth degree robbery offense includes robbery of a motor vehicle, as well as robberies in which the defendant recklessly causes significant bodily injury. Significant bodily injury is defined as "a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer."[190] Significant bodily injuries include broken bones, lacerations requiring stitches, second degree burns, and traumatic brain injuries. The penalty for committing a robbery while causing this degree of injury is sufficient to account for the harm involved in committing a robbery in which a motor vehicle is taken. Under the D.C. Code, there are some minor differences between the robbery and carjacking statutes, in addition to the requirement under carjacking that the property involved be a motor vehicle. For example, the D.C. Court of Appeals has noted two differences between the robbery and carjacking statutes: 1) the robbery offense required "specific intent to steal," whereas the carjacking statute only requires that the actor "recklessly" took the motor vehicle; and 2) unlike the robbery statute, the carjacking statute does not require "asportation." i.e. that the property be carried away.[191] Given these differences, it may have been necessary under the D.C. Code to separately codify each offense.[192] However, the RCC does not maintain these distinctions, and the USAO's comments do not suggest

[189] Question 1.14 provided the scenario: "Pulling the only person in a car out, causing them minor injury, then stealing it." Question 1.14 had a mean response of 6.2, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.
[190] RCC § 22-701.
[191] *Pixley v. United States*, 692 A.2d 438, 440 (D.C. 1997).
[192] It does not appear from the available legislative history, however, that the when the separate carjacking statute was legislatively enacted there was consideration as to whether a person could be convicted of both robbery and carjacking for the same event. This oversight means that, under the DCCA's "elements test" (which generally allows multiple convictions for offenses that each differ by one element from each other, absent a legislative intent to the contrary), a person now can be convicted and sentenced consecutively for robbery and carjacking. Such stacking of convictions and penalties appears to authorize disproportionate penalties.

that these distinctions should remain in effect. Accordingly, there is no sufficient rationale for separately codifying a carjacking offense.

(3) *USAO, at App. C. 302, recommends amending the robbery statute to include taking property by "engaging in conduct that otherwise places the complainant or any person present other than an accomplice in reasonable fear or being killed, kidnapped, subject to bodily injury, or subject to a sexual act or sexual contact." USAO says that this language would clarify that robbery includes non-verbal threats.*

- The RCC partially incorporates this recommendation by adding a threat of a "sexual contact" to the list of specified threats. This change eliminates a possible gap in liability.
- The RCC does not adopt USAO's proposed language concerning use of conduct that places a person in fear because drafting statutes in such a manner is inconsistent with the RCC general approach of including within threats gestures and other conduct. This RCC approach is consistent with the plain language meaning of "threaten" as including menacing a person with a weapon.[193] To separately address conduct that places a person in "reasonable fear" may suggest that threats ordinarily do *not* include conduct that place a person in reasonable fear, or that a significant difference is intended between a threat that is verbal or non-verbal.[194] The RCC consistently uses threats to include non-verbal conduct, however, the robbery commentary will be updated to further clarify that threats, as required for the robbery statute, do not require verbal communication.

(4) *USAO, App. C. 302, recommends amending the "protected person provisions consistent with recommendations in the General Comments.*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(5) *USAO, at App. C. 302, recommends amending the offense to provide for higher penalty grades when the actor acted "while armed," instead of requiring that the actor "used or displayed" a dangerous weapon or imitation weapon.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a

[193] See Merriam-Webster online dictionary definition of "threaten" (providing as one of the definitions "to cause to feel insecure or anxious" and listing as the first example of a use of the word, "The mugger threatened him with a gun.") (last visited 12-29-19).

[194] For example, it is unclear what work the word "reasonable" is doing in the USAO's proffered language, and whether or how such a reasonableness requirement differs from a verbal threat.

weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[195] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[196]

(6) *USAO, at App. C. 303, recommends including the words "imitation dangerous weapon" in first, second, and third degree robbery.*

- The RCC incorporates this recommendation by including the words "imitation dangerous weapon" in first, second, and third degree robbery. Inclusion of both dangerous weapons and imitation dangerous weapons achieves separate policy goals. Dangerous weapons produce a heightened risk of serious injury or death while imitation weapons may elicit substantially greater fear in the complainant but do not involve a similar risk of violence. However, the grading of the RCC first, second, and third degree robbery accounts for not only the display or use of a dangerous weapon, but the infliction of varying degrees of bodily injury by means of that weapon. While it would be a rare fact pattern where the use or display of an imitation dangerous weapon causes bodily injury or worse, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties.

(7) *USAO, at App. C. 303 recommends in the alternative that fourth degree robbery should replace the word "display" with "displays or uses."*

- The RCC incorporates this recommendation by adding the words "or uses" to subparagraph (d)(2)(A)(ii). While there are few fact patterns where

[195] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[196] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

"use" of a dangerous weapon or imitation dangerous weapon would not involve a "display" of such a weapon, there is no significant difference in seriousness in such scenarios and they should be graded the same. This change clarifies the revised statute and may improve the proportionality of penalties..

(8) *USAO, at App. C. 303, recommends amending subparagraph (e)(4)(B) to add threats of "sexual contact" as a form of robbery.*

- The RCC incorporates this recommendation by adding a threat of a "sexual contact" to the list of specified threats. This change will improve the clarity and proportionality of the revised criminal code.

(9) *USAO, at App. C. 303-304, recommends in subparagraph (e)(4)(C) replacing the words "overpower" with the words "is sufficient to overpower."*

- The RCC does not incorporate this recommendation because it would make the statute less clear and does not improve the consistency of the revised statutes. The current definition of "force" in the sexual abuse context may have been intended to avoid language that suggests there must be proof that the complainant offered resistance to the actor (a common requirement in older sex assault statutes). However, importing such language into the revised statute is unnecessarily complicated and inherently ambiguous, and such language is eliminated in the RCC revised sexual assault statutes. It is unclear if the degree of force that "is sufficient to overcome" a person is intended to be different in degree from force that "actually overcomes" a complainant, or whether this is primarily intended as an evidentiary provision that, for example, would allow a witness description of a robbery to suffice for prosecution even when the complainant themselves is unwilling to testify. Either way, requiring speculation as to what degree of force would be sufficient to overcome a person would introduce an ambiguous and subjective element into the revised statute—particularly as this "overpowers" element only comes into play in lower gradations that don't involve bodily injuries, threats, or use or display of dangerous weapons.

(10) *PDS, at App. C. 414, recommends that first degree robbery should be classified as a Class 6 felony instead of a Class 5 felony, and moving each subsequent grade of robbery down by one class.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Under PDS's proposal, degrees of robbery generally would be included in the same penalty class as corresponding degrees assault, even though robberies involve both assaultive conduct and theft-type conduct. The hybrid nature of robbery as an offense against persons and a property crime merits more serious punishment than the corresponding assaultive harm alone. Due to the current robbery statute's lack of gradations, it is not possible to evaluate how current District robbery involving assaultive conduct compares to the sentencing for various gradations of assault. However, support among District voters for grading the penalty for a robbery involving assaultive

conduct more seriously than such assaultive conduct alone is apparent in the CCRC public opinion surveys.[197]

(11) *The CRCC recommends adding the word "or" at the end of sub-subparagraph (d)(2)(A)(ii). This change is clarificatory and does not substantively alter the offense. This change clarifies that the elements under subparagraph (d)(2)(A) are alternates, and only one must be proven. This change improves the clarity of the revised statute.*

[197] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.18 provided the scenario: "Robbing someone's wallet by punching them, which caused minor injury."). Question 1.18 had a mean response of 6, two classes above the 4 milestone corresponding to simple assault involving a minor injury, and the same as the 6 milestone corresponding to significant bodily injury assault, currently a 3 year offense in the D.C. Code.

RCC § 22E-1202. Assault.

(1) USAO, App. C at 305, recommends in first degree assault, second degree assault, and third degree assault replacing "by displaying or using an object that, in fact, is a dangerous weapon" with "while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon." USAO, App. C at 272, states that the RCC language is "too limited" and it is "more appropriate" to include the language from the current "while armed" enhancement statute in D.C. Code § 22-4502(a) ("armed with or ha[s[readily available."). USAO states that "[i]n addition to the increased fear or injury that a victim may experience if a defendant uses or displays a gun or other weapon, a defendant creates an increased risk of danger by introducing a weapon to an offense," even if the defendant does not use or display it. Specifically, for firearms, a firearm "could inadvertently discharge, and a complainant could suffer additional injury as a result" and "the presence of a firearm also increases the changes of the intentional use of the weapon at some point during the offense." USAO states that "it is appropriate to require that the defendant 'knowingly' be armed with or have readily available the weapon." Finally, USAO states that is "appropriate to include both dangerous weapons and imitation dangerous weapons" because if "a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[198] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory

[198] Commentary to the revised assault statute references commentary to RCC § 22E-1203. Menacing.

Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[199]

(2) USAO, App. C at 305, recommends in first degree assault, second degree assault, third degree assault, and fifth degree assault replacing the "protected person" gradations with a negligence standard, for the reasons stated in its General Comments (App. C at 273-274).

- The CCRC does not incorporate this recommendation for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).

(3) The CCRC recommends replacing "an object that, in fact, is" with "what, in fact, is" in the weapons gradations and in the prohibition on negligent discharge of a firearm. With this change, the weapons gradations will require the use or display of "what, in fact, is a dangerous weapon or imitation dangerous weapon" and the prohibition on the negligent discharge of a firearm will require discharging "what, in fact, is a firearm." The reference to "an object" is unnecessary and is not used in the weapons gradations of other RCC offenses.

- This change improves the clarity and consistency of the revised statute.

(4) The CCRC recommends replacing the reference to a firearm "as defined in D.C. Code § 22-4501(2A)" in sixth degree assault. With this change, this provision in sixth degree assault would require negligently causing bodily injury to the complainant by discharging a "firearm" and the RCC definition of "firearm" in RCC § 22E-701 would apply. "Firearm" is a defined term in the RCC and is used in multiple revised offenses.

- *This change improves the clarity and consistency of the revised statute.*

(5) The CCRC recommends including "an imitation dangerous weapon" in paragraphs (a)(3), (b)(2), and (c)(2) so that they prohibit causing the specified type of bodily injury "by displaying or using an object that, in fact, is a dangerous weapon or imitation dangerous weapon." If a defendant uses an "imitation dangerous weapon" to directly cause one of the specified types of bodily injury, e.g., repeatedly hitting a complainant with an imitation firearm, that conduct was already included in the weapons gradations of the RCC assault statute to the extent that the imitation dangerous weapon satisfies subsection (F) of the RCC definition of "dangerous weapon" ("Any object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."). USAO, App. C. 303, recommended including the words "imitation dangerous weapon" in first, second, and third degree robbery, in part because "if a gun is not recovered, it is

[199] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

impossible to ascertain if the firearm used is real or an imitation, and they often look identical." The RCC incorporated this recommendation into the RCC robbery statute, and the same concerns apply to assault. To the extent that the defendant uses an imitation dangerous weapon to directly cause a specified type of bodily injury, and the imitation dangerous weapon does not satisfy the RCC definition of "dangerous weapon," e.g., hitting the complainant with an imitation firearm one time and causing only "bodily injury," it is consistent and proportionate to include that conduct in the weapons gradation to account for the use of an imitation weapon. If the defendant uses the imitation dangerous weapon to indirectly cause the specified type of bodily injury, e.g., brandishing an imitation firearm and so causing the complainant to fall down stairs, it is consistent and proportionate to include that conduct in the weapons gradations of assault. Including imitation dangerous weapons ensures that, if the other requirements, particularly the causation requirements, of the RCC assault statute are met, whether an object is an imitation dangerous weapon should not determine liability.

- This change improves the clarity and consistency of the revised statute.

(6) USAO, App. C at 304-305, recommends that the assault statute include liability for the use of "force or violence" against the complainant "with the intent to cause bodily injury to the complainant," even if no bodily injury results.[200] *USAO states that for these attempted-battery assaults, the "RCC statute shifts the focus from the defendant's conduct (using force or violence against another) to the results of the defendant's actions (causing bodily injury)." USAO states that it is "more appropriate to focus on the actions of the defendant when assessing whether the defendant committed an Assault than solely on the injuries created by the defendant's actions." USAO states that this change "may shield" from assault liability defendants "who, using force or violence, intend to cause physical injury to another but do not achieve that result" and defendants "who actually cause physical injury to the complainant, but which the government is unable to prove at trial," including when the complainant is uncooperative. When the government cannot prove bodily injury, USAO states that the defendant "should not be subject to lesser penalties for the same conduct (and subject to liability only for attempted assault or second degree offensive physical contact)."*

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the offense and may authorize disproportionate penalties. The USAO recommendation does not include a definition of the phrase "force or violence" or specify how this phrase differs from the clearly defined definition of attempted assault liability under RCC § 22E-301. Defining the scope of attempted-battery assaults and the meaning of "force or violence" under current District law is a matter in active

[200] Specifically, USAO recommends including in third degree of the RCC assault statute "With the intent to cause bodily injury to the complainant, uses force or violence against the complainant, while knowingly armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon," and including in sixth degree "With the intent to cause bodily injury to the complainant, uses force or violence against the complainant." USAO, App. C at 304.

litigation due to the D.C. Code's failure to clearly define the elements of assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability.[201] The USAO recommendation would increase the penalty for conduct that does not result in bodily injury—defined in the RCC to include the infliction of "physical pain, physical injury, illness, or any impairment of physical condition"—and is inconsistent with the other gradations of the RCC assault statute that require a specified type of bodily injury, disfigurement, or maiming. The RCC offensive physical contact offense (RCC § 22E-1205) or attempted assault provide liability for the use of force or violence when bodily injury does not result or cannot be proven, but do so with penalties proportionate to the harm suffered.

(7) USAO, App. C at 305, recommends re-instating the "assault with intent to commit" offenses (AWI offenses), or, in the alternative, updating D.C. Code § 16-2307 to replace "assault with intent to commit any such offense" with "an attempt to commit any such offense." USAO states that under current D.C. Code § 16-2307, there is "a rebuttable presumption for charging a juvenile defendant as an adult pursuant to Title 16" when the defendant is charged with "'murder, first degree sexual abuse, burglary in the first degree, robbery while armed, or assault with intent to commit any such offense . . . and any other offense property joinable with such an offense.'"[202] USAO notes that eliminating the AWI offenses "limit[s] USAO's ability to exercise its discretion in charging such individuals pursuant to Title 16." USAO further states that it "submitted a comment on this issue in its May 20, 2019 comments (App. C at 236-237), which is separately addressed in this Appendix in the entries for RCC § 22E-301 (criminal attempt provision).

- The RCC does not incorporate the recommendation to re-instate "assault with intent to" offenses because doing so would reintroduce ambiguity and unnecessarily overlapping offenses, and may authorize disproportionate penalties. In the RCC, liability for the conduct criminalized by the current AWI offenses[203] is provided through application of the general attempt statute in RCC § 22E-301 to the completed offenses in a more consistent manner.[204]
- The RCC does not incorporate the recommendation to update D.C. Code § 16-2307 to replace "assault with intent to commit any such offense" with "an attempt to commit any such offense" at this time. After the Advisory Group votes to approve final recommendations, time permitting the CCRC

[201] *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).
[202] USAO, App. C at 305 (quoting D.C. Code § 16-2308(e-2)(1) – (2).
[203] D.C. Code §§ 22-401 (assault with intent to kill, assault with intent to commit first degree sexual abuse, assault with intent to commit second degree sexual abuse, assault with intent to commit child sexual abuse, assault with intent to commit robbery); 22-402 (assault with intent to commit mayhem); 22-403 (assault with intent to commit any other felony).
[204] The commentary to the RCC assault statute (RCC § 22E-1202) discusses this revision in detail.

will include recommendations to the Council and Mayor for conforming amendments such as this one.

(8) USAO, App. C a 305-306, recommends codifying separately from other assaults and offensive physical contact statutes assaults and offensive physical contact on a law enforcement officer. USAO states that there should be a specific RCC offense for "assaulting a police officer, regardless of whether injury results" as there is under the current assault on a police officer statute. USAO notes that, "it appears that that "Resisting Arrest" is a possible or planned RCC statute in Chapter 34 that has not yet been drafted" but says "USAO believes that a person's physical conduct might not qualify as 'resisting arrest' and yet should still be criminalized." USAO gives as a hypothetical "a person [that] pushes or shoves an officer," stating under the RCC, the person would not be guilty of assault, but merely "generic second-degree offensive physical contact." USAO states that the RCC should separately criminalize assault and offensive contact with law enforcement officers "in recognition of officer's special roles and the potential for violence if a person does make offensive physical contact with the officer."

- The RCC partially incorporates this recommendation by revising the offensive physical contact offense to include a "protected person" gradation for each type of prohibited conduct—contact with bodily fluid or excrement and general offensive physical contact. The RCC definition of "protected person" includes a law enforcement officer, in the course of his or her official duties.[205] This change improves the consistency and proportionality of the revised statutes.
- The RCC assault statute already provides liability for physical actions toward law enforcement officers that do not result in bodily injury (defined in the RCC to include the infliction of "physical pain, physical injury, illness, or any impairment of physical condition") whenever such action satisfies the requirements for attempt liability under RCC § 22E-301.[206] The scope of attempted assault liability is the same for law enforcement officers as for other persons, however, even while the penalties differ. In addition, the CCRC does plan to issue recommendations regarding revision of the District's "resisting arrest" statute, § 22–405.01. Together with the revised offensive physical contact offense, there is no apparent decrease in the scope of covered conduct toward law enforcement officers between the current D.C. Code and the RCC.[207] However, unlike the current D.C. Code the RCC reduces overlap between relevant offenses and improves the proportionality of penalties.

[205] RCC § 22E-701.

[206] For this reason, the USAO statement that, "under the RCC, if a person pushes or shoves an officer, the person would not be guilty of an assault; the person would merely be guilty of the generic second-degree offensive physical contact" appears incomplete or incorrect. But, today, if a person shoves a police officer, the person would be guilty of assault on a police officer (APO). See D.C. Crim. Jur. Instr. 4.114 (APO does not require any bodily injury).

[207] Defining the scope of attempted-battery assaults and the meaning of "force or violence" under current District law is a matter in active litigation due to the D.C. Code's failure to clearly define the elements of

(9) USAO, App. C at 306-307, recommends adding "regardless of whether the arrest, stop, or detention was lawful" to paragraph (g)(2)[208] of the limitation on justification and excuse defenses to assault on a law enforcement officer. Currently, the subsection reads "the use of force occurred during an arrest, stop, or detention for a legitimate law enforcement purpose." USAO states that the word "legitimate" is undefined in the RCC, and "could lead to unnecessary litigation over whether the police officer's actions were for a 'legitimate' purpose." In addition, USAO states that "legitimate" could "connote that the officer's purpose was also unlawful," which is contrary to current law[209] and that the RCC "should make clear that whether an officer's actions were legitimate *is not related to whether the officer's actions were* lawful*."*

- The RCC incorporates this recommendation by revising paragraph (g)(2) to include "regardless of whether the arrest, stop, or detention is lawful." This change improves the clarity of the revised statute and may reduce a possible gap in liability.

(10) OAG, App. C at 249, comments that it assumes that "appeared reasonably necessary" in paragraph (g)(3)[210] ("The law enforcement officer used only the amount of physical force that appeared reasonably necessary") refers to "how it appeared to the law enforcement officer." OAG comments that "[i]f the Commission wanted something else, the language should be amended and further discussion would be warranted."

- The RCC commentary previously noted that subsection (g) of the assault statute "codifies the requirements in DCCA case law" that "the law enforcement officer's use of force appeared reasonably necessary," and cited to *Nelson v. United States*, 580 A.2d 114, 117 (D.C.1990) *(on rehearing).*[211] The citation to *Nelson* has been replaced with a citation to *Speed v. United States*, where the DCCA approved a jury instruction for assault on a police officer that stated "[i]n making and maintaining the arrest, the measure of reasonable force is that which an ordinarily prudent and intelligent person, with the knowledge and in the situation of the arresting officer, would have deemed necessary."[212] This changes clarifies the revised commentary.

(11) The CCRC recommends, through use of the phrase "in fact," specifying that strict liability applies to the requirements in paragraphs (g)(2) and (g)(3) of

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assault and the lack of prior case law on point. A panel of the DCCA recently ruled (in an opinion since vacated pending an *en banc* ruling) that unwanted touchings do not necessarily constitute "force or violence" necessary for assault liability. *Perez Hernandez v. United States*, 207 A.3d 594, 604 (D.C.), vacated, 207 A.3d 605 (D.C. 2019).

[208] The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(B), but has now been corrected to (g)(2).

[209] USAO cites to *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989).

[210] The previous version of the RCC assault statute had non-substantive numbering errors in the subsections. The relevant subsection was previously labeled as (g)(C), but has now been corrected to (g)(3).

[211] RCC Commentary Subtitle II. Offenses Against Persons, pages 89-90 & n. 144.

[212] The citation now reads "*Speed v. United States*, 562 A.2d 124, 127, 128 (D.C. 1989).

the limitation on justification and excuse defenses to assault on a law enforcement officer. With this change, subparagraph (g)(2) would specify "In fact, the use of force occurs during an arrest, stop, or detention for a legitimate police purpose, regardless of whether the arrest, stop, or detention is lawful" and, per the rule of construction in 22E-207, "in fact" would also apply to the requirements in paragraph (g)(3) ("The law enforcement officer uses only the amount of physical force that appears reasonably necessary."). The previous version of the limitation did not specify whether a culpable mental state or strict liability applied to these requirements in paragraph (g)(2) and (g)(3).

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.

(12) The CCRC recommends deleting the jury demandability provisions in subsection (i). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(13) OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. With respect to the RCC assault offenses, this would make attempts to commit sixth degree assault (a Class B misdemeanor) non-jury demandable.

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(14) USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for sixth degree assault (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.

The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41 the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, sixth degree assault (a Class B misdemeanor) and attempted sixth degree assault are jury demandable. See

the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

RCC § 22E-1203. Menacing.

(1) *USAO, App. C at 307, recommends subsuming the menacing statute into the assault statute. USAO does not raise concerns about the drafting of the revised menacing statute's element, but states it is "concerned that this will result in ADW-intent-to-frighten cases being explicitly treated as lesser cases, and likely subject to lesser penalties…[which] does not represent the dangers created by this offense."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties by punishing conduct of significantly different seriousness the same.
- In criminal law, District courts have recognized "intent-to-frighten assault,"[213] "attempted battery assault,"[214] and "offensive physical contact assault," which includes "non-violent sexual touching assault."[215] District courts have explained that intent-to-frighten assault requires a "menacing" or "threatening" act.[216] The RCC relabels the infliction of apprehension "menacing,"[217] the infliction of physical harm or injury "assault,"[218] the infliction of offensive physical contact "offensive physical contact,"[219] and non-violent sexual touching "sexual assault"[220] and/or "non-consensual sexual conduct."[221] The revised menacing statute accounts for the seriousness of displaying or using a weapon or imitation weapon through the penalty gradation structure, which punishes "gun point cases" as first degree menacing. Subsuming these cases—which do not involve contact, bodily injury, or attempted bodily injury—into the RCC's equivalent of a battery statute would lead to disproportionate penalties.
- In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree menacing—which does not require any bodily injury or an attempt to cause bodily injury—as a Class 9 felony, equivalent to an assault that actually results in significant bodily injury.[222] The RCC grading of assault, detailed in the First Draft of

[213] *McGee v. United States*, 533 A.2d 1268, 1270 (D.C. 1988).
[214] *Ray v. United States*, 575 A.2d 1196 (D.C. 1990).
[215] *In the Matter of A.B.*, 556 A.2d 645, 646–47 (D.C. 1989).
[216] *Williamson v. United States*, 445 A.2d 975, 978 (D.C. 1982); *Robinson v. United States*, 506 A.2d 572, 574 (D.C. 1986).
[217] RCC § 22E-1203.
[218] RCC § 22E-1202.
[219] RCC § 22E-1205.
[220] RCC § 22E-1301.
[221] RCC § 22E-1307.
[222] "Significant bodily injury" means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer. The following injuries constitute at least a significant bodily injury: a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least

Report #41, provides more serious penalties for assaults with a dangerous weapon that result in any bodily injury (3rd Degree Assault, a Class 8 felony), significant bodily injury (2nd Degree Assault, a Class 7 felony), and serious bodily injury (1st Degree Assault, a Class 6 felony). In contrast, the USAO recommendation would punish conduct that results in bodily injury (of varying degrees) the same as conduct that does not cause any bodily injury and falls short of an attempt to inflict bodily injury.

(2) *USAO, App. C at 307-308 and 415-419, appears to recommend against creation of a right to a jury trial for second degree menacing. USAO states, in relevant part, that it is "unclear how there are any particular, unique constitutional interests created by this offense." USAO further states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A and Class B misdemeanors, and inchoate versions of those offenses, as jury demandable offenses, improving the consistency of the revised statutes. This would include the RCC first and second degree menacing offenses, and inchoate versions of those offenses. The Second Draft of Report #41 provides a general justification of this change.
- In addition to the general RCC approach to jury demandability, the RCC menacing offense particularly merits jury demandability because it, in part, criminalizes a form of speech. Unlike the current "intent-to-frighten" assault statute, the RCC menacing offense includes not only bodily movements but verbal speech. Subject to limited exceptions, such as a "true threats" exception,[223] the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[224] The DCCA

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second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation. RCC § 22E-701.

[223] See *Virginia v. Black*, 538 U.S. 343, 359–360 (2003).

[224] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
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> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury

recently noted, "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[225]

(3) *USAO, App. C at 308, recommends adding a penalty enhancement for first degree menacing of a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member. USAO cites its general comments for all offenses on such penalty enhancements. This apparently refers to USAO recommendations in App. C at 273 that there be a new affirmative defense applying a negligence standard as to the defendant's age.*

- The RCC partially incorporates this recommendation by applying a penalty enhancement for recklessly menacing a protected person.[226] This change improves the proportionality and consistency of the revised statutes.
- The RCC does not adopt a "negligence" standard as to the victim's status as a protected person for the reasons stated in the response to the same comment in the RCC murder statute.[227]

(4) *OAG, App. C at 249, recommends either striking the exclusion from liability for protected speech or providing a specific example of a menacing fact pattern that involves protected speech.*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion. This change clarifies but does not substantively change the revised offense.

(5) *OAG, App. C at 249, recommends amending the commentary (p. 94) that explains a communication must be "received and understood" by the intended listener. OAG notes an apparent conflict between this comment and the commentary (p. 95) explaining that it is "not necessary to prove that the communication was perceived as a serious expression of an intent to do harm."*

- The RCC partially incorporates this recommendation by clarifying the commentary. The menacing offense requires that the listener receive and

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demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[225] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[226] "Protected person" is defined in RCC § 22E-701.

[227] RCC § 22E-1101.

understand, at the most basic level, the *meaning* of the defendant's speech.[228] However, the offense does not require that the listener be certain about the *intent* behind the defendant's speech. So long as (1) the defendant intended that the victim perceive the threat as serious[229] and (2) a reasonable person in the victim's circumstances would perceive the threat as serious,[230] it is of no consequence that the listener does not actually believe that the defendant means what was said.[231] The commentary is updated to include this explanation. This change clarifies the revised commentary.

(6) *USAO, App. C at 426, recommends that first degree menacing be reclassified as a Class 7 or Class 8 felony. USAO notes that survey respondents ranked 'threatening to kill someone face-to-face, which [sic.] displaying a gun,' at a mean score of 7.6 [out of 12]."*[232]

- The RCC partially incorporates this recommendation by making first degree menacing a Class 8 felony when committed against a protected person.

[228] Similarly, in the revised criminal threats offense, the verb "communicates" is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1205. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[229] For example, a person who screams a threatening remark out of exasperation without intent to frighten the listener does not commit a menacing offense.

[230] *See Lewis v. United States*, 95 A.3d 1289, 1290 (D.C. 2014) (reversing a conviction where the appellant was expressing frustration over his arrest by yelling derogatory names at the officers and yelling that the officer was "lucky" that appellant had not had a gun on him because he would have "blown [the officer's] partner's god-damned head off.")

[231] Consider, for example, Coworker A approaches Coworker B threatening to "beat him up" in the office. B believes that A would never risk losing A's job by following through on this threat. A, nevertheless, may have committed menacing against B.

[232] Advisory Group Memo #27, at 2.

RCC § 22E-1204. Criminal Threats.

(1) *USAO, App. C at 308 and 415-419, appears to recommend against creation of a right to a jury trial for all degrees of threats, including attempts. USAO also states, in relevant part, "there are no particular constitutional interests creates [sic.] by the Threats statute." USAO further states that in current practice, the government almost always proceeds under an attempted threat theory in misdemeanor cases, resulting in non-jury trials.*

- The RCC partially incorporated this recommendation in the Second Draft of Report #41, concerning jury demandability. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify first degree threats as a Class B misdemeanor and second degree threats as a Class C misdemeanor. In the Second Draft of Report #41, the CCRC recommended that the RCC classify completed and inchoate forms of Class B misdemeanors as jury demandable and classify Class C misdemeanors as non-jury demandable, improving the consistency of the revised statutes.
- Under current District law violation of D.C. Code § 22-407 is punishable by six months and a violation of D.C. Code § 22-1810 is punishable by 20 years, rendering both jury demandable.[233] Only an attempted violation of D.C. Code § 22-407 or D.C. Code § 22-1810—currently punishable by up to 180 days—is non-jury demandable. In contrast with the current threats statutes, the sole manner in which the RCC changes jury demandability is by making the completed form of the revised second degree threats statute non-jury demandable.
- In addition to the general RCC approach to jury demandability, the RCC criminal threats offense particularly merits jury demandability because it criminalizes a form of speech. Subject to limited exceptions, including a "true threats" exception,[234] the exercise of free speech is protected by the First Amendment to the United States Constitution. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[235] The DCCA

[233] *See* D.C. Code § 16-705.

[234] See *Virginia v. Black*, 538 U.S. 343, 359–360 (2003).

[235] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
>
> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury

recently noted, "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[236]

(2) *USAO, App. C at 309, recommends adding a penalty enhancement for threats against a minor, senior citizen, transportation worker, District official or employee, or citizen patrol member.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Notably, the threats offenses under current District law[237] are not subject to a protected person-type enhancement based on the victim's status as over 65 years of age or under 18 years of age, or as a citizen patrol member. Current D.C. Code § 22-3752 provides an enhancement for "threats to do bodily harm" to transportation workers, and there is a separate offense for certain threats to District officials in D.C. Code § 22-851. The RCC brings consistency to the wide array of predicate offenses for various enhancements based on the victim's "protected person" status but does not expand the use of such enhancements for misdemeanors other than simple assault.

(3) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $250 to $500 consistent with the thresholds for the revised property offenses.[238] This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.[239]*

- This change improves the consistency of the revised offenses.

(4) *The CCRC recommends revising the commentary to reflect an additional change to current District law. Specifically, the revised statute does not include a provision similar to the D.C. Code § 22-407's statement that, "Whoever is convicted…may be required to give bond to keep the peace for a period not exceeding 1 year."*

- This change clarifies the revised commentary.

(5) *The CCRC recommends revising the commentary to note the DCCA's recent opinion in* Roberts v. United States,*[240] which was issued after the most recent draft language was released.*

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demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[236] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[237] D.C. Code §§ 22-407 and 22-1810.

[238] *See, e.g.*, RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).

[239] RCC § 22E-2201.

[240] 216 A.3d 870, 886 (D.C. 2019).

- This change clarifies the revised commentary.

(6) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

RCC § 22E-1205. Offensive Physical Contact.

(1) *USAO, App. C at 309-310, recommends, in the event that "bodily injury" is not eliminated as a requirement from assault, making what is now third degree offensive physical contact "an explicit lesser included offense of sixth degree assault." Specifically, USAO recommends amending what is now third degree offensive physical contact to include as paragraph (c)(4) "Or commits what would be sixth degree assault but for the absence of bodily injury." USAO states that "the line between a sixth-degree assault and [what is now third degree] offensive physical contact will sometimes be hard to delineate" and "will often turn on whether the victim experienced 'physical pain'" as assessed by a factfinder. USAO states that this revision would eliminate the need for USAO to charge both third degree offensive physical contact and sixth degree assault "in every run-of-the-mill assault case."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC assault statute and RCC offensive physical contact statute require different culpable mental states in addition to different types of harm. RCC sixth degree assault requires recklessly causing "bodily injury," defined in RCC § 22E-701 as "physical pain, physical injury, illness, or any impairment of physical condition." What is now third degree of the RCC offensive physical contact offense requires higher culpable mental states—knowingly causing physical contact with the complainant with intent that the physical contact be offensive to the complainant.[241] Including in what is now third degree offensive physical contact a reckless touching without bodily injury would criminalize any physical contact that is done "recklessly," no matter how trivial, such as bumping into someone on Metro.

(2) *USAO, App. C at 310, recommends including a protected person enhancement for both degrees of the RCC offensive physical contact offense. USAO states that conduct that constitutes first degree offensive physical contact "could be a serious offense in certain circumstances" because bodily fluid "can contain transmittable disease, and can lead to serious consequences for a victim" who becomes infected. Second, having a protected person enhancement "reflects the added seriousness of committing these crimes against vulnerable community members." USAO proposes using the language suggested in its General comments, App. C at 273, which applies strict liability to the fact that the complainant is a "protected person" with an affirmative defense that the accused "was negligent as to the fact that the victim was a protected person at the time of the offense. This defense shall be established by a preponderance of the evidence."*

- The RCC partially incorporates this recommendation by expanding the offensive physical contact offense to three gradations, as opposed to two, and codifying a protected person gradation in what is now first degree and

[241] The RCC offensive physical contact offense also requires that "in fact, a reasonable person in the situation of the complainant would regard" the contact as offensive.

second degree of the offense. The protected person gradation applies to each type of prohibited conduct in the revised statute—contact with bodily fluid or excrement and general offensive physical contact. Specifically, first degree offensive physical contact is now reserved for causing a protected person to come into physical contact with bodily fluid or excrement or causing this physical contact with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Second degree offensive physical contact now prohibits either causing any complainant to come into physical contact with bodily fluid or excrement, or committing third degree offensive physical contact when the complainant is a protected person or with the purpose of harming the complainant because of the complainant's status as a law enforcement officer, public safety employee, or District official. Third degree offensive physical contact generally prohibits offensive physical contact against any complainant. This change improves the consistency and proportionality of the revised statute.

- The RCC does not incorporate the recommendation to replace the "protected person" gradations with a negligence standard, for the reasons stated in the response to the same comment for the RCC murder statute (RCC § 22E-1101).

(3) *The CCRC recommends deleting the jury demandability provision (previously in subsection (d)). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(4) *The CCRC recommends classifying second degree offensive physical contact as a Class C misdemeanor, instead of a Class D misdemeanor, and classifying third degree offensive physical contact as a Class D misdemeanor. As is discussed elsewhere in this appendix, offensive physical contact now has three gradations. As a result of this revision, what was previously second degree offensive physical contact (general offensive physical contact with any person) is now third degree. Second degree offensive physical contact now requires making any person come into contact with bodily fluid or excrement, or causing general offensive physical contact with a protected person or other specified complainant. Increasing the severity of second degree offensive physical contact by one class to a Class C misdemeanor is proportionate with the more serious conduct contained in second degree, and making third degree offensive physical contact a Class D misdemeanor is proportionate with the comparatively less serious conduct contained in third degree.*

- This change improves the consistency and proportionality of the revised statute.

(5) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor, not be jury-demandable. This would make attempts to commit first degree offensive physical contact non-jury demandable.*

- The RCC partially incorporates this recommendation to the extent it is consistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. First degree offensive physical contact is a Class B misdemeanor and attempted first degree offensive physical contact would be an inchoate form of a Class B misdemeanor See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(6) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for all degrees of offensive physical contact (including attempts).*[242] *USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC not partially incorporates this recommendation by specifying in the RCC that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer (including offense physical contact). Under this framework, any gradation of offensive physical contact in which the complainant is a law enforcement officer is jury demandable, and for any complainant, first degree offensive physical contact (Class B misdemeanor) and attempted first degree offensive physical contact would be jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

[242] When USAO submitted this comment, the RCC offensive physical contact statute had only two gradations. As is discussed elsewhere in this Appendix, the RCC offensive physical contact statute now has three gradations, but first degree is still classified as a Class B misdemeanor with a maximum term of imprisonment of 6 months.

Chapter 13. Sexual Assault and Related Provisions.

RCC § 22E-1301. Sexual Assault.

(1) USAO, App. C at 316-317, recommends adding "engages in" to paragraphs (a)(1), (b)(1), (c)(1), and (d)(1) so that the paragraphs prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact instead of "causes the complainant to engage in or submit to" the sexual act or sexual contact. USAO states that "it makes more sense to focus on the actions of the defendant than on the actions of the complainant" and that the recommended language "tracks the current law."

- The RCC incorporates this recommendation by adding to paragraphs (a)(1) and (b)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraphs (c)(1) and (d)(1) that the actor "engages in a sexual contact with the complainant." This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(2) USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing "overcomes, restrains, or causes bodily injury" with "is sufficient to overcome, restrain, or cause bodily injury." USAO states that the proposed language is "consistent with current law" where "force" is defined, in relevant part as, "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person" and is "consistent with the current jury instructions."

- The RCC does not incorporate USAO's recommendation because it would retain the ambiguity that exists in the definition of "force" for the current sexual abuse statutes. The current D.C. Code definition of "force" requires "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person."[243] It is unclear whether "as is sufficient" means the force must actually overcome, restrain, or injure the complainant, or whether the force must be sufficient to overcome, restrain, or injure a "reasonable" or "average" person, regardless of the effect on the complainant. However, independent of the current D.C. Code definition of "force," the current first degree sexual abuse statute requires that the defendant's use of force actually cause the complainant to engage in a sexual act or sexual contact.[244] Given this causation requirement, the

[243] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[244] D.C. Code §§ 22-3002(a)(1) (first degree sexual abuse statute stating "if that person engages in or causes another person to engage in or submit to a sexual act in the following manner: (1) By using force against that other person."); 22-3004(1) (third degree sexual abuse statute stating "if that person engages in or causes sexual contact with or by another person in the following manner: (1) By using force against that other person.").

clarity and consistency of the revised sexual assault statute improves if first degree and third degree require that the force actually overcome, restrain, or cause bodily injury to the complainant. The use of force that does not physically overcome, restrain, or cause bodily injury to the complainant, may be covered by second degree or fourth degree sexual assault if it satisfies the RCC definition of "coercive threat" and causes the complainant to engage in or submit to a sexual act or sexual contact. The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes "as is sufficient" from the current definition of "force" and that it is a clarificatory change.

(3) OAG, App. C at 250, recommends revising first degree sexual assault[245] to replace "by using physical force that overcomes . . . the complainant" with "by using physical force that overcomes resistance." At the July 31, 2019 Advisory Group meeting, OAG stated that its concern was not substantive, but rather grammatical, and that it is unclear in the current drafting what or who must be overcome by the force.[246] OAG stated at the meeting that reordering the relevant language in first degree and third degree sexual assault would address its concern.

- The RCC incorporates this recommendation by re-ordering subparagraphs (a)(2)(A) and (c)(2)(B) to require "By using physical force that causes bodily injury to, overcomes, or restrains the complainant." This change improves the clarity of the revised statute.

(4) The CCRC recommends replacing "the complainant" with "any person" in first degree and third degree sexual assault (subparagraphs (a)(2)(A) and (c)(2)(A)) so that they prohibit "By using physical force that causes bodily injury to, overcomes, or restrains any person." This change makes the scope of these provisions match the scope of subparagraphs (a)(2)(B) and (c)(2)(B), which prohibit threats against "any person." The current D.C. Code first degree and third degree sexual abuse statutes require either the use of "force" against the complainant[247] or certain threats against "any person."[248] However, the current D.C. Code definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim,"[249] which would include causing bodily injury to, overcoming, or restraining any person. Replacing "the complainant" with "any person" in (subparagraphs (a)(2)(A) and (c)(2)(A)) of the RCC sexual assault statute makes it clear that physical harms to any individual that the actor knows cause the complainant to engage in or submit to the sexual act or sexual contact are sufficient for first degree and third degree sexual assault. All other threats not pertaining to physical harm are potentially sufficient for second degree and fourth degree sexual assault if they meet the RCC definition of "coercive threat."

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[245] OAG's comment is specific to first degree sexual assault, but also applies to third degree.
[246] *See* Minutes of the July 31, 2019 Advisory Group meeting.
[247] D.C. Code §§ 22-3002(a)(1); 22-3004(1).
[248] D.C. Code §§ 22-3002(a)(2); 22-3004(2).
[249] D.C. Code § 22-3001(5).

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(5) The CCRC recommends deleting from first degree and third degree sexual assault what was previously subparagraphs (a)(2)(B) and (c)(2)(B), which prohibited "using a weapon against the complainant." The definition of "force" in the current D.C. Code sexual abuse statutes prohibits "the use or threatened use of a weapon,"[250] but "weapon" is not defined statutorily and there is no DCCA case law interpreting it. It is unclear how a "weapon" in the current D.C. Code definition of "force" differs from a "deadly or dangerous weapon" in the current sexual abuse aggravators.[251] To the extent that a "weapon" is an item that does or may cause a comparatively less serious bodily injury than a deadly or dangerous weapon, first degree and third degree of the RCC sexual assault statute prohibit the use or threatened use of such an item in subparagraphs (a)(2)(B) and (c)(2)(B) (the use of force that causes bodily injury to, overcomes, or restrains the complainant) and subparagraphs (a)(2)(C) and (c)(2)(C) (prohibiting threats of "bodily injury.").

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(6) OAG, App. C at 251, recommends defining "weapon" for first degree and third degree sexual assault, which previously specifically prohibited using a "weapon" against the complainant. OAG recommends defining "weapon" as "an object that is designed to be used, actually used, or threatened to be used, in a manner that is likely to produce bodily injury." OAG notes that while "dangerous weapon" is defined in the RCC, "weapon" is not.

- The RCC does not incorporate this recommendation because, as is discussed above, using a "weapon" is no longer a discrete basis of liability for first degree or third degree sexual assault.

(7) USAO, App. C at 317, recommends in first degree and third degree sexual assault replacing "using a weapon" with "displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon." USAO states that "dangerous weapon" is a clearer term than "weapon," which is undefined in the RCC. USAO recommends including an "imitation dangerous weapon" in these gradations because it may be difficult to prove whether a dangerous weapon is real or imitation and "the victim's belief that he/she was being threatened by a real firearm, and the victim's submission as a result of that belief, is the crux of the offense." USAO further states that "in fact" should apply to this element, consistent with the weapons gradations in other RCC offenses, such as robbery. Finally, USAO recommends including "displaying or using" because displaying a

[250] D.C. Code § 22-3001(5) (defining "force" as "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

[251] D.C. Code § 22-3001(6) ("The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

dangerous weapon "could compel a complainant to submit to a sexual act or contact, and should be criminalized as sexual assault." USAO notes that "displaying or using" is consistent with the weapons gradations in other RCC offense, such as robbery.

- The RCC does not incorporate this recommendation because, as is discussed above, first degree and third degree of the revised sexual assault statute no longer include the use of a "weapon" against the complainant as a discrete basis of liability. The proposed language as it pertains to a "real" dangerous weapon would be sufficient for liability under first degree and third degree sexual assault as either the use of force that causes bodily injury to, overcomes, or restrains the complainant (subparagraphs (a)(2)(B) and (c)(2)(B)) or the use of specified threats, including threats of "bodily injury" (subparagraphs (a)(2)(C) and (c)(2)(C)). The proposed language as it pertains to "an imitation dangerous weapon," may also be sufficient for liability in these subparagraphs if actually used or threatened in a manner that causes the complainant to engage in or submit to conduct, and, if not, may be sufficient for the use of a "coercive threat" in second degree and fourth degree sexual assault.

(8) *The CCRC recommends deleting "unwanted" from "unwanted sexual act" in subparagraphs (a)(2)(B) and (c)(2)(B) of first degree and third degree sexual assault ("By threatening, explicitly or implicitly, to kill, kidnap, or cause bodily injury to any person, or to commit an unwanted sexual act against any person). "Unwanted" is conveyed in the concept of a threat and it is superfluous.*

- This change improves the clarity of the revised statute.

(9) OAG, App. C at 251, recommends revising subparagraph (c)(2)(B) in third degree sexual assault[252] to prohibit "the use of, or threatened use of, a weapon against a third party, as opposed to "using a weapon against the complainant." OAG states that the revision is necessary to account for situations where the complainant is "coerced" into a sexual act or sexual contact because of the use of, or threatened use of, a weapon against a third party.

- The RCC does not incorporate OAG's recommendation because the RCC sexual assault statute no longer has a provision that is specific to the use of a weapon. However, first degree and third degree sexual assault encompass the use or threatened use of a weapon against a third party in subparagraphs (a)(2)(A) and (c)(2)(A) (the use of force against any person) and subparagraphs (a)(2)(B) and (c)(2)(B) (specified threats against any person).

(10) USAO, App. C at 319, recommends replacing threats of "significant bodily injury" with threats of "bodily injury" in first degree and third degree sexual assault (now subparagraphs (a)(2)(B) and (c)(2)(B)). USAO gives as a hypothetical a defendant that threatens to "punch a complainant repeatedly in the face, and the complainant submitted to a sexual act on that basis" and states this should be first degree sexual assault. USAO states that the current D.C. Code

[252] OAG's comment is specific to third degree sexual assault, but also applies to first degree.

definition of "bodily injury" for the sexual abuse statutes is "more limited in certain respects" than the RCC definition of "bodily injury," but notes that the current D.C. Code definition of "bodily injury" also includes "injury involving significant pain" and in that respect is "far more expansive than the RCC's proposed definition of 'significant bodily injury.'"

- The RCC incorporates this recommendation by replacing threatening to cause "significant bodily injury" with threatening to cause "bodily injury" in subparagraphs (a)(2)(B) and (c)(2)(B). This change improves the clarity and consistency of the revised statute and removes a possible gap in liability. The commentary to the RCC assault statute has been updated to reflect this is a change in law.

(11) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing "threatening" with "threatening or placing in reasonable fear." USAO states that this "tracks current law," which is "an appropriate statement of the law." USAO states that a threat requires a communication, citing the RCC criminal threats statute (RCC § 22E-1204), and states that a complainant "may be placed in reasonable fear through means other than a threat, and when the complainant engages in or submits to a sexual act/contact on that basis, that should be punished as sexual assault."

- The RCC does not incorporate USAO's recommendation because it would introduce ambiguity into the statute. The current D.C. Code general sexual abuse statutes prohibit "threatening or placing that other person in reasonable fear."[253] The DCCA has not generally discussed the meaning of "placing in reasonable fear" in the current D.C. Code sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.[254] As is discussed below, first degree and third degree of the RCC sexual assault statute now specifically include implied threats (subparagraphs (a)(2)(B) and (c)(2)(B)), and second degree and fourth degree now specially include implied coercive threats (subparagraphs (b)(2)(A) and (d)(2)(A)). It is unclear what conduct "placing in reasonable fear" prohibits beyond an implied threat. Limiting the sexual assault statute to express or implied threats improves the clarity of the revised statute.

(12) The CCRC recommends specifying that first degree and third degree of the RCC sexual assault statute include both express and implied threats, and that second degree and fourth degree include both express and implied coercive threats. With this change, what is now subparagraphs (a)(2)(B) and (c)(2)(B) specify "By threatening, explicitly or implicitly," and subparagraphs (b)(2)(A) and (d)(2)(A) specify "By a coercive threat, express or implied." The current D.C. Code general sexual abuse statutes prohibit "threatening or placing that

[253] D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

[254] *See, e.g.*, *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

other person in reasonable fear."[255] *The DCCA has not generally discussed the meaning of "placing in reasonable fear" in the current sexual abuse statutes, but has interpreted it to reach implied threats based upon conduct.*[256] *The RCC previously stated in the commentary to the RCC sexual assault statute that the offense extended to both express and implied threats, but it is clearer to codify this in the statute.*

- This change improves the clarity of the revised statute. Other (non-sex offense) statutes in the RCC have also been updated to refer to both "express or implied" threats to ensure consistency. The commentary to the RCC sexual assault statute has been updated to reflect that the offense includes both express and implied threats and classifies it as a clarficatory change in law.

(13) USAO, App. C at 318, recommends in first degree and third degree sexual assault replacing "sexual act" with "sexual act or sexual contact" so that the gradations include threats to commit a sexual contact against any person. USAO states that a "threat to commit any unwanted sexual contact can be a very serious threat, and should be a basis for liability."[257]

- The RCC does not incorporate USAO's recommendation because it may authorize disproportionate penalties for similar conduct. Expanding first degree and third degree of the RCC sexual assault statute to include threats of a "sexual contact" would create overlap with second degree and fourth degree and risk disproportionate penalties for similar conduct. First degree and third degree of the RCC sexual assault statute prohibit threats to kill, kidnap, or cause bodily injury to any person, as well as threats to cause a "sexual act," as defined in RCC § 22E-701, against any person. Second degree and fourth degree of the RCC sexual assault statute prohibit using a "coercive threat" against the complainant. A "coercive threat" is a defined term in RCC § 22E-701 that includes a threat of a "sexual contact."[258]

(14) USAO, App. C at 319-320, recommends adding to the involuntary intoxication provisions in first degree and third degree of the RCC sexual assault statute that the drug or other intoxicant renders the complainant "substantially

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[255] D.C. Code §§ 22-3002(a)(2), 22-3003(1), 22-3004(2), 22-3005(2).

[256] *See, e.g.*, *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

[257] When USAO submitted this comment, first degree and third degree of the RCC sexual assault statute prohibited threats of an "unwanted" sexual act. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "unwanted" so that first degree and third degree sexual assault prohibit threats to commit a "sexual act."

[258] The RCC definition of "coercive threat" is defined as "a threat, express or implicit, that, unless the complainant complies, any person will . . .: (A) Engage in conduct that, in fact, constitutes: (1) An offense against persons as defined in subtitle III of RCC Title 22E." In addition to this specific provision in the definition of "coercive threat," subsection (G) of the definition includes threats to "Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply."

incapable, mentally or physically, of declining participation" in the sexual act or sexual contact.[259] *USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is "incapable of declining participation" in the sexual act or sexual contact. USAO states that "[i]t is appropriate to attach liability in this situation and it is consistent with current law."*

- The RCC does not incorporate USAO's recommendation because it would introduce ambiguity into the revised statute. The revised intoxication provision includes complainants that are "asleep, unconscious, substantially paralyzed, or passing in and out of consciousness," as well as complainants that are "substantially incapable of communicating unwillingness to engage in" the sexual act or sexual contact. These provisions more clearly refer to common situations and encompass a complainant that is substantially incapable, mentally or physically, of declining participation in the sexual act or sexual contact.

(15) USAO, App. C at 319, recommends revising first degree and third degree of the RCC sexual assault to include as a paragraph (E) "after rendering the complainant unconscious." USAO states that this conduct "may not currently fall within the RCC's proposed definition of sexual assault." USAO gives as a hypothetical a defendant that "physically assaults a complainant to the point of unconsciousness and then engages in a sexual act or sexual contact with that complainant while the complainant remains unconscious." USAO states that this language is in current law and "should be an option for liability."

- The RCC does not incorporate USAO's recommendation because the RCC sexual assault statute already includes liability for a defendant that engages in a sexual act or sexual contact "after" rendering the complainant unconscious. First degree and third degree of the RCC sexual assault statute include engaging in or causing a complainant to engage in or submit to a sexual act "by using physical force that causes bodily injury to the complainant" (subparagraphs (a)(2)(A) and (c)(2)(A)). The RCC definition of "bodily injury" in RCC § 22E-701 would extend to unconsciousness ("physical pain, physical injury, illness, or any impairment of physical condition."). If the actor renders the complainant unconscious and then later decides to sexually assault the complainant, without the causal connection that first degree and third degree require, there is liability in second degree and fourth degree sexual assault for engaging in a sexual act or sexual contact with an "unconscious" complainant (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)). The commentary to the RCC sexual assault statute has been updated to reflect that the RCC sexual assault statute deletes "after rendering [the

[259] When USAO submitted this comment, the involuntary intoxication provision in first degree and third degree of the RCC sexual assault statute specified "mentally or physically" for several of the required effects of the intoxicant. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "mentally or physically" from these provisions.

complainant] unconscious" as a discrete basis of liability as a possible change in law.

(16) USAO, App. C at 319-320, recommends adding to second degree and fourth degree sexual assault that the complainant is "incapable, mentally or physically, of declining participation" in the sexual act or sexual contact.[260] *USAO states that current law for second degree and fourth degree sexual abuse includes liability if the defendant knows or has reason to know that the other person is "incapable of declining participation" in the sexual act or sexual contact. USAO states that "[i]t is appropriate to attach liability in this situation and it is consistent with current law."*

- The RCC does not incorporate USAO's recommendation because it would reduce the clarity of the revised statute. The current D.C. Code second degree and fourth degree sexual abuse statutes include as a basis for liability that the complainant is "incapable of declining participation in"[261] the sexual act or sexual contact. This language is not statutorily defined and there is no DCCA case law interpreting it. Second and fourth degree of the RCC sexual assault statute include complainants that are incapable of declining participation in the sexual act or sexual contact due to conditions such as sleep, paralysis, etc. (sub-subparagraphs (b)(2)(B)(i) and (d)(2)(B)(i)), and that are incapable of communicating unwillingness to engage in the sexual act or sexual contact (sub-subparagraphs (b)(2)(B)(iii) and (d)(2)(B)(iii)). These provisions more clearly refer to the most common situations and encompass a complainant that is incapable, mentally or physically, of declining participation in the sexual act or sexual contact. The RCC sexual assault statute clarifies the physical and mental requirements for being incapable of declining participation in the sexual act or sexual contact.

(17) The CCRC recommends deleting "mentally or physically" from the required effects of the intoxicant in first degree and third degree of the revised sexual assault statute (sub-subparagraphs (a)(2)(C)(ii)(II), (a)(2)(C)(ii)(III), (c)(2)(C)(ii)(II), and (c)(2)(C)(ii)(III)). With this revision, the revised intoxication provision would require, in relevant part, that the intoxicant, in fact, renders the complainant "substantially incapable of appraising the nature of" the sexual act or sexual contact or "substantially incapable of communicating unwillingness to engage in" the sexual act or sexual contact. The previous version of the RCC sexual assault statute added "mentally or physically" to these provisions to mirror the requirements for an incapacitated complainant in second degree and fourth degree of the revised sexual assault statute. However, as is discussed elsewhere in this Appendix, the CCRC now recommends deleting "mentally or physically" from second degree and fourth degree. In the revised intoxication

[260] When USAO submitted this comment, second degree and fourth degree of the RCC sexual assault statute specified "mentally or physically" for several of the specified types of incapacitation. As is discussed elsewhere in this Appendix, the CCRC recommends deleting "mentally or physically" from these provisions.

[261] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

provision, deleting "mentally or physically" keeps the focus on whether the intoxicant rendered the complainant substantially incapable of appraising the nature of or communicating unwillingness to engage in the sexual act or sexual contact, which may be due to combination of mental or physical effects of the intoxicant rather than one or the other.

- This change improves the clarity and consistency of the revised statute.

(18) The CCRC recommends deleting "[m]entally or physically" from "incapable of appraising the nature of" the sexual act or sexual contact from sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) of second degree and fourth degree sexual assault. With this revision, these sub-subparagraphs are limited to certain complainants that are "incapable of appraising the nature of" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct."[262] This language is not statutorily defined, and there is no DCCA case law on point.[263] The previous version of the RCC sexual assault statute added "mentally or physically" to "incapable of appraising the nature of" in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of appraising the nature of the sexual or sexual contact, to whether the complainant has a mental or physical condition or disability.[264]

- This change improves the clarity and consistency of the revised statute.

(19) The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute incapacitation that prevents the complainant from "understanding the right to give or withhold consent" to the sexual act or sexual contact. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "incapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact]." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of the conduct,"[265] as well as "incapable of declining participation in that [sexual act or sexual contact]."[266] The language is not statutorily defined and there is no DCCA case law that interprets the meaning of "the nature of the conduct" or "declining participation." The proposed language clarifies that understanding the right to

[262] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[263] In *In re M.S.*, the DCCA stated in dicta that "incapable of appraising the nature of the conduct" for "an adult victim, the charge might involve proof of the victim's intoxication or general mental incapacity." In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

[264] For example, "physically incapable of appraising the nature of" appears to include within second degree and fourth degree of the RCC sexual assault statute physical characteristics, such as blindness, deafness, or muteness that do not affect a complainant's ability to understand the nature of sexual activity or give meaningful consent. Retaining this language may categorically prohibit defendants from engaging in consensual sexual activity with blind, deaf, or mute individuals.

[265] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[266] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

give or withhold consent is a crucial part of sexual conduct and a complainant's inability to understand this right can be a basis for liability in second degree and fourth degree of the RCC sexual assault statute.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect that including "understanding the right to give or withhold consent" is a clarificatory change to current District law.

(20) The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to "an intellectual, developmental, or mental disability or mental illness," which excludes age as the sole cause of a complainant's inability. With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to an intellectual, developmental, or mental disability or mental illness." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[267] The language is not statutorily defined, but the DCCA has held that the current D.C. Code fourth degree sexual abuse statute categorically merges into the current D.C. Code second degree child sexual abuse statute,[268] in part because "once the government proves in a sexual assault case that the defendant was four or more years older than the [complainant under the age of 16 years], there is a conclusive presumption that the defendant knew or should have known that the [complainant under the age of 16 years] was incapable of appraising the nature of the sexual conduct."[269] However, such a conclusive presumption categorically convicts defendants of sexual assault that are themselves under the age of 16 years even if they, due to their young age, are also incapable of appraising the nature of the sexual activity. This is inconsistent with the protected status of persons under the age of 16 years in the current sexual abuse statutes. In contrast, in the RCC, a defendant cannot be found guilty of second degree or fourth degree sexual assault based solely on the complainant's age. If the complainant is under 16 years of age and the defendant is at least four years older, there is no longer a conclusive presumption that the complainant is incapable of appraising the nature of the sexual activity. In the case of any complainant under the age of 18 years, the complainant's young age is no longer the sole basis for determining whether that complainant is incapable of appraising the nature of the sexual activity.[270] A defendant of any

[267] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[268] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017) ("[W]e hold that it is impossible to commit second-degree child sexual *166 abuse without also committing fourth-degree sexual abuse. Therefore, appellant's fourth-degree sexual abuse adjudications merge into his second-degree child sexual abuse adjudications.").

[269] *In re M.S.*, 171 A.3d 155, 165-166 (D.C. 2017).

[270] A complainant's young age may be highly relevant in assessing whether the complainant has an intellectual, developmental, or mental disability or mental illness that makes the complainant incapable of appraising the nature of the sexual act or sexual contact or of understanding the right to give or withhold

age that engages in sexual activity with a complainant under the age of 18 years may still have liability under other provisions of the RCC sexual assault statute, and the young age of the complainant remains a basis for liability under the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). Age also remains the basis of liability for the RCC sexual abuse of a minor statute (RCC § 22E-1302), which would entirely overlap with the second and fourth degree sexual assault statutes without this change. Notably, the American Law Institute's most recent draft revised sexual assault statute exclude age as a basis of liability for sexual assault of a vulnerable person.[271]

- This change improves the clarity, consistency, and proportionality of the revised sexual assault and sexual abuse of a minor statutes, and reduces unnecessary overlap. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding "an intellectual, developmental, or mental disability or mental illness" as a specific basis of liability and classifies it as a change to current District law.

(21) The CCRC recommends in second degree and fourth degree sexual assault specifying as a basis for liability that a complainant's inability to appraise the nature of the sexual act or sexual contact or give or withhold consent be due to "a drug, intoxicant, or other substance." With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require, in relevant part, that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact] . . . due to a drug, intoxicant, or other substance." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct.[272] *This language is not statutorily defined, and there is no DCCA case law on point. However, the DCCA has stated in dicta that "incapable of appraising the nature of the conduct" for "an adult*

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consent to the sexual act or sexual contact. In addition, although this entry focuses on the young age of a complainant, the age of an older complainant may not be the sole basis of determining whether that complainant is incapable of appraising the nature of the sexual conduct or of understanding the right to give or withhold consent to the sexual conduct. It may, however, be relevant in determining whether an older complainant has an intellectual, developmental, or mental disability or mental illness and otherwise meets the requirements of this provision.

[271] American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

> *Sexual Assault of an Impaired Person.* An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
>
> (a) the act is without effective consent because at the time of the act the other person:
>
> (i) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

[272] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

victim . . . might involve proof of the victim's intoxication or general mental incapacity."[273]

- This change improves the clarity, consistency, and proportionality of the revised sexual assault statute. The commentary to the RCC sexual assault statute has been updated to reflect this discussion of adding "a drug, intoxicant, or other substance" as a specific basis of liability and classifies it as a clarificatory change to current District law.

(22) The CCRC recommends including in second degree and fourth degree of the revised sexual assault statute certain types of incapacitation if "the actor has no similar serious disability or illness." With this revision, sub-subparagraphs (b)(2)(B)(ii) and (d)(2)(B)(ii) would require that the complainant be "[i]ncapable of appraising the nature of the [sexual act or sexual contact] or of understanding the right to give or withhold consent to the [sexual act or sexual contact]. . . due to an intellectual, developmental, or mental disability or mental illness when the actor has no similarly serious disability or illness." The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of appraising the nature of" the sexual conduct,[274] *"incapable of declining participation in" the sexual act or sexual contact,*[275] *and "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.*[276] *The language is not statutorily defined, and there is no DCCA case law interpreting these provisions when the defendant has a similar disability or illness as the complainant. The proposed language excludes from liability defendants that have a "similarly serious" disability or illness as the complainant for second degree or fourth degree sexual assault. There may still be liability under other provisions of the RCC sexual assault statute or the RCC nonconsensual sexual conduct statute (RCC § 22E-1307). This approach is consistent with the American Law Institute's most recent draft revised sexual assault of a vulnerable person statute.*[277]

- This change improves the consistency of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect

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[273] In *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017) (citing the underlying facts of *Thomas v. United States*, 59 A.3d 1252, 1255 (D.C. 2013).

[274] D.C. Code §§ 22-3003(2)(A); 22-3005(2)(A).

[275] D.C. Code §§ 22-3003(2)(B); 22-3005(2)(B).

[276] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

[277] American Law Institute, Council Draft No. 10 (December 13, 2019), § 213.3(2):

> *Sexual Assault of an Impaired Person.* An actor is guilty of Sexual Assault of an Impaired Person when the actor causes another person to submit to or perform an act of sexual penetration or oral sex and:
>
> (b) the act is without effective consent because at the time of the act the other person:
>
> (j) has an intellectual developmental, or mental disability or mental illness that makes the person substantially incapable of appraising the nature of the sexual activity involved, or of understanding the right to give or withhold consent in sexual encounters, and the actor has no similarly serious disability; . . .

that requiring that the defendant not have a mental disability as the complainant is a possible change to current District law.

(23) The CCRC recommends in second degree and fourth degree sexual assault deleting "mentally or physically" from sub-subparagraphs (b)(2(B)(iii) and (d)(2)(B)(iii). With this change, these sub-subparagraphs would specify that the complainant must be "[i]ncapable of communicating unwillingness to engage in" the sexual act or sexual contact. The current D.C. Code second degree and fourth degree sexual abuse statutes include complainants that are "incapable of communicating unwillingness to engage in" the sexual act or sexual contact.[278] *This language is not statutorily defined, and there is no DCCA case law on point. The previous version of the RCC sexual assault statute added "mentally or physically" to "incapable of communicating unwillingness to engage in" in an attempt to clarify the scope. However, this language shifts the focus away from whether a given complainant is incapable of communicating unwillingness to engage in the sexual or sexual contact, to whether the complainant's inability is due to a mental or physical condition or disability.*

- This change improves the clarity and consistency of the revised statute.

(24) USAO, App. C at 320, recommends removing what was previously sub-subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) of the effective consent defense that place requirements on the ages of the parties and the relationship between them: "(B) At the time of the conduct, none of the following is true: (i)The complainant is under 16 years of age and the actor is at least 4 years older than the complainant; or (ii)The complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least 4 years older than the complainant." USAO states that "this exception should not exist here" because if "the complainant is under 16 years of age and the defendant is at least 4 years older, that conduct is appropriately criminalized in the Sexual Abuse of a Minor provision, and should not be further criminalized here, assuming the complainant gave effective consent." In the alternative, App. C at 322, USAO recommends removing the age gap requirements in these subsections.

- The RCC does not incorporate USAO's recommendation because it would lead to inconsistency with the RCC sexual abuse of a minor statute. These sub-subparagraphs limit situations in which young complainants can give effective consent under the RCC sexual assault statute and codify the DCCA holding in *Davis v. United States*.[279] These situations mirror the

[278] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

[279] The DCCA held that in a prosecution under the current D.C. Code general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code Ann. § 22-3001(3). "Adult" is not statutorily defined in the current D.C. Code sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current D.C. Code child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of

requirements for liability in the RCC sexual abuse of a minor statute so that if there would be liability under the RCC sexual abuse of a minor statute, the minor cannot give effective consent to that conduct under the RCC sexual assault statute. Although sexual conduct with minors is criminalized under the sexual abuse of a minor statute, it could also be charged under the general sexual assault statute. For example, a 20 year old defendant that uses a firearm to cause a 15 year old complainant to engage in a sexual act could be charged under either first degree sexual assault or second degree sexual abuse of a minor. The RCC does not incorporate USAO's recommendation to strike the age gap requirements in subparagraphs (e)(1)(B)(i) and (e)(1)(B)(ii) because, with the exception of the 4 year age gap in subsection (e)(1)(B)(ii), these subparagraphs follow current law.[280]

(25) The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the element that the actor has the complainant's effective consent. With this change, subsection (e) requires either that "the actor has, in fact, the complainant's effective consent to the actor's conduct or the actor reasonably believes that the complainant gives effective consent to the actor's conduct." The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to the fact that the actor had the complainant's effective consent.

- This change improves the clarity of the revised statute.

(26) The CCRC recommends in subsection (e) applying strict liability (with the language "in fact") to the requirements of the affirmative defense in paragraph (e)(2) (the actor's conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon), (e)(3) (age requirements for the actor and the complainant), and (e)(4) (age requirements for the actor and the complainant). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.

- This change improves the clarity of the revised statute.

(27) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense (previously paragraph (e)(2)). The RCC has a general*

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consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

[280] The current D.C. Code child sexual abuse statutes and the RCC sexual abuse of a minor statute prohibit sexual conduct when the complainant is under the age of 16 years and the actor is at least four years older. D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years."); RCC § 22E-1302(a), (b), (d), (e) (prohibiting a sexual act of sexual contact when the complainant is under 16 years of age and the actor is at least four years older). Subparagraph (e)(1)(B)(i) retains these age and age gap requirements.

The current D.C. Code sexual abuse of a minor statutes prohibit sexual conduct when the complainant is under the age of 18 years and the actor is at least 18 years of age and in a "significant relationship" with the complainant. D.C. Code §§ 22-3009.01, 22-3009.02, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years."). Third degree and sixth degree of the RCC sexual abuse of a minor statute retain these requirements, but, as is discussed in the commentary to the offense, require a four year age gap to match the age gap in the child sexual abuse statutes.

provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

(28) The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (f)(5) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

(29) OAG, App. C at 251, recommends replacing "sexual conduct" with "sexual act or sexual contact" in what is now subparagraph (f)(5(A)) of the sexual assault penalty enhancement for causing the "sexual conduct" with the use or display of a dangerous weapon or imitation dangerous weapon). OAG notes that "sexual conduct" is not a defined term in the RCC.

- The RCC incorporates OAG's recommendation in subparagraph (f)(5)(A), as well as the penalty enhancement in subparagraph (f)(5)(C) (causing serious bodily injury during the sexual act or sexual contact). This change improves the clarity of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a clarificatory change in law.

(30) The CCRC recommends replacing "an object that, in fact" was with "what is, in fact" is in the weapons penalty enhancement. With this change, the weapons penalty enhancement will require the use or display of "what is, in fact, a dangerous weapon or imitation dangerous weapon." The reference to "an object" is unnecessary and is not used in the weapons gradations of other RCC offenses.

- This change improves the clarity and consistency of the revised statute.

(31) USAO, App. C at 321-322, recommends replacing the penalty enhancement in subparagraph (f)(5)(A) with "The actor committed the offense of sexual assault while knowingly being armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon." USAO states that it is "more appropriate to include language from the current 'while armed' enhancement" and that the RCC's language, which requires displaying or using a dangerous weapon or imitation dangerous weapon, is "too limited" because "[e]ven if a defendant does not use the firearm or other dangerous weapon, there is an additional level of risk created when a defendant has a

weapon readily available." USAO states that a firearm could inadvertently discharge or intentionally discharge, resulting in injury.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC does not enhance the penalty for sexual assault when the defendant merely possess or carries a dangerous weapon or imitation dangerous weapon, without using or displaying it to cause the sexual act or sexual contact. Possessing or carrying a dangerous weapon or imitation dangerous weapon is subject to punishment under an array of separate RCC weapons offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the sexual assault penalty enhancement specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[281] Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[282]

(32) USAO, App. C at 321, recommends deleting "that were present at the time of the offense" from the accomplice penalty enhancement (now in subparagraph (f)(5)(B) ("The actor knowingly acted with 1 or more accomplices that were present at the time of the offense."). First, USAO states that it is unclear whether "present at the time of the offense" applies "solely to the sexual act or sexual contact, or if it applies to the totality of the actions leading to the forced sexual act or sexual contact," such as kidnapping and assaulting a complainant. Second, USAO states that "present" is unclear because it could require a physical presence, or be read to include remote presence, such as a telephone.

[281] Commentary to the revised sexual assault statute references commentary to RCC § 22E-1203 (Menacing).

[282] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Finally, USAO states that the revised penalty enhancement is contrary to current law, which does not have a requirement that the accomplice be present at the time of the offense.

- The RCC partially incorporates this recommendation by revising the penalty enhancement to require that the accomplices "were physically present at the time of the sexual act or sexual contact." The current D.C. Code penalty enhancement merely requires that the defendant "was aided or abetted by 1 or more accomplices"[283] and there is no DCCA case law interpreting this language. Accomplices that are physically present at the time of the sexual act or sexual contact potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. This change improves the clarity and proportionality of the revised statute. The commentary to the RCC sexual assault statute has been updated to reflect this is a possible change in law.

(33) USAO, App. C at 321-322, recommends removing "during the sexual conduct" from the serious bodily injury penalty enhancement (now subparagraph (f)(5)(C) ("The actor recklessly caused serious bodily injury to the complainant during the sexual conduct."). USAO states that the current D.C. Code penalty enhancement requires that the complainant "sustained serious bodily injury as a result of the offense" and that the RCC "inappropriately limits this enhancement." USAO gives as a hypothetical a defendant that "viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time." USAO states that under the RCC penalty enhancement, the defendant would not have caused serious bodily injury during the sexual act and the penalty enhancement would not apply. In addition, USAO states that "'during the offense' is vague under current law" because it could apply "solely to the sexual act or sexual contact, or . . . to the totality of the actions leading to the forced sexual act or sexual contact," such as kidnapping and assaulting a complainant. USAO states it is unnecessary to state "during the offense" because "[i]t is clear that this enhancement can only apply when it relates to a sexual offense." USAO does not recommend a substitute for the removed "during the sexual conduct" language.

- The RCC partially incorporates USAO's recommendation by amending the penalty enhancement to state: "The actor recklessly causes serious bodily injury to the complainant immediately before, during, or immediately after the sexual act or sexual contact." This language includes within the penalty enhancement USAO's hypothetical of a defendant that "viciously stabbed a complainant, and then forced the complainant to engage in a sexual act after a brief period of time." The commentary to the RCC sexual assault statute has been updated to reflect that this is a possible change in law. This change clarifies and may improve the proportionality of the revised statutes.

(34) USAO, App. C at 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(i) removing the requirement that the actor be at least four

[283] D.C. Code § 22-3020(a)(4).

years older than a complainant under the age of 12 years. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that that an age gap should not be added because the RCC sexual assault statute "only deals with sexual acts/contacts involving force or violence." As such, USAO states the age gap "is not a relevant consideration" because the "focus is on the particular vulnerability of the victim, who has been subjected to forced sexual acts/contacts, not on whether the defendant happened to be a similar age." USAO compares the age gap in the penalty enhancement to the four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement "serve[s] a very different purpose," "exclud[ing] from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting."

- The RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting very young complainants. An actor that commits sexual assault against a complainant under the age of 12 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(35) The CCRC recommends deleting the second "in fact" from sub-subparagraph (f)(5)(D)(i) so that the provision requires "The complainant is, in fact, under 12 years of age and the actor is at least 4 years older than the complainant." Given the revised rule of construction in RCC § 22E-207, strict liability applies to every element following "in fact" until a new culpable mental state is specified.

- This change improves the clarity of the revised statute.

(36) USAO, App. C at 322, recommends removing the penalty enhancement in sub-subparagraph (f)(5)(D)(ii) ("The actor was reckless as to the fact that the complainant was under 16 years of age and the actor was, in fact, at least 4 years older than the complainant."). USAO states that this is "consistent with current law" and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.

- The RCC does not incorporate this recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute. The current D.C. Code sexual abuse penalty enhancements do not have an enhancement for a complainant that is under the age of 16 years when the actor is at least four years older,[284] but do when "the victim was under the age of 12 years"[285] and when "the victim was under the age of 18 years at the time of the offense and the actor had a

[284] D.C. Code § 22-3020.
[285] D.C. Code § 22-3020(a)(1).

significant relationship to the victim."[286] The RCC added this penalty enhancement to parallel the requirements for liability in second degree and fifth degree of the RCC sexual abuse of a minor statute (RCC § 22-3020) and the current child sexual abuse statutes,[287] which prohibit a sexual act or sexual contact with a complainant under the age of 16 years when the actor is at least four years older. The penalty enhancement improves the proportionality of the revised statute and its consistency with the RCC sexual abuse of a minor statute.

(37) USAO, App. C at 322, recommends in sub-subparagraph (f)(5)(D)(iii) of the penalty enhancements replacing the "recklessly" culpable mental state with strict liability ("in fact") for the fact that the complainant is under 18 years of age and the fact that the actor is in a position of trust with or authority over the complainant. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[288] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[289] USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests." In the alternative, USAO recommends keeping strict liability for "offenses involving

[286] D.C. Code § 22-3020(a)(2).

[287] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[288] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[289] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

complainants under the age of 14 when the actor is not in a position of trust with or authority over the complainant, or under the age of 18 when the offense involves an actor who is in a position of trust with or authority over the complainant." There is no discussion specific to the element that the actor was in a position of trust with or authority the complainant.

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the offense does not base liability on the ages of the parties or the relationship between them. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[290] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[291] Requiring recklessness as to the age of the minor is not

[290] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[291] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of

inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[292] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[293] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[294]

(38) USAO, App. C at 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iii) removing the requirement that the actor be at least four years older than the complainant so that the penalty enhancement would apply if the complainant was under 18 years of age and the actor was in a "position of trust with or authority over" the complainant. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "the important consideration is the power dynamic between the defendant and the complainant, not the age differential" and that the "focus is on the relationship between the parties, and the defendant violating the trust that was put into him or her."

- The RCC does not incorporate USAO's recommendation because the four year age gap improves the proportionality of the revised statute. The four year age gap requirement reserves the penalty enhancement for predatory behavior targeting young complainants. An actor that is at least 18 years of age and in a position of trust with or authority over a complainant that is under 18 years when there is less than a four year age gap still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(39) USAO, App. C at 322, recommends deleting the penalty enhancement: "The actor was reckless as to the fact that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 4 years older than the complainant." USAO states that this is "consistent with current law" and that it relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion of deleting this enhancement.

- The RCC accepts this recommendation by deleting this penalty enhancement. The CCRC independently makes this recommendation, discussed below. This change improves the consistency of the revised statute with the RCC sexual abuse of a minor statute.

(40) The CCRC recommends deleting the sexual assault penalty enhancement in what was previously subparagraph (g)(4)(D): "The actor was reckless as to the fact that the complainant was under 18 years of age and the actor was, in fact, 18

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body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[292] D.C. Code § 22-1834.

[293] D.C. Code § 22–1839.

[294] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

years of age or older and at least 4 years older than the complainant." This penalty enhancement codified a revised version of the general penalty enhancement for crimes against minors in D.C. Code § 22-3611.[295] *However, it is inconsistent with RCC sexual abuse of a minor statute (RCC § 22E-1302), which only imposes liability for sexual conduct with a complainant under 18 years if the defendant was at least 18 years of age, at least four years older, and in a position of trust with or authority over the complainant.*

- This change improves the consistency of the RCC sexual assault and sexual abuse of a minor statutes and improves the proportionality of the penalties. The commentary to the RCC sexual assault statute has been updated to reflect this is a change in law.

(41) *The CCRC recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) requiring that the actor is under 65 years of age. With this change, the penalty enhancement requires that the complainant is 65 years of age or older, and, in fact, the actor is under 65 years of age and at least 10 years younger than the complainant. This change was proposed for the RCC definition of "protected person" in the First Draft of Report #36, Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code (Report),*[296] *but the revised statutory text for the definition omitted the requirement. The CCRC recommends making this change in the definition of "protected person," discussed elsewhere in this appendix, and in this sexual assault penalty enhancement. This change preserves the penalty enhancement for predatory behavior targeting older complainants.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(42) USAO, App. C 322, recommends in the penalty enhancement in sub-subparagraph (f)(5)(D)(iv) removing the requirement that the complainant be at least 10 years younger than a complainant that is 65 years of age or older so that the penalty enhancement would apply if the complainant were 65 years of age or older. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that an age gap should not be added because the RCC sexual assault statute "only deals with sexual acts/contacts involving force or violence." As such, USAO states the age gap "is not a relevant consideration" because the "focus is on the particular vulnerability of the victim, who has been subjected to forced sexual acts/contacts, not on whether the defendant happened to be a similar age." USAO compares the age gap in the penalty enhancement to the

[295] D.C. Code § 22-3611(a) ("Any adult, being at least 2 years older than a minor, who commits a crime of violence against that minor may be punished by a fine of up to 1 ½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for the offense, or both."). The RCC increased the required age gap to 4 years and expanded the crimes to which the enhancement applies, *see* RCC Commentary to the definition of "protected person" in RCC § 22E-701.

[296] First Draft of Report #36, *Cumulative Update to Chapters 3, 7 and the Special Part of the Revised Criminal Code* (Report), Appendix D - Disposition of Advisory Group Comments & Other Changes to Draft Documents (4-1519).

four year age gap required in the RCC sexual abuse of a minor statute and current law for complainants under 16 years of age, noting that in these offenses, the age gap requirement "serve[s] a very different purpose," "exclud[ing] from liability consensual or non-forced sexual acts/contacts between minors who are close enough in age that the law has deemed them capable of consenting."

- The RCC does not incorporate USAO's recommendation because the 10 year age gap improves the proportionality of the revised statute. The 10 year age gap requirement reserves the penalty enhancement for predatory behavior targeting older complainants. An actor that is less than 10 years younger than an elderly complainant still has liability for sexual assault, and another sexual assault penalty enhancement may apply to the actor's conduct.

(43) USAO, App. C at 322, recommends in the penalty enhancement for complainants that are 65 years of age or older in sub-subparagraph (f)(5)(D)(iv) replacing the "recklessly" culpable mental state for the age of the complainant with strict liability ("in fact") for the fact that the complainant is 65 years of age or older. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states that "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[297] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[298] USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case."

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves a complainant with a specified type of mental or physical incapacitation. Unlike the RCC sexual abuse of a minor statute (RCC § 22E-1302), the

[297] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[298] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

offense does not base liability on the ages of the parties or the relationship between them. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's age and the fact that the actor is in a position of trust with or authority over the complainant, yet still chooses to use force, threats, engage with an incapacitated complainant, etc. The penalty enhancement does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[299] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[300] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[301] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[302] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[303]

[299] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[300] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[301] D.C. Code § 22-1834.

[302] D.C. Code § 22–1839.

[303] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

(44) USAO, App. C at 322, recommends in the penalty enhancement for a vulnerable adult (subparagraph (g)(4)(E)) replacing the "recklessly" culpable mental state for the fact that the complainant is a vulnerable adult with strict liability ("in fact."). USAO states that this is "consistent with current law" and relies on the rationale in its General Comments (App. C at 313-316). However, there is no discussion specifically about the sexual assault penalty enhancement for a vulnerable adult.

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The sexual assault offense requires the use of force, threats, involuntary intoxication, a coercive threat, or involves an incapacitated complainant. The "recklessly" culpable mental state in the sexual assault penalty enhancement reserves the enhancement for a defendant that has subjective awareness of the complainant's status as a "vulnerable adult," yet still chooses to use force, threats, engage with an incapacitated complainant, etc. There is no current sexual abuse aggravator for a "vulnerable adult" so it is not possible to compare the RCC penalty enhancement to current law.

(45) USAO, App. C at 275-276, recommends codifying a sex offense repeat offender penalty enhancement to the RCC's repeat offender penalty enhancement statute (RCC § 22E-606). Specifically, USAO recommends adding a sex offense recidivist penalty enhancement when either: "(1) The offender, in fact, has one or more previous convictions for a District of Columbia sexual offense defined in Chapter 13 of this Title [or an equivalent offense]; or (2) The offender, in fact, is or has been found guilty of committing a District of Columbia sexual offense defined in Chapter 13 of this Title [or an equivalent offense], involving 2 or more victims." USAO is "concerned" that the misdemeanor recidivist penalty enhancement and the non-crime of violence felony penalty enhancement in RCC § 22E-606 require two or more prior convictions. USAO is also "concerned" that this enhancement "only applies to the number of prior convictions, rather than to the total number of victims." USAO states that the proposed provision is "consistent with current law," which "permits the enhancement with only one previous conviction, or if there are two or more victims in the instant case." USAO states that "though not all sex offenses are crimes of violence, they are sufficiently serious that they should be treated in the same manner as crimes of violence are treated" in the RCC crime of violence felony recidivist enhancement.

- The RCC does not incorporate this recommendation because it is would change current law in a way that leads to inconsistencies with other RCC offenses of similar seriousness and may authorize disproportionate penalties. The USAO recommendations significantly expand the scope of the current D.C. Code sexual abuse aggravators, which do not contain an aggravator for only one prior conviction and require crimes be committed "against" 2 or more victims.[304] The RCC general provision provides a

[304] The current D.C. Code sexual abuse aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims . . . ." D.C. Code § 22-3020(a)(5). The

uniform penalty enhancement for an actor who has a prior crime of violence, felony, or misdemeanor crime of violence conviction. It is inconsistent with other revised and D.C. Code offenses to provide a recidivist penalty based on the number of victims in an instant case—multiple counts may be brought in such cases, resulting in multiple punishments that can be run consecutively. Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,[305] Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.[306]

(46) USAO at App. C. 420-421, "recommends ranking enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor, and enhanced 2nd degree sexual abuse of a minor as Class 1 felonies, and that Class 1 felonies have a maximum penalty of life imprisonment.

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.[307] The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.

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plain language of the enhancement is unclear and there is no case law clarifying the issue. One possible interpretation of the current aggravator is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[305] The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

[306] See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim).

[307] The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

- While the RCC at present does not address absolute imprisonment penalties associated with classes, the RCC recommendation of Class 3 for enhanced first degree sex assault and enhanced first degree sexual abuse of a minor would correspond to 480 months or 384 months in Models 1 and 2 in the First Draft of Report #41. The RCC recommendation of Class 4 for first degree sex assault, first degree sex abuse of a minor, and enhanced second degree sex abuse of a minor would correspond to according to 360 months or 288 months in Models 1 and 2 in the First Draft of Report #41. The RCC's penalty recommendations reflect a significant decrease from the current D.C. Code statutory penalties of up to life imprisonment for enhanced forms of first degree sexual abuse and first degree child sexual abuse, which appear to be more severe than is proportionate under modern D.C. judicial practice. Note that, as the District abolished parole in 2000, "life" sentences issued since then are functionally the equivalent of "life without parole" sentences.
    i. For all first degree sexual abuse and first degree child sexual abuse offense sentences reviewed in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions (covering a 10 year span), even the most severe (97.5%) Superior court sentences for first degree sexual abuse (444 months, including enhancements) and first degree child sexual abuse (234.6 months, including enhancements) are well below the life without parole penalties authorized by current statute and within the Model 1 and/or 2 in the First Draft of Report #41.
- Support among District voters for grading the penalty for sexual assault lower than first or second degree homicide is apparent in the CCRC public opinion surveys.[308]
- The RCC presently sets only the relative penalties for Class 1 felonies and does not establish the absolute penalties, be it a determinate term of years or an indeterminate term such as "life without parole." However, the CCRC data in sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions indicates that in the relevant 10 year time range, there were 6 first degree child sexual abuse convictions, one second degree child sexual abuse conviction, one misdemeanor sexual abuse, and no first degree sexual abuse convictions that received a life sentence. However, as the record for misdemeanor sexual abuse evinces, it is possible that some of the life

[308] See Advisory Group Memo #27 Appendix A - Survey Responses at 1 (showing public evaluation of sexual assault involving serious bodily injury as being significantly less severe, by at least one classification, than a manslaughter scenario described as: "An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)." Question 2.16 provided the scenario: "Forcing submission to sexual penetration by inflicting serious injury.."). Question 2.16 had a mean response of 8.7, over class below the 10.0 milestone corresponding to manslaughter, and nearer the 8.0 corresponding to aggravated assault, currently a 10 year offense in the D.C. Code.

sentences in this court data was a clerical error. The CCRC plans to conduct further research with its dataset on the enhancements and facts at play in the 7 life sentences (by charge, not by case) imposed for child sex offenses in Superior Court 2009-2018. Notably, data provided in by the D.C. Sentencing Commission was collected in Appendix D to Advisory Group Memorandum #10 and provides a breakout of charges by the specific type of enhancement applied. According to this D.C. Sentencing Commission data (which evaluates dispositions at different points in a case and includes resentencing), from 2010 to 2015 there were a total of 4 life sentences given for first degree child sexual abuse under the enhancement for the victim being a minor with whom the actor had a significant relationship (per D.C. Code § 22-3020(a)(2)). Correspondence with USAO identified at least two sex offense cases sentenced 2009-2018, one in 2011 and another in 2015, that resulted in one or more life sentences. Subsequent agency research of public records indicates that one of these two cases involved a person convicted of numerous counts of child sex offenses which included 6 life sentences for first degree child sexual abuse and one for second degree child sexual abuse. In the second case identified by USAO in the ten-year timespan, the person was convicted of guilty on 23 counts of sexual abuse, assault, robbery, kidnapping and other charges. As the data evaluated by the CCRC, the Sentencing Commission, and the public records is taken at different points in time, a direct comparison of these life sentences is not possible. However, based on these several sources, it appears that there have been life sentences imposed by Superior Court judges in the past ten years for first and second degree child sexual abuse, but to the best of our knowledge these sentences were in cases involving so many convictions and serious charges that had the person convicted received a low number of years for each conviction the aggregate punishment would be equivalent to life imprisonment. A maximum sentence in accord with the RCC recommendations for sex offenses would have no practical effect on the imprisonment these offenders received and they would still be imprisoned for the rest of their lives.

RCC § 22E-1302. Sexual Abuse of a Minor.

(1) USAO at App. C. 420-421, "recommends ranking enhanced 1st degree homicide, enhanced 2nd degree homicide, enhanced 1st degree sexual assault, 1st degree sexual abuse of a minor, and enhanced 2nd degree sexual abuse of a minor as Class 1 felonies, and that Class 1 felonies have a maximum penalty of life imprisonment.

- The RCC does not incorporate the recommendation because it may authorize disproportionate penalties by punishing offenses of differing seriousness the same.[309] The USAO recommendation would authorize punishments more severe than first degree murder (acting with premeditation and deliberation) for enhanced first degree sexual assault, first degree sexual abuse of a minor (presumably including enhanced first degree sexual abuse of a minor), and enhanced second degree sexual abuse of a minor. In contrast, under the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree sexual assault is a Class 4 felony and enhanced first degree sexual assault is a Class 3 felony. These rankings are proportional in relation to the rankings of the most serious RCC homicide offenses—enhanced first degree murder as a Class 1 felony, first degree murder as a Class 2 felony, enhanced second degree murder as a Class 3 felony, and second degree murder as a Class 4 felony.
- Further details and rationale regarding this recommendation are listed in the Appendix D1 entry above regarding the identical USAO recommendation for enhanced first degree sex assault.

(2) *The CCRC recommends classifying enhanced first degree sexual abuse of a minor as a Class 3 felony, enhanced second degree sexual abuse of a minor as a Class 4 felony, enhanced third degree sexual abuse of a minor as a Class 5 felony, enhanced fourth degree sexual abuse of a minor as a Class 5 felony, enhanced fifth degree sexual abuse of a minor as a Class 6 felony, and enhanced sixth degree sexual abuse of a minor as a Class 7 felony. Enhanced first degree sexual abuse of a minor and enhanced second degree sexual abuse of a minor have the same penalty classifications as enhanced first degree sexual assault and enhanced second degree sexual assault, which is consistent with the classification of the unenhanced gradations of these offenses. The enhanced gradations for third degree, fourth degree, fifth degree, and sixth degree sexual abuse of a minor are one penalty class higher than the equivalent unenhanced gradations in sexual abuse of a minor.*

- This change improves the consistency and proportionality of the revised statute.

(3) USAO, App. C at 324, recommends adding "engages in" to paragraphs (a)(1), (b)(1), (c)(1), (d)(1), (e)(1), and (f)(1) so that the paragraphs prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact, as opposed to "causes the complainant to engage in or submit to" the sexual act or sexual contact." USAO states that this is consistent with the current

[309] The USAO recommendation for homicide crimes is addressed in the corresponding Appendix D1 entries for homicide crimes.

first degree child sexual abuse statute that prohibits "engages in a sexual act with that child or causes that child to engage in a sexual act" (D.C. Code § 22-3008). USAO states "it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant." USAO gives as a hypothetical if "a very young child were to initiate a sexual encounter with an adult defendant, and the defendant knowingly participated in the sexual encounter with the child, it could not be said that the defendant 'caused' the child to engage in the conduct." USAO states that liability should "still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant."

- The RCC incorporates this recommendation by adding to paragraphs (a)(1), (b)(1), and (c)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraphs (d)(1), (e)(1), and (f)(1) that the actor "engages in a sexual contact with the complainant." The commentary to the RCC sexual abuse of a minor statute has been updated to include this change in the discussion of the "causes the complainant to engage in or submit to" language. This change improves the clarity and consistency of the revised statute.

(4) The CCRC recommends including in the reasonable mistake of age defense a "written" statement that the complainant made to the actor about the complainant's age in addition to oral statements. As previously drafted, the reasonable mistake of age defense was limited to certain "oral" statements, which could lead to inconsistent liability dependent on the form of communication the complainant uses.

- This change improves the consistency and proportionality of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a change to current law.

(5) The CCRC recommends replacing "supported by" with "based on" in subparagraphs (g)(2)(A)(ii) and (g)(2)(B)(ii) so that the actor's reasonable belief must be "based on" an oral or written statement of age. The basis of the actor's belief must be an oral or written statement of age and "supported by" is potentially confusing.

- This change improves the clarity of the revised statute.

(6) USAO, App. C at 323, recommends deleting the reasonable mistake of age defense. USAO relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[310] as well as "extremely

[310] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted,

prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[311] *USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO also notes that, as the RCC commentary recognizes, reasonable mistake of age is not "well-recognized or uniformly adopted by other jurisdictions." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is under the age of 14 when the actor is not in a position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because it would authorize disproportionate penalties for consensual sexual conduct when the defendant reasonably believes the complainant is a certain age and the complainant actually is at least 14 years old. The RCC reasonable mistake of age defense has three requirements: 1) the defendant's belief must be "reasonable"; 2) the defendant's belief must be based on an oral statement of age that the complainant makes to the defendant; and 3) the complainant must be 14 years of age or older,[312] regardless of the defendant's mistake. In these limited situations, the RCC does not impose liability for consensual sexual conduct because the defendant is unaware that what he or she is doing is wrong due to the age of the complainant. The RCC sexual abuse of a minor statute retains strict liability as to age for any complainant that is under the age of 14 years. Given the narrow requirements of the defense, the RCC reasonable mistake of age defense does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape

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and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[311] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[312] Although there are two reasonable mistake of age defenses with differing requirements, overall, they require that the complainant is, in fact at least 14 years of age. First degree, second degree, fourth degree, and fifth degree sexual abuse require that the complainant either be under 12 years of age or under 16 years of age. The reasonable mistake of age defense for these gradations, codified in [ ], requires that the complainant, in fact, be at least 14 years of age or older. Strict liability remains for complainants that are under the age of 14 years, regardless of the defendant's mistake. Third degree and sixth degree require that the complainant be under the age of 18 years. The reasonable mistake of age defense, codified in [ ], requires that the complainant is, in fact, 16 years of age or older.

Shield Laws,"[313] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[314] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[315] The RCC does not incorporate the alternative recommendation because it would lead to inconsistency.[316] The RCC reasonable mistake of age defense improves the proportionality of the revised statute.

[313] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[314] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[315] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[316] In the alternative, USAO recommends "that strict liability remain for offenses involving complainants under the age of 14 when the actor is not in a position of trust with or authority over the complainant, or under the age of 18 when the actor is in a position of trust with or authority over the complainant." USAO, App. C at 315. The RCC sexual abuse of a minor statute does retain strict liability for a complainant under the age of 14 years when the actor is not in a position of trust with or authority over the complainant. The RCC reasonable mistake of age does not apply to the gradations of the offense for a complainant under the age of 16 (first degree, second degree, fourth degree, or fifth degree) unless the complainant actually is 14 years of age or older. Thus, if a complainant under 14 years of age, strict liability applies. The alternative recommendation to require strict liability for a complainant that is under the age of 18 when an actor is in a position of trust with or authority over the complainant would give complainants that are 16 years of age or older, but under 18 years of age, less autonomy in their sexual decision-making than complainants under the age of 16 years, solely because the actor is in a position of trust with or authority over the complainant.

(7) USAO, App. C at 323, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be limited to an oral statement the complainant made "to the defendant." The reasonable mistake of age defense as previously drafted required an "oral statement by the complainant about the complainant's age" without specifying the recipient. USAO states that the "only relevance of the complainant making an oral statement about the complainant's age is if the defendant was aware of that statement." USAO states that "[g]iven that the defendant's subjective belief is the issue, and that this is the defendant's burden to prove, it is appropriate to require that the statement be made to the defendant for it to have any relevance."

- The RCC incorporates this recommendation by revising subparagraphs (g)(2)(B) and (g)(3)(B) to require that the reasonable belief is supported by an oral or written statement "that the complainant made to the actor about the complainant's age." This change improves the clarity and consistency of the revised statute.

(8) USAO, App. C at 323, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, that the reasonable mistake of age defense be revised to include as an additional requirement that the "actor had not had a reasonable opportunity to observe the complainant." USAO states that this is consistent with the current sex trafficking of children statute (D.C. Code § 22-1834(b)) and the federal sex trafficking of children statute (18 U.S.C. § 1591(c)), under which the government need not prove the defendant's knowledge or recklessness as to the complainant's age if the defendant had a "reasonable opportunity to observe the complainant."

- The RCC does not incorporate USAO's recommendation because it is inconsistent with the requirements for liability in the RCC sexual abuse of a minor statute and the other provisions of the RCC reasonable mistake of age defense. The RCC sexual abuse of a minor statute requires that a "sexual act" or "sexual contact" occur. Unlike the current D.C. Code child sex trafficking statute,[317] where a business or individual can traffic a complainant without ever seeing the complainant, it is very likely that the defendant in the RCC sexual abuse of a minor statute will have an opportunity to observe the defendant. In addition, as is discussed above, the RCC reasonable mistake of age defense has been limited to an oral or written statement of age that the complainant makes to the defendant, which also makes it likely that the defendant will have an opportunity to observe the complainant. Finally, the reasonable mistake of age defense requires that the defendant's belief be "reasonable," and a fact finder may consider whether the defendant had a reasonable opportunity to observe the complainant in assessing whether the belief was "reasonable." The

[317] D.C. Code § 22-1834(a) ("It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.").

proposed recommendation would negate the defense and is inconsistent with the other requirements of the statute.

(9) USAO, App. C at 323-324, recommends that, if the RCC does not incorporate its recommendation to delete the reasonable mistake of age defense, the reasonable mistake of age defense be revised to specify that strict liability ("in fact") applies to the actual age of the complainant. USAO states that "it believes that it is the RCC's intent to have strict liability in these situations" and that adding "in fact" clarifies this.

- The RCC incorporates USAO's recommendation by specifying strict liability in paragraphs (g)(2) and (g)(3) of the reasonable mistake of age defense , which applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C), including the actual age of the complainant. This change clarifies the revised statute.

(10) *The CCRC recommends specifying strict liability ("in fact") in paragraphs (g)(2) and (g)(3), which, per the rule of construction in RCC § 22E-207, applies to each element in subparagraphs (g)(2)(A) – (g)(2)(C) and subparagraphs (g)(3)(A)-(g)(3)(C). With this change, it is clear that there is no culpable mental state for the fact that the actor has a reasonable belief that the complainant is a certain age, that the reasonable belief is based on an oral or written statement that the complainant made to the actor about the complainant's age, or the actual, required age of the complainant. For example, the actor need not "know" that his or her belief is reasonable. The previous version of the reasonable mistake of age defense did not specify whether a culpable mental state or strict liability applied to these requirements.*

- This change improves the clarity of the revised statute.

(11) The CCRC recommends in subparagraphs (g)(2)(A), (g)(2)(C), (g)(3)(A), and (g)(3)(C) of the reasonable mistake of age defense replacing "at the time of the offense" with "at the time of the sexual act or sexual contact." This is consistent with a revision made to the RCC sexual assault penalty enhancements.

- This revision improves the clarity of the revised statute.

(12) *PDS, App. C at 270-271, objects to the limitations placed on the affirmative defense of reasonable mistake of age. PDS states that "[a]bsent a recording or writing record (e.g., text messages) of every communication between the actor and the complainant" whether the complainant made an oral statement age will always be a "she said, he said" issue and an issue of credibility. In addition, PDS states that an oral statement "might be one aspect of whether the actor's belief that the complainant was 16 (or 18) or older was reasonable." PDS gives as examples of evidence that might make an actor's belief reasonable: the actor and complainant may have met at a bar that "cards" every patron; the actor may have asked if the complainant were a certain age and the complainant nodded in assent; or that the complainant may have shown the actor a fake ID. PDS also gives as examples evidence that make an actor's belief unreasonable despite a complainant's oral statement of age, such as meeting the complainant outside a middle school. PDS states that "there are numerous circumstances a factfinder could consider to find the claimed belief about the complainant's age unreasonable, including circumstances so overwhelming that any evidence of an*

oral statement by the complainant to the contrary carries negligible weight with a factfinder" and that "[i]n deciding whether the actor had a reasonable belief about the complainant's age, a jury should be instructed to view the circumstances as a whole rather than evaluating oral statements in a vacuum."

- The CCRC partially incorporates PDS' recommendation to strike the limitations on the reasonable mistake of age defense by including within the offense written statements of age by the complainant to the actor. This revision is discussed further above in this Appendix. Although the defendant's belief must be based on an oral or written statement of age, a jury may also be able to consider the types of evidence PDS raises in determining whether the defendant's belief is "reasonable."

(13) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[318] to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse of a minor. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with is 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."

- The RCC partially incorporates USAO's recommendation by codifying in the RCC sexual abuse of a minor statute the RCC sexual assault penalty enhancements that do not overlap[319] with the elements of the RCC sexual abuse of a minor offense or are not inapplicable to the offense[320]: 1) the

[318] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[319] The RCC sexual assault penalty enhancements that overlap with the elements of the RCC sexual abuse of a minor statute, and are not included as penalty enhancements in the RCC sexual abuse of a minor offense, are: 1) the complainant was under the age of 12 and the actor was at least 4 years older; 2) the complainant was under the age of 16 years and the actor was at least 4 years older; and 3) as it pertains to third degree and sixth degree sexual abuse of a minor, that the actor was in a position of trust with or authority over the complainant.

[320] The RCC sexual assault statute has penalty enhancements for elderly complainants and a complainant that is a "vulnerable adult," which are inapplicable to the RCC sexual abuse of a minor statute.

use or display of a dangerous weapon or imitation dangerous weapon; 2) acting with one or more accomplices; 3) causing serious bodily injury to the complainant; or 4) for first degree, second degree, fourth degree, and fifth degree, the actor knew that he or she was in a position of trust with or authority over complainant.[321] Notably, while the statistical evidence available to the CCRC is limited as to the operation of specific enhancements,[322] Superior Court statistics for 2009-2015 indicate only five instances during those six years where an aggravating factor for a sex offense resulted in a sentence higher than the otherwise-authorized statutory maximum—and in all five instances the aggravator concerned the relationship of the actor to the complainant, not priors or multiple victims.[323] This change improves the consistency and proportionality of the revised statutes.

(14) USAO, App. C at 324, recommends in third degree and sixth degree of the RCC sexual abuse of a minor statute removing the four year age gap between the actor and the complainant. With this change, third degree and sixth degree of the RCC sexual abuse of a minor statute would require only that the defendant is at least 18 years of age, the complainant is under 18 years of age, and the actor is in a position of trust with or authority over the complainant. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). USAO states that the "age differential is not appropriate here because it is the fact of the relationship, which creates a power imbalance, which is at the heart of the prohibition set forth in this statute." In addition, USAO states that the RCC noted that there is "mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap."[324]

- The RCC does not incorporate USAO's recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code child sexual abuse statutes[325] and the RCC sexual abuse of a minor statute require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Code sexual abuse of a minor statutes do not require a four year age gap when the complainant is under the age of 18

[321] USAO separately raises, and the entry in this appendix for the RCC sexual assault statute separately addresses, the aggravator for prior convictions in the current D.C. Code sexual abuse statutes.

[322] The CCRC analysis of court statistics provided in Advisory Group Memo #28 do not differentiate between non-while armed enhancements.

[323] See Advisory Group Memo #10 Appendix C - Sentencing Commission Statistics on District Penalty Enhancements (6-7-17). According to the analysis provided by the Sentencing Commission, four life sentences were given for First Degree Child Sexual Abuse, D.C. Code § 22-3008, and one sentence of 408 months was given for First Degree Sexual Abuse, D.C. Code § 22-3002, based on the aggravator in D.C. Code §22-3020(a)(2) enhancement ("The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim).

[324] USAO, App. C at 315, quoting RCC, App. J at 261-63.

[325] D.C. Code §§ 22-3008, 22-3009, 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

years and the actor is at least 18 and in a "significant relationship" with the complainant.[326] Third degree and sixth degree of the RCC sexual abuse of a minor statutes added a four year age gap to parallel the age gap requirement in the child sexual abuse statutes. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant. Finally, while RCC Appendix J noted that there is "mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap,"[327] this is also due, in part, to the fact that only a narrow minority of reformed jurisdictions have liability at all for sexual conduct with complainants under 18 years of age.[328]

(15) OAG, App. C at 251, recommends removing the reference to "domestic partnerships" in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of "domestic partnership," the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are "substantially similar" to District domestic partnerships. OAG states that since the RCC sexual abuse of a minor statute requires the complainant to be under 18 years of age, "there is never a situation where a person will be able to use the domestic partnership defense."

- The RCC does not incorporate OAG's recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of "domestic partnership" are substantively identical to the defense[329] and definition[330] in the current D.C. Code sexual abuse statutes.

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[326] D.C. Code §§ 22-3008, 22-3009, 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

[327] RCC App. J at 258-260.

[328] RCC App. J noted, with footnotes omitted here:

> At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant. Five of these 14 reformed jurisdictions require an age gap between the actor and the complainant in at least one of the offenses or gradations and one jurisdiction makes the age gap an affirmative defense. An additional jurisdiction narrows the offense not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.

[329] D.C. Code § 22-3011(b) ("Marriage 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, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.").

[330] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). The current D.C. Code sexual abuse statutes use the D.C. Code § 32-701(4) definition of "domestic

Under the current D.C. Code definition of "domestic partnership," the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."[331] It appears possible that the Mayor could recognize a relationship in another jurisdiction as "substantially similar" to a domestic partnership in the District even if the individuals were not at least 18 years of age.[332] In addition, the current definition of "domestic partnership" states that "the Mayor shall broadly construe the term 'substantially similar' to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,"[333] and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.[334] The RCC marriage and domestic partnership defense is consistent with current District law.

(16) USAO, App. C at 324-325, recommends adding a paragraph (g)(4) that states "Consent is not a defense to a prosecution under RCC § 22E-1302, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title." USAO

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partnership." D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4).").

[331] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines "domestic partnership" as the "relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)." Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."

[332] Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

[333] D.C. Code § 32-702(i)(1).

[334] D.C. Code § 32-702(i)(1) requires the Mayor to "establish and maintain a certified list of jurisdictions" that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

> (2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

states that this is "implied" in the RCC sexual abuse of a minor statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense." USAO states that this is consistent with current law.

- The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse of a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing for other RCC offenses which do not take this approach of stating defenses that do not apply. However, the commentary to the RCC sexual abuse of a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(17) The CCRC recommends in paragraph (g)(1) of the marriage or domestic partnership defense replacing "at the time of the offense" with "at the time of the sexual act or sexual contact." This is consistent with a revision made to the RCC sexual assault penalty enhancements.

- This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this is a clarificatory change to current District law.

(18) The CCRC recommends in paragraph (g)(1) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, paragraph (g)(1) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.

- This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse of a minor statute has been updated to reflect that this a clarificatory change to current District law.

(19) The CCRC recommends deleting the burden of proof requirements for the affirmative defenses (previously paragraph (g)(3)). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).

- This change improves the clarity and consistency of the revised statute.

RCC § 22E-1303. Sexual Abuse by Exploitation.

(1) OAG, App. C at 251-252, recommends changing the name of the offense from "sexual exploitation of an adult" to "sexual exploitation." OAG states that the offense title is "misleading" because the offense applies to certain students that are under the age of 20 years.

- The RCC partially incorporates this recommendation by changing the name of the offense to "sexual abuse by exploitation." The reference to "sexual abuse" is consistent with "abuse" in the RCC "sexual abuse of minor" offense (RCC § 22E-1302). Like the RCC sexual abuse of a minor offense, the sexual abuse by exploitation offense criminalizes otherwise consensual sexual conduct due to the relationship between the parties. This change improves the clarity of the revised statute.

(2) USAO, App. C at 325-326, recommends adding "engages in" to paragraphs (a)(1) and (b)(1) so that they prohibit "engages in or causes the complainant to engage in or submit to" the sexual act or sexual contact, as opposed to "causes the complainant to engage in or submit to" a sexual act or sexual contact. USAO states that this is consistent with the current sexual abuse of a ward statutes,[335] which prohibit "engages in" a sexual act or sexual contact, and the current sexual abuse of a patient or client statutes,[336] which are limited to "engages in" a sexual act or sexual contact. USAO states "it is appropriate to provide liability for not only causing the complainant to engage in sexual conduct, but also for engaging in sexual conduct with the complainant." USAO gives as a hypothetical if "a prisoner were to initiate a sexual encounter with a prison guard, and the prison guard knowingly participated in the sexual encounter with the prisoner, it could not be said that the defendant 'caused' the prisoner to engage in the conduct." USAO states that liability should "still attach in this situation, as the adult defendant acted culpably by engaging in sexual conduct with the complainant."

- The RCC incorporates this recommendation by adding to paragraph (a)(1) that the actor "engages in a sexual act with the complainant" and adding to paragraph (b)(1) that the actor "engages in a sexual contact with the complainant." This change improves the clarity and consistency of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to include this change in the discussion of the "causes the complainant to engage in or submit to" language. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect this is a possible change in law.

(3) The CCRC recommends replacing "In one or more of the following ways" in paragraphs (a)(2) and (b)(2) with "In one or more of the following situations." "In one or more of the following situations" clarifies that there is no a causation requirement between the sexual act or sexual contact and the prohibited scenarios-i.e., when the actor is a specified individual at a secondary school, etc.

- This change improves the clarity of the revised statute.

[335] D.C. Code §§ 22-3013; 22-3014.
[336] D.C. Code §§ 22-3015; 22-3016.

(4) USAO, App. C at 325, recommends adding "or other person of authority" to the list of specified secondary school employees (subparagraphs (a)(2)(A) and (b)(2)(A)). With USAO's recommendation, the statute provisions would read "The actor is a teacher, counselor, principal, administrator, nurse, coach, or security officer, or other person of authority in a secondary school." USAO states that such a catch-all is included in the current sexual abuse of a secondary education student statutes[337] and that it is important to have a catch-all "for any individuals [the RCC] list may inadvertently fail to include." As a hypothetical, USAO states that "a doctor at the school would not be included in this list," but "a nurse would."

- The RCC does not incorporate this recommendation because it would introduce ambiguity into the statute and risk disproportionate penalties. The current D.C. Code sexual abuse of a secondary education student statutes prohibit sexual activity between certain students that are under the age of 20 years and certain "teacher[s], counselor[s], principal[s], coach[es], or other person[s] of authority in a secondary school."[338] From the current D.C. Code statutes, the RCC sexual abuse by exploitation statute retained "teacher," "counselor," "principal," and "coach," but deleted the "other person of authority in a secondary school" catch-all. The RCC sexual abuse by exploitation statute also codified three additional types of actors, "administrator," "nurse," and "security guard." As a result, the RCC sexual abuse by exploitation statute is limited to five types of actors (teacher, counselor, principal, administrator, nurse, coach, or security officer) that are uniquely positioned in a secondary school such that a sexual relationship with a student under the age of 20 years can be deemed inherently coercive. Other individuals at a secondary school that engage in sexual activity with students that are at least 18 years of age, but under the age of 20 years,[339] may face liability under second degree or fourth degree of the revised sexual assault statute (RCC § 22E-1301) if the actor uses his or her position to coerce the complainant. In addition, under USAO's hypothetical of a doctor that engages in sexual activity with a student under the age of 20 years, there may be liability under subparagraphs (a)(2)(C) and (b)(2)(C) of the RCC sexual abuse by exploitation offense pertaining to health professionals. A "doctor" is not typically an employee at a school, but a "nurse" is, justifying its inclusion in the secondary education student provision of the RCC sexual abuse by exploitation offense.

(5) OAG, App. C at 252, recommends defining the term "clergy" in the sexual abuse by exploitation offense, as opposed to stating the intended scope in the

[337] D.C. Code §§ 22-3009.03; 22-3009.04.
[338] D.C. Code §§ 22-3009.03; 22-3009.04.
[339] If the student is under the age of 18 years, there is liability under third degree or sixth degree of the RCC sexual abuse of a minor statute (RCC § 22E-1302) if the actor is in a "position of trust with or authority over" the complainant and if the actor is at least 18 years of age and at least four years older than the complainant.

commentary. OAG recommends defining "clergy" as "any priest, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia, and any duly accredited practitioner of Christian Science."

- The RCC partially incorporates this recommendation by replacing a "member of the clergy" in subparagraphs (a)(2)(C) and (b)(2)(C) with "a religious leader described in D.C. Code § 14-309." The discussion in the commentary of the intended broad scope of this provision remains unchanged. D.C. Code § 14-309 refers to a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science."[340] This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this definition is part of a change in law.

(6) USAO, App. C at 326, recommends adding "medical or therapeutic" to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i) so that the provisions prohibit falsely representing that the sexual act or sexual contact is for a "bona fide professional, medical, or therapeutic purpose," as opposed to a "bona fide professional purpose." USAO states that the current sexual abuse of a patient or client statutes provide liability for when the actor "represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided."[341] USAO states the revised statute should be "consistent with current law" and this revision would "ensure that the medical and therapeutic purposes are expressly included" in the revised statute.

- The RCC incorporates this recommendation by adding a "medical" or "therapeutic" purpose to sub-subparagraphs (a)(2)(C)(i) and (b)(2)(C)(i). This change improves the clarity of the revised statute.

(7) USAO, App. C at 325, recommends replacing the "recklessly" culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(I), (b)(2)(A)(i)(I), (a)(2)(A)(i)(II), and (b)(2)A)(i)(II) with strict liability ("in fact."). USAO further recommends applying strict liability to subparagraphs (a)(2)(A) and (b)(2)(A).[342] With these changes, these provisions would require that the actor is "in fact" a specified member of a secondary school and that the complainant is "in fact" an enrolled student in the same secondary school as the actor or that the complainant "in fact" receives services or attends programming at the same secondary school as the actor. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC

[340] D.C. Code § 14-309.
[341] D.C. Code §§ 22-3015(a)(1); 22-3016(a)(1).
[342] Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraphs (a)(1) and (b)(1) applies to all elements in subparagraphs (a)(1)(A) and (b)(1)(A) until the "recklessly" culpable mental state is specified in those subparagraphs.

Chapter 13, App. C at 313-316, which is specific to removing the requirement of recklessness as to the complainant's age.

- The RCC does not incorporate this recommendation because requiring strict liability for these elements may authorize disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle,[343] but recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[344] Given the heightened responsibility that comes with the specified secondary school positions in subparagraphs (a)(2)(A) and (b)(2)(A), a "knowingly" culpable mental state is proportionate. This heightened responsibility makes proportionate the lower culpable mental state of "recklessly" for the requirements pertaining to the complainant—that the complainant is an enrolled student in the same secondary school as the actor or that the complainant receives services or attends programming at the same secondary school as the actor. The "knowingly" and "recklessly" culpable mental states improve the proportionality of the revised statute.

(8) *USAO, App. C at 325, recommends replacing the "recklessly" culpable mental state that applies to sub-subparagraphs (a)(2)(A)(i)(II) and (b)(2)(A)(ii) with strict liability ("in fact.") With these changes, these sub-subparagraphs would require that the complainant "in fact" is under the age of 20 years. USAO states that this change is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[345] as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[346] USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but*

[343] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[344] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[345] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[346] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests."

a. The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. The RCC sexual abuse by exploitation statute criminalizes sexual activity with complainants that are adults, i.e., over the age of 18 years, solely because of the school-based relationship between the actor and the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[347] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[348] In addition, although the current D.C. Code sexual abuse of a secondary education student statutes do not specify any culpable mental states, the strict liability statute in current D.C. Code § 22-3012 does not appear to apply to them.[349] There is no DCCA case law on the current D.C. Code sexual abuse of a secondary education student statutes, making it unclear whether requiring a "recklessly" culpable mental state for the age of a secondary education student complainant is a change to current law. The "recklessly" culpable

[347] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[348] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[349] D.C. Code § 22-3012 states, "In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child." D.C. Code § 22-3012. The current D.C. Code sexual abuse of a secondary education student statutes are codified at D.C. Code §§ 22-3009.03 and 22-3009.04, which fall within the specified range of statutes, but it is unclear if the Council intended for D.C. § 22-3012 to apply to the secondary education student statutes or realized that it would. The current secondary education statutes do not use the term "child" or require an age gap, and D.C. Code § 22-3012 has not been revised since the 1994 Anti-Sexual Abuse Act. The secondary education students were codified in 2010.

Similarly, D.C. Code § 22-3011(a) states that "mistake of age . . . is [not] 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." D.C. Code § 22-3011(a). The current D.C. Code sexual abuse of a secondary education student statutes fall within the specified range of D.C. Code §§ 22-3008 to 22-3010.01, but this appears to be a result of the codification of the misdemeanor sexual abuse of a child or minor statute at D.C. Code § 22-3010.01. The current D.C. Code misdemeanor sexual abuse of a child or minor statute was enacted in 2007, and as part of the legislation, D.C. Code § 22-3011(a) was amended to make D.C. Code § 22-3010.01 the end of the specified range of statutes. Since the current sexual abuse of a secondary education student statutes were not enacted until 2010, it is unclear if the Council intended for § 22-3011 to apply to the secondary education student statutes, or realized that it did.

mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[350] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[351] Requiring recklessness as to the age of the secondary education student is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[352] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[353] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[354]

(9) *USAO, App. C at 326, recommends adding a subsection that states "Consent is not a defense to a prosecution under RCC § 22E-1303, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title." USAO states that this is "implied" in the RCC sexual abuse by exploitation statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion." USAO states that this is consistent with current law in D.C. Code § 22-3017(a).*

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[350] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[351] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[352] D.C. Code § 22-1834.

[353] D.C. Code § 22–1839.

[354] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

a. The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexual abuse by exploitation statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(10) *The CCRC recommends replacing "at the time of the offense" with "at the time of the sexual act or sexual contact" the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

a. This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.

(11) *The CCRC recommends in subsection (c) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (c) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*

b. This change improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this a clarificatory change to current District law.

(12) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (c). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-201).*

a. This change improves the clarity and consistency of the revised statute.

(13) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law*[355] *to all sex offenses in RCC §§ 22E-1301-1307, including sexual abuse by exploitation. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far*

[355] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability." There is no discussion in USAO's comment of how the current penalty enhancements would affect the RCC sexual abuse by exploitation statute.

a. The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexual abuse by exploitation statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexual abuse by exploitation offense, similar conduct could receive significantly different penalties.[356]

[356] If, for example, a prison guard uses a weapon to coerce an inmate into having sex with the prison guard, that behavior is more proportionately charged as sexual assault.

RCC § 22E-1304. Sexually Suggestive Conduct with a Minor.

(1) USAO, App. C at 327, recommends replacing "contact" with "conduct" in subsection (a) so that the subsection reads "An actor commits sexually suggestive conduct with a minor when that actor." USAO states that this clarifies the statute.

- The RCC incorporates this recommendation by replacing "contact" with "conduct." This change resolves a typographical error and improves the clarity of the revised statute.

(2) The CCRC recommends replacing "Knowingly touches the actor's genitalia or that of a third person in the sight of the complainant with intent that the complaint's presence cause the sexual arousal or sexual gratification of any person" (previously subparagraph (a)(1)(D)) with the actor "Purposely engages in: (i) A sexual act that is visible to the complainant; (ii) A sexual contact that is visible to the complainant; or (iii) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering, that is visible to the complainant." There are two changes with this revision. First, the scope of prohibited conduct is expanded to include, if visible to the complainant, a sexual act, a sexual contact, and sexualized displays of the genitals, pubic area, or anus. This is consistent with the scope of the RCC indecent exposure statute (RCC § 22E-4206), the one exception being that the sexually suggestive conduct with a minor statute does not require less than a full opaque covering for sexualized displays. Displays of the genitals, pubic area, and anus to a minor complainant may still be sexualized even when there is a full opaque covering (e.g., an erection covered by underwear but visible). Second, the "purposely" culpable mental state replaces "with intent that the complainant's presence cause the sexual arousal or sexual gratification of any person." This previous language was drafted to avoid criminalizing adult sexual conduct in front of a minor in a small living space. However, the "purposely" culpable mental state has the same effect by requiring that the defendant consciously desires that the sexual act, sexual contact, or sexualized display is visible to the complainant.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(3) The CCRC recommends expanding the prohibited conduct to "engages in with the complainant or causes the complainant to engage in or submit to." The current D.C. Code misdemeanor sexual abuse of a child or minor statute[357] and the previous version of the RCC sexually suggestive conduct with a minor statute were limited to the actor touching or kissing the complainant and there would be

[357] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

no liability for the actor making the complainant touch or kiss the actor or a third party or submit to touching or kissing by a third party. Prohibiting "engages in" or "causes the complainant to engage in or submit to" is consistent with the scope of the other RCC sex offenses.

- This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(4) The CCRC recommends replacing "Touches the complainant inside his or her clothing . . . ; (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . . ; (C) Places the actor's tongue in the mouth of the complainant . . . " (previous subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C)) with "(a) Touching or kissing any person, either directly or through the clothing." This revision simplifies the requirements for touching a minor complainant by removing the focus on where and how the complainant was touched and instead making the defendant's intent the deciding factor. For example, under the current D.C. Code misdemeanor sexual abuse of a child or minor statute[358] and the previous draft of the RCC sexually suggestive conduct with a minor statute, a defendant would not have liability for touching a minor complainant on the complainant's bare foot or licking the complainant's face with the intent to sexually arouse or gratify himself or herself.

- This change improves the clarity of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a change in current law.

(5) The CCRC recommends including as a basis for liability engaging in or causing the complainant to engage in or submit to "removing clothing from any person." Under the current D.C. Code misdemeanor sexual abuse of a child or minor statute[359] and the previous draft of the RCC sexually suggestive conduct with a minor statute, there was no liability for this conduct. This is a gap in liability that may encourage defendants to make a minor complainant undress so that the defendants avoid liability by not touching the complainant.

- This change removes a gap in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

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[358] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

[359] D.C. Code § 22-3010.01(b)(1) – (b)(3) ("(1) Touching a child or minor inside his or her clothing; (2) Touching a child or minor inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks; (3) Placing one's tongue in the mouth of the child or minor."). The fourth type of prohibited conduct in the current statute, "[t]ouching one's own genitalia or that of a third person," has been interpreted by the DCCA to mean doing so in view of the complainant, and is unrelated to either the actor or a third person touching the complainant.

(6) USAO, App. C at 328, recommends revising what was previously subparagraph (a)(1)(A) to prohibit "Touches the complainant directly or causes the complainant to touch the actor directly, or inside the complainant's or actor's clothing with intent to cause the sexual arousal or sexual gratification of any person." USAO states "it is appropriate to modify the language to include touching that are either direct or inside the clothing" because "if a person is naked, it is unclear whether a touching would be 'inside' the clothing." USAO further states that it is "appropriate to include liability for either the defendant touching the complainant, or the defendant causing the complainant to touch the defendant." USAO gives as a hypothetical a defendant that would face liability for touching a complainant, but not face liability for making the complainant touch the defendant in the same way.

- The RCC incorporates this recommendation by prohibiting in sub-subparagraph (a)(2)(B)(i) "engages in one of the following with the complainant or causes the complainant to engage in or submit to one of the following." This revision is discussed above. This change improves the consistency of the revised statute and removes gaps in liability. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect this is a change in law.

(7) USAO, App. C at 328, recommends revising what was previously subparagraph (a)(1)(B) by replacing the words "inside his or her clothing" with "directly or through the complainant's clothing." With this change, the subparagraph would read "Touches the complainant directly or through the complainant's clothing." USAO states that although the previous subparagraph followed current law, it is unclear if touching a naked minor would be considered touching "inside or outside his or her clothing." USAO states that it is "equally (or more) culpable to engage in this sexual conduct with a naked child as with a clothed child." USAO states that the proposed language tracks the RCC definition of "sexual contact."

- The RCC incorporates this recommendation by specifying "either directly or through the clothing" in sub-subparagraph (a)(2)(B)(i)(a). The RCC does not specify that the clothing must be the "complainant's" because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.

(8) USAO, App. C at 328, recommends specifying in what was previously subparagraph (a)(1)(B) that the "genitalia, anus, breast, or buttocks" must be "the complainant's." USAO states that without this language, "it could be vague" that the intimate parts belong to the actor.

- The RCC does not incorporate this recommendation because, as is discussed above, the scope of the offense now includes the complainant touching the actor or a third party in addition to himself or herself.

(9) USAO, App. C at 328, recommends specifying in what was previously subparagraph (a)(1)(B) the "complainant's" genitalia, anus, breast, or buttocks so that the provision reads "Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks . . ." USAO states that

this "clarifies that the intimate body parts must belong to the complainant, not to the actor, which could be vague."

- The RCC does not incorporate this recommendation because the sexually suggestive conduct with a minor statute no longer has this provision. In addition, the sexually suggestive conduct with a minor statute has an expanded scope, prohibiting causing the complainant to engage in or submit to touching or kissing any person, which would include touching the actor. This scope is consistent with the scope of the other RCC sex offenses and improves the clarity and consistency of the revised statute.

(10) OAG, App. C at 252-253, recommends deleting "with intent to cause the sexual arousal or sexual gratification of any person" from what was previously subparagraph (a)(1)(C) of the sexually suggestive conduct with a minor statute, which prohibited the actor from placing his or her tongue in the mouth of a minor. OAG states that there may be legitimate reasons for an actor to engage in the other prohibited conduct with a minor, making it necessary to include the sexual intent requirement for those subsections (subsections (A), (B), and (D)). However, "it is less apparent when a person would have a legitimate reason [to] place their tongue in a minor's mouth." In lieu of striking the intent language, OAG states the commentary should be revised to include examples of legitimate reasons why a person would put their tongue in a minor's mouth.

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability. The RCC sexually suggestive conduct statute as now drafted no longer has a separate subparagraph for placing the tongue in the mouth of a minor. Instead, all forms of touching or kissing are broadly prohibited in sub-subparagraph (a)(2)(B)(i)(a) and there are appropriate non-sexual reasons for an actor to kiss a minor.

(11) USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. With this change, what is now sub-paragraph (a)(1)(A) would require that "the complainant is, in fact, under 16 years of age," and what is now sub-subparagraph (a)(1)(B)(i) would require that "the complainant is, in fact, under 18 years of age." USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[360] as well as "extremely

[360] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted,

prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."[361] *USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests." In the alternative, USAO recommends keeping strict liability for sexually suggestive conduct with a minor when the complainant is under the age of 14 when the actor is not in a position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[362] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[363] A "recklessly" culpable mental state is proportionate given the comparatively less serious conduct that the sexually suggestive conduct statute prohibits. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[364]

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and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[361] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[362] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[363] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[364] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow

which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[365] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[366] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[367] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[368]

(12) USAO, App. C at 327, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under 18 years of age. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[369] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a "knowingly" culpable mental state is proportionate. The "knowingly" culpable mental state improves the proportionality of the revised statute.

(13) USAO, App. C at 327, recommends adding as a basis for liability that the actor "Engages in or causes the complainant to engage in or submit to a sexual act or sexual contact." USAO states that this would make sexually suggestive

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categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[365] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[366] D.C. Code § 22-1834.

[367] D.C. Code § 22–1839.

[368] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[369] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

conduct with a minor a lesser included offense of second degree and fifth degree sexual abuse of a minor. USAO states that the current misdemeanor sexual abuse of a child or minor statute "is frequently treated for plea purposes as a lesser charge to First and Second Degree Child Sexual Abuse" and this change "allows this current practice to continue." In addition, USAO states [a]ssuming that Sexually Suggestive Conduct with a Minor is a misdemeanor offense, and all of the various gradations of Sexual Abuse of a Minor remain felony offenses, it makes sense to have a misdemeanor lesser-included offense, which can benefit both the government and the defense."

- The RCC incorporates this recommendation by requiring in subparagraph (a)(2)(C) "Knowingly engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact." This change improves the consistency and proportionality of the revised statute.

(14) The CCRC recommends in subsection (b) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the prohibited conduct. With this change, subsection (b) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the prohibited conduct." The previous version of the defense did not specify whether a culpable mental state or strict liability applied.

- This change improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this a clarificatory change to current District law.

(15) *The CCRC recommends deleting the burden of proof requirements in the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(16) OAG, App. C at 251, recommends removing the reference to "domestic partnerships" in the marriage or domestic partnership defense. OAG states that, due to the current and RCC definition of "domestic partnership," the District only recognizes domestic partnerships where the parties are at least 18 years old—either domestic partnerships registered in the District or domestic partnerships that are "substantially similar" to District domestic partnerships. OAG states that since the RCC sexually suggestive conduct with a minor statute requires the complainant to be under 18 years of age, "there is never a situation where a person will be able to use the domestic partnership defense."

- The RCC does not incorporate OAG's recommendation because it may lead to inconsistencies with the District law governing domestic partnerships. It appears possible for the District to recognize a domestic partnership in another jurisdiction even if the parties are not at least 18 years of age. The RCC marriage and domestic partnership defense and the RCC definition of "domestic partnership" are substantively identical to the

defense[370] and definition[371] in the current D.C. Code sexual abuse statutes. Under the current D.C. Code definition of "domestic partnership," the District does require individuals to be at least 18 years of age in order to register a domestic partnership in the District, but "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."[372] It appears possible that the Mayor could recognize a relationship in another jurisdiction as "substantially similar" to a domestic partnership in the District even if the individuals were not at least 18 years of age.[373] In addition, the current D.C. Code definition of "domestic partnership" states that "the Mayor shall broadly construe the term 'substantially similar' to maximize the recognition of relationships from other jurisdictions as domestic partnerships in the District,"[374] and has a provision that requires the Mayor in certain circumstances to recognize relationships in other jurisdictions as domestic partnerships, regardless of how they are treated in those jurisdictions.[375] The RCC marriage and domestic partnership defense is consistent with current District law.

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[370] D.C. Code § 22-3011(b) ("Marriage 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, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor.").

[371] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). The current sexual abuse statutes use the D.C. Code § 32-701(4) definition of "domestic partnership." D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4).").

[372] RCC § 22E-701 defines "domestic partnership" as having the same meaning as D.C. Code § 32-701(4). D.C. Code § 32-701(4) defines "domestic partnership" as the "relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)." Under D.C. Code § 32-702(a), individuals must be at least 18 years old to register a domestic partnership in the District. However, under D.C. Code § 32-702(i), "relationships established in accordance with the laws of other jurisdictions, other than marriages, that are substantially similar to domestic partnerships established by this chapter, as certified by the Mayor, shall be recognized as domestic partnerships in the District."

[373] Consider, for example, if the individuals entered into the relationship in the other jurisdiction when one or both individuals was 17 and-a-half years of age and the individuals seek to register the relationship in the District just shy of an 18th birthday. Or consider if one or both individuals was significantly younger than 18 years of age when they entered the relationship in the other jurisdiction, but at the time of seeking to register in the District, the relevant party or parties are 18 years of age or well older than 18 years of age.

[374] D.C. Code § 32-702(i)(1).

[375] D.C. Code § 32-702(i)(1) requires the Mayor to "establish and maintain a certified list of jurisdictions" that are recognized as having substantially similar domestic partnerships. However, in the event of a jurisdiction that is not on this list,

> (2) If the Mayor has not yet certified, pursuant to paragraph (1) of this subsection, that the laws of a jurisdiction permit the establishment of relationships substantially similar to domestic partnerships established by this chapter, and if the laws of that jurisdiction prescribe that the relationship, regardless of the term or phrase used to refer to the relationship, has all the rights and responsibilities of marriage under the laws of that jurisdiction, the relationship shall be recognized as a domestic partnership in the District

(17) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[376] to all sex offenses in RCC §§ 22E-1301-1307, including sexually suggestive conduct with a minor. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC sexually suggestive conduct with a minor statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC sexually suggestive conduct with a minor offense, similar conduct could receive significantly different penalties.[377]

(18) *USAO, App. C at 329, recommends adding a subsection that states "Consent is not a defense to a prosecution under RCC § 22E-1304, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title." USAO states that this is "implied" in the RCC statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age." USAO states that this is consistent with current law in D.C. Code § 22-3011(a).*

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and the Mayor shall include that jurisdiction in the certified list required under paragraph (1) of this subsection.

D.C. Code § 32-702(i)(2).

[376] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[377] If many of the RCC sexual assault penalty enhancements applied to the prohibited conduct in the RCC sexually suggestive conduct with a minor offense, that offense would be more proportionately charged as attempted sexual assault, attempted sexual abuse of a minor, or another RCC offense against persons. For example, if a defendant recklessly caused serious bodily injury during the offense, that would be more proportionately charged under the RCC assault statute.

a. The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC sexually suggestive conduct with a minor statute suggests that consent is a defense. Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

(19) *The CCRC recommends replacing "at the time of the offense" with "at the time of the prohibited conduct" in the marriage or domestic partnership defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

a. This revision improves the clarity of the revised statute. The commentary to the RCC sexually suggestive conduct with a minor statute has been updated to reflect that this is a clarificatory change to current District law.

(20) *The CCRC recommends deleting the jury demandability provisions in what was previously subsection (e). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

a. This revision improves the clarity, consistency, and proportionality of the revised statute.

(21) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for sexually suggestive conduct with a minor (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

a. The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, the RCC sexually suggestive conduct with a minor statute is a Class A misdemeanor with a maximum term of imprisonment of one year, as opposed to 180 days in current law for the misdemeanor sexual abuse of a child or minor statute.[378] The increased penalty in the RCC as compared to current law is justified by the sexual nature of the offense with certain complainants under the age of 18 years. Under both current law and the RCC approach to jury demandability, an offense with a maximum term of imprisonment of one year is jury demandable. The Second Draft of Report #41, recommends a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is sex offender registration offense, which would include attempted sexually suggestive conduct with a minor.

[378] D.C. Code § 22-3010.01.

RCC § 22E-1305. Enticing a Minor into Sexual Conduct.

(1) *The CCRC recommends deleting what was previously subparagraph (a)(1)(B) in the prior draft: "Persuades or entices, or attempts to persuade or entice, the complainant to go to another location and plans to cause the complainant to engage in or submit to a sexual act or sexual contact at that location." When the actor successfully persuades or entices the complainant to go somewhere, this provision overlaps with the RCC kidnapping offense (RCC § 22E-1401), and when the actor does not succeed, this provision overlaps with the RCC attempted kidnapping offense under the general RCC attempt statute (RCC § 22E-301). The RCC kidnapping and RCC attempted kidnapping offenses have higher penalties than the RCC enticing statute and providing separate liability in the RCC enticing statute risks disproportionate penalties for similar conduct. Consequently, the revised statute deletes prior subparagraph (a)(1)(B) and relies on the more severe RCC kidnapping statute for the conduct of relocating (or attempting to relocate) the complainant to commit a sex crime.*

- This revision reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes. The commentary to the RCC enticing statute has been updated to reflect this change to District law.

(2) *The CCRC recommends replacing "Knowingly persuades or entices, or attempts to persuade or entice" in what was previously paragraph (a)(1)(A) with "Knowingly commands, requests, or tries to persuade." With this change, what is now paragraph (a)(1) reads "Knowingly commands, requests, or tries to persuade the complainant to engage in or submit to a sexual act or sexual contact." "Commands, requests, or tries to persuade" matches the language in the RCC solicitation statute (RCC § 22E-302). With this change, the RCC solicitation statute and the RCC enticing statute differ primarily in the required culpable mental state—enticing requires "knowingly" and solicitation requires "purposely." The RCC enticing statute has a set penalty, which is proportionate to the inchoate nature of the offense and the lower "knowingly" culpable mental state, whereas the penalty for the RCC solicitation offense depends on the penalty of the underlying offense. This change also removes from the RCC enticing statute "attempts to persuade or entice" as a completed form of the offense. In the current D.C. Code enticing statute, the scope of "attempts" to persuade or entice is unclear, but generally this conduct is covered by the revised statute's language "tries to persuade." To the extent the "attempts" language in the current D.C. Code enticing statute prohibits conduct broader than "tries to persuade," liability (though with a reduced penalty) would remain in the revised offense to the extent the under the general RCC attempt statute (RCC § 22E-301) covers such conduct.*

- This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this is a possible change in law.

(3) *The CCRC recommends in subparagraph (a)(3)(B) referring to the "purported age of the complainant" as opposed to "the complainant purports to be" a certain age. With this change, subparagraph (a)(3)(B) will require that the actor "is reckless as to the fact that the purported age of the complainant is under 16 years of age." The revised language is consistent with the reference in paragraph (a)(3) to the "purported age of the complainant."*

- This change improves the clarity and consistency of the revised statute.

(4) *OAG, App. C at 253, comments that the phrase "purported age" in what is now paragraph (a)(3) makes it appear that "the minor must actually state his or her age (whether it is their actual age or not)." OAG states that "the text or the Commentary should address what happens when a minor does not purport to be any specific age, but instead indirectly refers to their age range—and it is clear that they fall within the scope of this provision," as when, for example, "a minor refers to their elementary or middle school" and are "not purporting to be any specific age, but, from that comment, the actor will know that the minor is a person who is under 16 years of age."*

- The provision in now paragraph (a)(3) is specific to when the complainant is a law enforcement officer. The language "purports to be" is necessary because a law enforcement officer is likely not, in fact, going to satisfy the age requirements for complainants in the enticing statute. The commentary to the RCC enticing statute has been updated to further clarify that "purports to be" does not mean that the law enforcement officer has to state an actual purported age.

(5) *USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. With this change, what is now subparagraph (a)(2)(A) would require that "the complainant is, in fact, under 16 years of age," what is now sub-subparagraph (a)(2)(B)(i) would require that "the complainant is, in fact, under 18 years of age," and what is now subparagraph (a)(3)(B) would require that the "the purported age of the complainant is, in fact, under 16 years of age."). USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[379] as well as "extremely prejudicial, and otherwise*

[379] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

inadmissible, evidence not specifically covered by the Rape Shield Act."[380] *USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is under the age of 14 when the actor is not in a position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.*

- The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[381] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[382] A "recklessly" culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[383] which the RCC does

[380] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[381] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[382] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[383] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current D.C. Code and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor,

not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[384] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C. Code sex trafficking of children statute[385] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[386] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[387]

(6) *USAO, App. C at 329, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under the age of 18. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."*

- The RCC does not incorporate this recommendation because requiring strict liability for this element risks disproportionate penalties. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[388] Given the heightened responsibility that comes with being a person in a position of trust with or authority over a complainant, a "knowingly" culpable mental state is proportionate. The "knowingly" culpable mental state improves the proportionality of the revised statute.

(7) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. With this change, for complainants under the age of 18 years, the RCC enticing statute would require only that the actor is at least 18 years of age and in a position of trust with or authority over*

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on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[384] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

[385] D.C. Code § 22-1834.

[386] D.C. Code § 22–1839.

[387] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[388] *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

the complainant. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the "important consideration is the power dynamic between the defendant and the complainant, not on the age differential."

- The RCC does not incorporate USAO's recommendation because it would be inconsistent with the liability requirements for a complainant that is under the age of 16 years. The current D.C. Code[389] and RCC enticing statutes require at least a four year age gap between an actor and a complainant under the age of 16 years. The current D.C. Cod enticing statute does not require a four year age gap when the complainant is under the age of 18 years and the actor is in a "significant relationship" with the complainant.[390] The RCC enticing statute added a four year age gap to parallel the age gap requirement for complainants under the age of 16 years. The four year age gap avoids criminalizing otherwise consensual sexual conduct between an actor that is at least 18 years of age and a complainant that is between 16 years and 18 years of age solely because the actor is in a position of trust with or authority over the complainant.

(8) *The CCRC recommends replacing "at the time of the offense" with "at the time of the sexual act or sexual contact" in the marriage or domestic partnership affirmative defense. This is consistent with a revision made to the RCC sexual assault penalty enhancements.*

b. This revision improves the clarity of the revised statute. The commentary to the RCC sexual abuse by exploitation statute has been updated to reflect that this is a clarificatory change to current District law.

(9) *The CCRC recommends in subsection (b) applying strict liability ("in fact") to the element that the actor and the complainant are in a marriage or domestic partnership at the time of the sexual act or sexual contact. With this change, subsection (b) requires that the actor and the complainant "are, in fact, in a marriage or domestic partnership at the time of the sexual act or sexual contact." The previous version of the consent defense did not specify whether a culpable mental state or strict liability applied.*

a. This change improves the clarity of the revised statute. The commentary to the RCC enticing statute has been updated to reflect that this a clarificatory change to current District law.

(10) *The CCRC recommends deleting the burden of proof requirements for the affirmative defense in subsection (b). The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

a. This change improves the clarity and consistency of the revised statute.

[389] D.C. Code §§ 22-3010(a) ("Whoever, being at least 4 years older than a child . . . ."; 22-3001(3) (defining "child" as "a person who has not yet attained the age of 16 years.").

[390] D.C. Code §§ 22-3010(a) ("Whoever . . . being in a significant relationship with a minor . . . ."); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

(11) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[391] to all sex offenses in RCC §§ 22E-1301-1307, including enticing. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."*

a. The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC enticing statute is an inchoate offense that is limited to commanding, requesting, or trying to persuade a complainant without the use of force, threats, or coercion. Much more severe penalties are available under other RCC statutes for purposely soliciting a child for sex act or sexual contact.[392]

(12) *USAO, App. C at 330, recommends adding a subsection that states "Consent is not a defense to a prosecution under RCC § 22E-1305, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title." USAO states that this is "implied" in the RCC enticing statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law requiring recklessness as to the complainant's age." USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

a. The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC enticing statute suggests that consent is a defense. Codifying a provision that

[391] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[392] For example, if a defendant tries to persuade a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact, that conduct, if done "purposely," is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor statute. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the enticing statute by one class of severity with an enhancement.

explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach. However, the commentary to the RCC enticing statute has been updated to reflect that the statute deletes the current prohibition on consent as a defense as a clarificatory change.

RCC § 22E-1306. Arranging for Sexual Conduct with a Minor.

(1) The CCRC recommends replacing "arranges for a sexual act or sexual contact between: (A) The actor and the complainant; or (B) A third person and the complainant" with "Gives effective consent for the complainant to engage in or submit to a sexual act or sexual contact." The scope of "arranges" is unclear in the current D.C. Code arranging statute. Requiring that the defendant knowingly gives "effective consent" for the complainant to engage in or submit to a sexual act or sexual contact encompasses arranging, but the requirements are clearer. The language is also consistent with a provision in the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) and RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809).

- This change improves the clarity of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.

(2) The CCRC recommends replacing the age requirements for the actor, the complainant, and a third party with the requirements that the actor is "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" and the complainant is under the age of 18 years. The current D.C. Code arranging statute does not specify any culpable mental states.[393] The RCC uses a "knowingly" culpable mental state to be consistent with other RCC sex offenses and because a "purposely" culpable mental state would make the statute duplicative with accomplice liability. However, the "knowingly" culpable mental state essentially allows accomplice liability to be imposed with a lower culpable mental state than otherwise would be required. This lower culpable mental state is justified if the defendant has a responsibility for the complainant under civil law. The phrase "as a person with a responsibility under civil law for the health, welfare, or supervision of the complainant" is identical to the language used elsewhere in the RCC. This language focuses on the relationship between the defendant and the complainant instead of the various age requirements in the current D.C. Code and RCC arranging statutes, which can lead to counterintuitive results.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC arranging statute has been updated to reflect that this is a change in law.

(3) OAG, App. C at 253, recommends renumbering the statutory language in the RCC arranging statute to clarify the requirements for liability in what was previously paragraphs (a)(1), (a)(2), and (a)(3). Specifically, OAG states that, as previously drafted, the statute suggested that paragraphs (a)(1), (a)(2), and (a)(3) all had to be met for liability, or, in the alternative, that meeting only one of these paragraphs was sufficient. OAG states that it appears that the RCC intended to require what was previously paragraph (a)(1) to be met and then either (a)(2) or (a)(3), and provides a recommendation for reorganizing and renumbering these paragraphs

[393] D.C. Code § 22-3010.02.

- The RCC does not incorporate this recommendation because the requirements for liability have been simplified, addressing OAG's concern.

(4) *OAG, App. C at 253, states that, as previously drafted, it would not be an offense for a 17 year old to arrange for a 12 year old to have sex with a 30 year old, "which could encourage juveniles to run prostitution rings for adults as the youth would not be committing an offense" even though the harm to the 12 year old is the same regardless of the age of the defendant. OAG recommends revising what was subparagraph (a)(3) to read "The actor* or *any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant," as opposed to "The actor* and *any third person, in fact, are at least 18 years of age and at least 4 years older than the purported age of the complainant."*

- The RCC does not incorporate this recommendation because the age of the actor is no longer a factor in determining liability. As drafted now, an actor that is under the age of 18 may have liability under the arranging offense if the actor is also "a person with a responsibility under civil law for the health, welfare, or supervision of the complainant." If an actor that is under the age of 18 years does not have such a responsibility under civil law, as in OAG's hypothetical of a 17 year old arranging for a 12 year to have sex with a 30 year old, there may be liability under other RCC sex offenses and types of liability (e.g., solicitation, accomplice, conspiracy), depending on the actor's culpable mental state, whether there was force, etc., and if the sexual act actually occurred.[394]

(5) *USAO, App. C at 330, recommends replacing the culpable mental state of "knowingly" with strict liability ("in fact") for the fact that the actor is in a "position of trust with or authority over" a complainant that is under the age of 18. USAO states that this is "consistent with current law" and relies on the rationale in its General Comments to RCC Chapter 13 (App. C at 313-316). However, there is no specific discussion for the "knowingly" culpable mental state as to the element of "position of trust with or authority over."*

[394] If a 17 year old actor "knowingly" arranges for a 12 year old to have sex with a 30 year old that 17 year may have liability under second degree of the RCC sexual abuse of a minor statute (knowingly causes a complainant under 16 years of age to engage in or submit to a sexual act and the actor is at least four years older than the complainant). If the actor uses force, specified threats, or involuntary intoxication to arrange for the sex, there would be liability under first degree of the RCC sexual assault statute (knowingly causes the complainant to engage in or submit to a sexual act by specified means). If the actor uses threats other than those specified in first degree sexual assault, there may be liability under second degree sexual assault for knowingly causing the complainant to engage in or submit to a sexual act by a "coercive threat."
If the sex does not actually occur, or if the actor does not satisfy the "knowingly causes" requirement in the RCC sexual abuse of a minor statute or RCC sexual assault statute, there may be liability under the RCC enticing offense (knowingly "commands, requests, or tries to persuade" the complainant to engage in or submit to a sexual act or sexual contact) or attempt liability under RCC § 22E-301 as applied to the RCC sexual assault or RCC sexual abuse of a minor statute. There may also be conspiracy liability (RCC § 22E-303) or solicitation liability (RCC § 22E-302), if the actor has a "purposely" culpable mental state and otherwise satisfies the heightened requirements of those offenses.

a. The RCC does not incorporate this recommendation because the arranging statute no longer requires "position of trust with or authority over" as an element.

(6) *USAO, App. C at 329, recommends deleting the four year age gap between an actor that is at least 18 years of age and in a position of trust with our authority over a complainant under the age of 18 years. USAO states that this change is "consistent with current law" and relies on the rationale set forth in its General Comments to RCC Chapter 13 (App. C, 313-316). There, USAO states that the "important consideration is the power dynamic between the defendant and the complainant, not on the age differential."*

a. The RCC does not incorporate this recommendation because the arranging statute no longer requires an age gap between the actor and the complainant.

(7) *USAO recommends replacing the culpable mental state of "recklessly" with strict liability ("in fact") for the ages of the complainants. USAO states that this change "is consistent with current law" and "relies on the rationale" in its General Comments to Chapter 13 of the RCC (App. C at 313-316). There, USAO states "there is no reason to change these offenses' strict liability to allow for the defense of reasonable ignorance of the complainant's age or to require the government, in its case-in-chief, to demonstrate that the defendant had actual knowledge of, or recklessly disregarded knowing, the complainant's age." USAO states that "the change would, in reality, create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"*[395] *as well as "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act."*[396] *USAO states that this latter type of evidence "would not only serve to embarrass a victim with irrelevant personal details, but would also have the unintended, but inevitable, consequence of dramatically reducing a victim's willingness to report sexual abuse and/or participate in the resulting criminal case." USAO states that it "understands that the RCC attempts to balance the laudable societal goal of protecting children from sexual predators with the countervailing goal of not criminalizing sexual acts based on an innocent and objectively reasonable mistake of the complainant's age." However, USAO "believes that escaping liability if the actor has not 'recklessly disregarded' the complainant's true age, without more, does not strike the proper balance of these competing interests." In the alternative, USAO recommends keeping strict liability for sexual abuse of a minor when the complainant is under the age of 14 when the actor is not in a*

[395] USAO further states that to "demonstrate that an actor was not reckless to the fact that the complainant was older than the age at issue in the particular offense, the defendant would, and could, introduce the following types of evidence known to the defendant: the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age."

[396] USAO states that this evidence "could include the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

position of trust with or authority over the complainant or under the age of 18 when the actor is in a position of trust with or authority over the complainant.

a. The RCC does not incorporate USAO's recommendation because the "recklessly" culpable mental state improves the proportionality of the revised statute. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[397] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[398] A "recklessly" culpable mental state is proportionate given the inchoate nature of the offense and that the actor may engage with the complainant through text message, phone calls, or social media. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[399] which the RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[400] Requiring recklessness as to the age of the minor is not inconsistent with robust rape shield laws as, for example, the current D.C.

[397] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

[398] *Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[399] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible under the RCC sexual assault penalty enhancements to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current D.C. Code and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is opinion or reputation evidence of the complainant's "past sexual behavior," it is excluded under the current and RCC rape shield statutes. *See* D.C. Code § 22-3021(a); RCC § 22E-1311(a). To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and it fits it within specific narrow categories. These narrow categories are: 1) evidence that is "constitutionally required to be admitted" (D.C. Code 22-3022(a)(1); RCC § 22E-1311(b)(1)(A)); 2) evidence of past sexual behavior with persons other than the actor, offered by the actor, on the issue of whether or not the actor is the source of semen or bodily injury (D.C. Code § 22-3022(a)(2)(A); RCC § 22E-1311(b)(2)(B)(i)); or 3) evidence of past sexual behavior with the actor where the consent of the complainant is at issue and is offered by the actor on the issue of consent (D.C. Code § 22-3022(a)(3)); RCC § 22E-1311(b)(1)(B)(ii) (requiring the RCC defined term "effective consent."). Whether the actor was reckless as to the complainant's age may not categorically fit into these specific categories. The current rape shield statutes and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[400] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

Code sex trafficking of children statute[401] already combines a recklessness requirement for the age of the complainant with a Rape Shield law.[402] In addition, the American Law Institute's most recent draft revised sexual abuse of a minor statute requires recklessness as to the age of the complainant, including a complainant under the age of 12 years, and also has a Rape Shield provision.[403]

(8) *USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[404] to all sex offenses in RCC §§ 22E-1301-1307, including arranging. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability."*

a. The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC arranging statute is an inchoate offense that is limited to giving effective consent for the complainant to engage in or submit to sexual conduct. Much more severe penalties are available under other RCC statutes for being an accomplice to a child sex act or sexual contact.[405]

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[401] D.C. Code § 22-1834.

[402] D.C. Code § 22–1839.

[403] American Law Institute, Council Draft No. 10 (December 13, 2019), §§ 213.8; 213.11.

[404] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[405] For example, if a defendant gives effective consent for a complainant that is under the age of 12 years to engage in or submit to a sexual act or sexual contact and the sexual act or sexual contact does not occur, that conduct, if done "purposely," is more proportionately charged under the RCC solicitation statute, as first degree or fourth degree sexual abuse of a minor. The penalty for solicitation under the RCC is one-half the maximum punishment applicable to that offense. Applying the RCC solicitation statute results in more proportionate penalties than increasing the arranging statute by one class of severity with an enhancement. Accomplice liability or conspiracy liability may result in punishment equal to the same or half of that of the predicate offense, e.g., first degree or fourth degree sexual abuse of a minor.

(9) *USAO, App. C at 330-331, recommends adding a subsection that states "Consent is not a defense to a prosecution under RCC § 22E-1306, whether prosecuted alone or as an inchoate offense under Chapter 3 of this Title." USAO states that this is "implied" in the RCC arranging statute as drafted, but that it should be explicitly stated "to eliminate any potential confusion, particularly given the potential change in law regarding a reasonable mistake of age defense." USAO states that this is consistent with current law codified at D.C. Code § 22-3011(a).*

b. The RCC does not incorporate USAO's recommendation because it introduces ambiguity into the revised statute. Nothing in the RCC arranging statute suggests that consent is a defense and it is unclear whether the prohibition on consent as a defense in current law applies to the current D.C. Code arranging statute.[406] Codifying a provision that explicitly states consent is not a defense is potentially confusing, particularly when other RCC offenses do not take this approach.

[406] Current D.C. Code § 22-3011(a) states, in relevant part, that consent is not a defense to "a prosecution under §§ 22-3008 to 22-3010.01." The current D.C. Code arranging statute is codified at D.C. Code § 22-3010.02, which falls outside the range of statutes specified in D.C. Code § 22-3011(a). D.C. Code § 22-3011 was enacted in 1995 as part of the original Anti-Sexual Abuse Act. It was amended in 2007 to reflect the codification of the sexual abuse of a minor statutes and misdemeanor sexual abuse of a child or minor statute, but was never amended to address the arranging statute, which was enacted in 2011. Indeed, the same legislation that enacted the arranging statute in 2011 also amended D.C. Code § 22-3011 to include a reference to domestic partnerships in the marriage or domestic partnership defense in D.C. Code § 22-3011(b). It seems likely that the failure of D.C. Code § 22-3011(a) to include the arranging statute is a drafting error, but it is ultimately unclear.

RCC § 22E-1307. Nonconsensual Sexual Conduct.

(1) The CCRC recommends adding to what is now paragraph (a)(1) that the actor "engages in a sexual act with the complainant" and adding to what is now paragraph (b)(1) that the actor "engages in a sexual contact with the complainant." With this change, paragraphs (a)(1) and (b)(1) would prohibit an actor from engaging in a sexual act or sexual contact with the complainant or causing the complainant to engage in or submit to a sexual act or sexual contact. This change makes the RCC nonconsensual sexual conduct offense consistent with the other RCC sexual assault offenses that have been revised to include "engages in" language.

- This change improves the clarity, consistency, and proportionality of the revised statute. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.

(2) USAO, App. C at 331, recommends replacing the "recklessly" culpable mental state with a "knowingly" culpable mental state for the prohibited conduct (engaging in or causing the complainant to engage in or submit to the sexual act or sexual contact). With this change, what is now paragraphs (a)(1) and (b)(1) would require that the actor "knowingly" engages in a sexual act or sexual contact with the complainant or causes the complainant to engage in or submit to a sexual act or sexual contact. USAO states that this change makes the offense "consistent with the other sexual assault provisions" and that it is "appropriate for the defendant to be required to act 'knowingly' with respect to his actions."

- The RCC incorporates this recommendation by requiring in what is now paragraph (a)(1) "[k]nowingly engages in a sexual act with the complainant or causes the complainant to engage in or submit to a sexual act" and in subparagraph (b)(1) "[k]nowingly engages in a sexual contact with the complainant or causes the complainant to engage in or submit to a sexual contact." This change improves the clarity of the revised statute and its consistency with the other RCC sexual assault offenses. The commentary to the RCC nonconsensual sexual conduct offense has been updated to reflect that this is a possible change in law.

(3) USAO, App. C at 331-332, recommends replacing the "recklessly" culpable mental state as to the complainant's lack of consent with "negligence." USAO states that the current misdemeanor sexual abuse statute "essentially assigns a negligence standard" to this element because it requires "have knowledge or reason to know." USAO disagrees with the RCC's assessment of Owens v. United States, *90 A.3d 1118 (D.C. 2014), given a 2019 DCCA opinion interpreting the District's current stalking statute (*Coleman v. United States, *202 A.3d 1127 (D.C. 2019). USAO quotes* Coleman: *"The 'should have known' language [in the District's current stalking statute] represents just the type of clear legislative statement not present in* Owens, *and it evinces the Council's intent to allow a conviction for stalking based on what an objectively reasonable person would have known." USAO states that a negligence standard in the RCC nonconsensual sexual conduct statute "is consistent with the plain language of the current misdemeanor sexual abuse statute, the jury instructions on misdemeanor sexual*

abuse…and with case law defining misdemeanor sexual abuse [citing Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)*]."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties to allow a conviction, particularly a felony conviction that per the RCC requires sex offender registry, on the basis of negligence. In addition, the current D.C. Code misdemeanor sexual abuse statute requires "*should* have knowledge or reason to know,"[407] not "have knowledge or reason to know."[408] The current D.C. Code misdemeanor sexual abuse language does not appear to fit neatly into either category of mental state discussed in *Owens* ("reason to believe") or *Coleman* ("should have known."). The commentary to the RCC nonconsensual sexual conduct statute has been updated to reflect this discussion and the DCCA's opinion in *Coleman v. United States*.

(4) USAO, App. C at 332, recommends deleting subsection (c), which excludes from liability "deception that induces the complainant to consent to the sexual act or sexual contact," but includes "deception that as to the nature of the sexual act or sexual contact." USAO states that this provision is "confusing and may inadvertently exclude conduct that should be criminalized." The RCC nonconsensual sexual conduct offense requires lack of "effective consent," and RCC § 22E-701 defines "effective consent" to include consent other that consent induced by "deception."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Subsection (c) excludes from liability the use of deception "that induces the complainant to consent to the sexual act or sexual contact." But for the exclusion, as defined in RCC § 22E-701, "deception" could include statements such as, "I'm a prince." It would be disproportionate to penalize deceptive statements that induce consent the same as deception as to the nature of the sexual act or sexual contact. As is noted in the commentary to this offense, criminalizing sexual conduct by deception is largely disfavored in current American criminal law,[409] with the exceptions of falsely represented medical procedures and impersonation of a woman's husband.[410]

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[407] D.C. Code § 22-3010.01.

[408] As is noted in the commentary, however, District case law and District practice consistently construe the language in the current misdemeanor sexual abuse statute as "know or should have known," without discussion of the discrepancy with the statutory language ("*should* have knowledge or reason to know") (emphasis added).

[409] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1372, (2013) (stating that "[r]ape-by-deception" is almost universally rejected in American criminal law.").

[410] *See, e.g.*, Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1397 (2013) (noting that "sex falsely represented as a medical procedure, and impersonation of a woman's husband--have been for over a hundred years the only generally recognized situations in which Anglo-American courts convict for rape-by-deception.") (citing Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998).

(5) USAO, App. C at 316, recommends applying all the sexual abuse aggravating circumstances in current law[411] to all sex offenses in RCC §§ 22E-1301-1307, including nonconsensual sexual conduct. USAO states that it "is important that these offenses apply to all sexual offenses, as the conduct they seek to deter merits an enhancement." USAO offers as an example a defendant that "engaged in a non-forced sexual act with his 13-year-old biological daughter," which is criminalized as second degree sexual abuse of a minor in the RCC. USAO states that the relationship between the parties "renders the offense far more heinous, and worthy of a more significant penalty, than if the defendant had no significant relationship with the complainant," which the RCC sexual abuse of a minor statute does not take into consideration. USAO notes that "although the [RCC] Sexual Abuse of a Minor offense accounts for the victim's age in its gradations," other offenses, such as enticing a minor into sexual conduct (RCC § 22E-1305) and arranging for sexual conduct with a minor (RCC § 22E-1306), do not. USAO states that an enhancement for the complainant's age in these offenses would "account for that additional vulnerability." There is no discussion in USAO's comment of how the current penalty enhancements would affect the RCC nonconsensual sexual conduct statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC nonconsensual sexual conduct statute is limited to sexual conduct that occurs without the use of force, threats, or coercion. If the RCC sexual assault penalty enhancements applied to the RCC nonconsensual sexual conduct offense, similar conduct could receive significantly different penalties.[412]

(6) OAG, App. C at 405, recommends that the penalty for nonconsensual sexual conduct "to be raised to be commensurate" with first degree arranging for sexual conduct with a minor.[413] OAG states that first degree nonconsensual sexual conduct is a class 9 felony, second degree nonconsensual sexual conduct is a class A misdemeanor, and arranging for sexual conduct with a minor is a class 8 felony. OAG states that "[n]othwithstanding that the offense of Nonconsensual Sexual Conduct applies to adults and Arranging for a Sexual Conduct with a Minor applies to children, it seems disproportionate to penalize a person who actually engages in nonconsensual sexual conduct less than someone who merely arranges for someone to engage in sexual conduct."

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[411] D.C. Code § 22-3020(a)(1) – (a)(6) ("(1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[412] For example, if a defendant uses physical force, resulting in bodily injury to the complainant, that behavior is more proportionately charged as first degree or third degree sexual assault.

[413] As there is only a single gradation of the RCC arranging offense, it appears that OAG means to recommend increasing the penalty of first degree nonconsensual sexual conduct (a class 9 felony), to be a class 8 felony like the arranging statute.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. As the OAG comment recognizes, the RCC arranging for sexual conduct with a minor statute applies to complainants under the age of 18 years. The RCC arranging statute does not require a sexual act or sexual contact to occur, but it is proportionate to penalize the offense a class higher than nonconsensual sexual conduct, which could apply to adults or complainants under the age of 18 years. In addition, as is discussed in this appendix entry for the RCC arranging statute, the offense now applies to any person under the age of 18 years if the defendant has a responsibility under civil law for the health, welfare, or supervision of the complainant. There is no such requirement in the nonconsensual sexual conduct statute and this further justifies the higher penalty for arranging. More generally, both the RCC nonconsensual sexual conduct and arranging for sexual conduct with a minor statutes are, like their corresponding statutes in the current D.C. Code, designed to be broad, low level offenses that sweep in conduct that falls somewhat short of the stricter requirements and penalties for sexual assault, sexual abuse of a minor, and other RCC felony sex offenses. The latter are, in the RCC and current D.C. Code, among the most serious crimes. The proportionality of the penalty for RCC nonconsensual sexual conduct must be considered against this constellation of more severe RCC offenses criminalizing a narrower but overlapping scope of conduct.

(7) *USAO, App. C 415-419, appears to recommend against creation of a right to a jury trial for nonconsensual sexual conduct (including attempts). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the First Draft of Report #41 (October 15, 2019) and the Second Draft of Report #41, first degree of the RCC nonconsensual sexual conduct offense is a Class 9 felony and second degree of the RCC nonconsensual sexual conduct offense is a Class A misdemeanor. Although the precise statutory maxima for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony and a Class A misdemeanor in the RCC will satisfy jury demandability requirements under current law. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor which is a sex offender registration offense, which would include attempted first degree and attempted second degree nonconsensual sexual conduct. Because the facts involved in a charge for nonconsensual sexual conduct may turn not only on the actor's intent and credibility, but judgments about what constitutes effective consent in a sexual situation, allowing community norms to be brought to bear in the form of a jury appears particularly appropriate.

RCC § 22E-1308. Limitations on Liability for RCC Chapter 13 Offenses.
[No advisory group comments or CCRC recommended changes.]

RCC § 22E-1309. Duty to Report a Sex Crime Involving a Person Under 16 Years of Age.

(1) USAO, App. C at 332, recommends moving RCC § 22E-1309 and RCC § 22E-1310 (Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age) to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."

- The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current *D.*C. Code § 4-1321.01, *et. seq.*, pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, *et. seq.*, and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.

(2) USAO, App. C at 332, recommends adding "universal" to the heading of this provision. With this change, the heading would read "Universal Duty to Report a Sex a Crime Involving a Person Under 16 Years of Age." USAO states it is "appropriate to clarify that this provision applies 'universally'" because the scope of the reporting requirement is "in contrast to the reporting requirements in D.C. Code § 4-1321.01, et. seq., which only apply to certain individuals specifically required to make a report of abuse or neglect, and which subject those individuals to criminal penalties for failure to report." USAO states that including "universal" in the heading "provides notice to all adults that they are obligated to report child sex crimes to the authorities."

- The RCC does not incorporate this recommendation because it would create ambiguity with the requirements in the duty to report statute. The duty to report is not, in fact, universal; it excludes individuals in subsection (b). Referring to a "duty" in the statute heading is sufficiently broad to put individuals on notice that they may be subject to the duty to report.

(3) The CCRC recommends in paragraph (b)(3) replacing a "priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia" with a "religious leader described in D.C. Code § 14-309." This change provides greater clarity as to what religious leaders are covered in the RCC duty to report statute and improves the consistency of the revised statute with RCC § 22E-1303, which includes these

religious leaders in the RCC sexual abuse by exploitation statute, and the evidentiary provisions in D.C. Code § 14-309."[414]

- This change improves the clarity and consistency of the revised statute. The RCC commentary to the duty to report a sex crime statute has been updated to reflect that this is a possible change in law.

(4) USAO, App. C at 332-333, recommends including in subsection (b) a new paragraph (b)(4) that states "No legal privilege, except the privileges set forth above in subsection (b) shall apply. USAO states that this is "implied" in the RCC version, but that the statement "clarifies that other privileged relationships do not create an exemption from mandatory reporting." USAO states that this provision is included in current law at D.C. Code § 22-3020.52(c).

- The RCC incorporates this recommendation by adding a new paragraph (b)(2) that states: "No legal privilege, except the privileges set forth in subsection (b) of this section, shall apply to the duty to report in subsection (a) of this section." Similarly, the commentary to the RCC duty to report statute has been updated to reflect that subsection (e) accounts for the language "[n]o other legally recognized privilege, except for the following" from current D.C. Code § 22-3020.52(c) and that it is a clarificatory change in law.

(5) USAO, App. C at 333, recommends adding a new subparagraph (b)(3)(E) that states "A confession or communication made under any other circumstances does not fall under this exemption." USAO states that this language is currently codified at D.C. Code § 22-3020.52(c)(2)(B) and that it is "appropriate to include it here to clarify the law."

- The RCC does not incorporate this recommendation because it introduces ambiguity into the revised statute. Nothing in subparagraph (b)(1)(C) of the RCC duty to report statute suggests that confessions or communications that do not satisfy the requirements in sub-subparagraphs (b)1)(C)(i) through (b)(1)(C)(iv) would be privileged, and the new paragraph (b)(2) clearly establishes that no other privileges than those described in subsection (b) apply. Codifying a provision that explicitly states other confessions or communications are *not* privileged is potentially confusing for other provisions that do not similarly list what is "not" included. However, the commentary to the RCC duty to report statute has been updated to reflect that the statute deletes the language "A confession or communication made under any other circumstances does

[414] D.C. Code § 14-309 refers to a "priest, clergyman, rabbi, or other duly licensed, ordained, or consecrated minister of a religion authorized to perform a marriage ceremony in the District of Columbia or duly accredited practitioner of Christian Science." The current D.C. Code duty to report a sex crime statute (D.C. Code § 22-3020.52(c)(2)(A)) and the previous version of the RCC statute specified a "priest, clergyman, rabbi, or other duly appointed, licensed, ordained, or consecrated minister of a given religion in the District of Columbia, or a duly accredited practitioner of Christian Science in the District of Columbia." The main difference between D.C. Code § 14-309 and D.C. Code § 14-309 appears to be that the latter refers to specified religious leaders that are "authorized to perform a marriage ceremony" in the District, and the current D.C. code statute and the previous RCC version referred to a duly appointed, licensed, ordained, or consecrated minister "of a given religion" in the District.

not fall under this exemption" from current D.C. Code § 22-3020.52(c)(2)(B) and that it is a clarificatory change in law.

(6) The CCRC recommends including three additional offenses in the definition of "predicate crime" in subsection (e): 1) Trafficking in a Commercial Sex Act under RCC § 22E-1604; 2) Commercial Sex with a Trafficked Person under RCC § 22E-1608; and 3) Incest (through the inclusion of any RCC sex offense in RCC Chapter 13). The current D.C. Code duty to report a sex crime statute defines a predicate crime, in relevant part, as including current D.C. Code § 22-1834 (sex trafficking of children) and any sex offense in Chapter 13 of current D.C. Code Title 22.[415] *D.C. Code § 22-1834 is specific to sex trafficking of children, but there are two other human trafficking crimes in the current D.C. Code and the RCC that are sex-related and could apply when the complainant is a child, though they do not require the complainant to be a child— Trafficking in Commercial Sex under RCC § 22E-1604, or Commercial Sex with a Trafficked Person under RCC § 22E-1608. The RCC specifically includes these human trafficking offenses, which is consistent with the current D.C. Code duty to report statute including any sex offense in Chapter 30 of Title 22 in its definition of a predicate crime. Similarly, the RCC duty to report statute includes incest. The current incest statute is codified at D.C. Code § 22-1901, and, as a result, is not included in Chapter 30 of current D.C. Code Title 22. The RCC codifies incest as a sex offense in Chapter 13 of Title 22E, which includes incest as a "predicate crime" for the RCC duty to report a sex crime statute.*

- This change improves the clarity, consistency, and the proportionality of the revised statute.

[415] D.C. Code §§ 22-3020.51(4) (defining "sexual abuse" for the purposes of the duty to report a sex crime and related statutes as "any act that is a violation of: (A) Section 22-1834; (B) Section 22-2704; (C) This chapter; or (D) Section 22-3102.").

RCC § 22E-1310. Civil Infraction for Failure to Report a Sex Crime Involving a Person Under 16 Years of Age.

(1) USAO, App. C at 332, recommends moving RCC § 22E-1309 (Duty to Report a Sex Crime Involving a Person Under 16 Years of Age) and RCC § 22E-1310 to the same location in the D.C. Code as the mandatory reporting laws in D.C. Code § 4-1321.01, et. seq. USAO states that this would be a change from the statutes' current location in the D.C. Code (Chapter 30 of Title 22; Sexual Abuse). USAO states that this would "reduce confusion about mandatory reporting obligations."

- The RCC does not incorporate this recommendation at this time, reserving the question as to relocation of these statutes until other reform recommendations are finalized. After the Advisory Group votes to approve final recommendations, time permitting the CCRC will include recommendations to the Council and Mayor for conforming amendments, but will not recommend moving RCC § 22E-1309 and RCC § 22E-1310 to Title 4 of the D.C. Code. The mandatory reporting laws in current *D.*C. Code § 4-1321.01, *et. seq.*, pertain to abused or neglected children and are broader than the duty to report a sex crime in current D.C. Code § 22-3020.51, *et. seq.*, and RCC § 22E-1309. Keeping the duty to report a sex crime and accompanying civil infraction statutes with the RCC sex offenses may improve the organization and consistency of the RCC.

RCC § 22E-1311. Admission of Evidence in Sexual Assault and Related Cases.

(1) The CCRC recommends revising the definition of "past sexual behavior" in subsection (g) so that it refers to sexual behavior "other than the sexual behavior" with respect to which an offense under RCC Chapter 13 is alleged. This language is in the current statute and was omitted in error.

- This change improves the clarity of the revised statute.

RCC § 22E-1312. Incest.

(1) PDS, App. C at 449, recommends decriminalizing incest. PDS states that "[c]onsensual sexual conduct where the complainant is under 18, the defendant is more than four years older than the complainant and the defendant is in a position of trust or authority with respect to the complainant is already criminalized" in the RCC sexual abuse of a minor statute. PDS states that "incest criminalizes consensual sexual conduct between adults [that] may be viewed as socially or morally repugnant," but there is "no clear justification" for criminalizing it. As a hypothetical, PDS states that incest would criminalize consensual sexual conduct between a "similarly aged niece and an uncle by marriage [and] [w]hile it may be morally reprehensible for a niece to have an affair with the husband of her aunt, the conduct should not be a crime." PDS states that for a variety of factors, such as the size of families and age differences in marriages, "it is impossible to assume that a niece and an uncle or a step-grandchild and a step-grandparent would be far apart in age or share other qualities that may create a coercive power dynamic." Similarly, PDS states "an adopted teenage sibling may never share the same house as his or her brother or sister who left home at 18." PDS states that "[r]ather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct."

- The RCC does not incorporate this recommendation because it may create a gap in liability. The revised incest offense may apply in situations that lie beyond the age requirements of the RCC sexual abuse of a minor statute.[416] In addition, as discussed below, the RCC incest statute adopts PDS's recommendation to replace the terms "aunt," "uncle," "nephew," and "niece" and instead requires "A parent's sibling or a sibling's child by blood," which would exclude the PDS hypothetical of a niece engaging in consensual sexual conduct with her aunt's husband. While an adopted sibling may never share the same house as his or her brother, sexual acts between adopted siblings can still be harmful to familial relationships and adopted siblings are included in the scope of several current and RCC sex offenses if certain requirements are met.[417]

[416] First degree and second degree of the RCC sexual abuse of a minor statute require a sexual act when the complainant is under the age of 16 years and the defendant is at least four years older than the complainant. If a defendant is within this four year age gap, these gradations of the RCC sexual abuse of a minor statute would not criminalize sexual conduct with a complainant under the age of 16 years—for example, a defendant sibling that is 17 years old when the complainant is 15 years old. Similarly, third degree of the RCC sexual abuse of a minor statute requires a sexual act when the defendant is at least 18 years of age, at least four years older than a complainant under the age of 18 years, and in a position of trust with or authority over the complainant. Third degree sexual abuse of a minor would not criminalize, for example, sexual conduct between specified individuals in the incest statute if there is less than a four year age gap between the individuals or the defendant is not at least 18 years of age.

[417] Current District law includes adopted siblings in the definition of "significant relationship." D.C. Code § 22-3001(10) (defining "significant relationship" to include "A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption."). The current D.C. Code sexual abuse of a minor statutes prohibit an actor that is 18 years of age or older and in a "significant relationship" with a person under the age of 18 years from engaging in a sexual act with that younger person. D.C. Code

(2) PDS, App. C at 449-450, recommends deleting the terms "legitimately or illegitimately" from the statute. PDS states that the RCC does not define these terms.

- The RCC incorporates this recommendation by deleting "legitimately or illegitimately" and revising the commentary accordingly.

(3) PDS, App. C at 450, recommends using the terms "sibling," "half-sibling," and "step-sibling" rather than "binary gendered terms" of "brother" and "sister." PDS further recommends replacing "aunt, uncle, nephew or niece" with "a parent's sibling or sibling's child."

- The RCC incorporates the recommendation for the use of "sibling" and "half-sibling" by replacing "brother [or] sister, or brother or sister by adoption" with "A sibling, by blood or adoption" in subsection subparagraph (a)(2)(C).
- The RCC incorporates the recommendation for the use of "step-sibling" by codifying as a new subparagraph (a)(2)(E) "A step-sibling, while the marriage creating the relationship exists."
- The RCC incorporates the recommendation for replacing "aunt, uncle, nephew, or niece" by replacing "aunt, uncle, nephew, or niece" with a "parent's sibling or a sibling's child by blood."

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§§ 22-3009.01 (first degree sexual abuse of a minor), 22-3001(5A) (defining a "minor" as a "person who has not yet attained the age of 18 years."). The current D.C. Code misdemeanor sexual abuse of a child or minor statute (D.C. Code § 22-3010.01) and the current D.C. Code enticing a minor statute (D.C. Code § 22-3010) also require that the defendant be in a "significant relationship," but prohibit different conduct and have different requirements.

The RCC sex offenses in Chapter 13 of the RCC have a similar scope as current law through the definition of "position of trust with or authority over" in RCC § 22E-701.

Chapter 14. Kidnapping, Criminal Restraint, and Blackmail.

Kidnapping. RCC § 22E-1401.

(1) *OAG at App. C. 254, says that the commentary to the revised kidnapping statute should be clarified as to whether the offense includes causing another person to believe the complainant will not be released, even if the actor does not intend for anyone to have that belief.*

- The RCC incorporates this comment by updating the commentary to clarify that the actor must intend for a person to believe that the complainant will not be released. This change clarifies the revised statute's commentary.

(2) *The CCRC recommends re-drafting the exclusion to liability to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*

- This revision will distinguish between the revised kidnapping statute and the revised parental kidnapping statute. The parental kidnapping offense is a less serious offense intended to cover taking children by relatives or persons acting at the direction of relatives, with intent to interfere with another custodian's right to custody. Due to the lesser harm and danger to the complainant, parental kidnapping is subject to less severe penalties than ordinary kidnapping. The prior draft kidnapping statute included an exclusion to liability for close relatives, but the exclusion did not specifically include persons who reasonably believed they are acting at the direction of relatives. Such drafting is unclear as to the liability of persons acting at the direction of a close relative, who may be considered agents of such close relatives. Without this revision to the revised kidnapping statute, a person who takes a child acting at the direction of a relative may be liable for both kidnapping and parental kidnapping. This change improves the proportionality of the revised code, and eliminates unnecessary overlap between the two offenses.

(3) *USAO at App. C. 333, recommends replacing the words "any felony" to the words "any criminal offense," in subparagraphs (a)(3)(C) and (b)(3)(C). USAO also recommends replacing the words "commit a sexual offense defined in Chapter 13 of this title" with the words "Commit any criminal offense" in subparagraphs (a)(3)(E) and (b)(3)(E).*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. The revised kidnapping statute is intended to cover restraints of movement that cause, or create heightened risk of, significant harm to the complainant. In addition to criminalizing intent to commit a sexual offense, the revised statute also includes restraining a person with intent to inflict bodily injury upon the complainant. Including intent to commit *any* offense would be overbroad, and include cases in which there is not sufficiently greater harm or increased risk of harm to the complainant to warrant kidnapping liability.

Misdemeanors are generally less serious, and restraining a person to facilitate commission of a misdemeanor does not create the same inherent risk of harm to the complainant as facilitating commission of a felony. For example, a person who locks a store employee in a back room for several minutes in order to shoplift goods has not caused, or created risk of, significant harm to warrant a kidnapping conviction.[418] The RCC provides liability for restraining a person's freedom of movement in connection with any sex offense as kidnapping (or aggravated kidnapping, depending on the circumstances of the complainant). The RCC provides liability for restraining a person's freedom of movement in connection with a non-sex offense misdemeanor under RCC § 22E-1402, the general criminal restraint statute, which is subject to a lower penalty classification.

(4) *USAO, at App. C. 334, recommends amending the exclusion to liability under subsection (c) to include a requirement that the actor did not commit a sex offense against the complainant, or threaten to commit a sex offense against the complainant.*

- The RCC partially incorporates this recommendation by requiring that the actor "Does not cause or threaten to cause bodily injury to the complainant, and does not cause or threaten to cause the complainant to engage in a sexual contact or sexual act." This change improves the clarity and proportionality of the revised statutes.

(5) *USAO, at App. C 334 recommends replacing the words "has been affirmed" with "becomes final" in the merger provision in subsection (e).*

- The RCC does not incorporate this recommendation. Instead, the words "has been affirmed" will be replaced with the phrase "the appeal from the judgment of conviction has been decided." This language is consistent with the general merger provision in RCC § 22E-214.[419]

(6) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor "used or displayed" a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense "while armed."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a

[418] In the case USAO cites, *Gooch v. United States*, 297 U.S. 124 (1936), the appellants, while heavily armed, seized two law enforcement officers in order to avoid arrest for an unspecified offense, inflicted serious injuries to one of the officers, and drove both officers across state lines from Texas to Oklahoma. On these facts, there are at least two possible theories of liability under the revised kidnapping statute: 1) if the unspecified offense was a felony, then the restraint would constitute intent to facilitate commission or flight from a felony; 2) since the appellants were heavily armed, drove the officers out of state, and inflicted serious bodily injury on one of the officers, there would have been intent to cause a person to believe the officers would not be released without having suffered significant bodily injury.

[419] RCC § 22E-214 will also be amended to change the words: "The judgment appealed from has been decided" to "The appeal from the judgment of conviction has been decided."

dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[420] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.

- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[421]

(7) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition, USAO recommends that the RCC should include an affirmative defense that "the accused was negligent as to the fact that the victim was a protected person at the time of the offense." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated kidnapping.*

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

[420] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[421] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

Criminal Restraint. RCC § 22E-1402.

(1) *USAO, App. C. 272, recommends that throughout the RCC, when a penalty enhancement or grade of an offense requires that the actor "used or displayed" a dangerous weapon or imitation dangerous weapon, the offense or enhancement instead should only require that the actor committed the offense "while armed."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC eliminates a general "while armed" penalty enhancement for crimes of violence in favor of incorporating gradations for the use or display of a weapon into violent offenses and retaining an array of separate offenses, such as: carrying a dangerous weapon (RCC § 22E-4102); possession of a dangerous weapon with intent to commit crime (RCC § 22E-4103); and possessing a dangerous weapon during a crime (RCC § 22E-4104). Commentary for the offense gradation specifies that the phrase "by displaying or using" a weapon "should be broadly construed to include making a weapon known by sight, sound, or touch."[422] When an actor does not satisfy this requirement for displaying or using a weapon, the complainant does not experience increased fear of serious harm and the impact of the encounter is likely to be significantly less traumatic. Although there may be an increased risk of harm when an actor simply possesses or carries a dangerous weapon, this is accounted for by the various separate RCC Chapter 41 weapons offenses for which the actor would be liable and may be sentenced consecutively. The USAO recommendation would treat as equivalent the display or use of a dangerous weapon during an encounter with less severe conduct.
- Polling of District voters also suggests that the harm caused by actual use or display of a dangerous weapon differs from mere possession or carrying a dangerous weapon. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[423]

(2) *USAO, App. C. 273, recommends that throughout the RCC, when the complainant's status as a protected person increases applicable penalties, instead of requiring recklessness as to the status, strict liability should apply. In addition,*

[422] Commentary to the revised robbery statute references commentary to RCC § 22E-1203. Menacing.

[423] Question 1.18 provides the scenario "Robbing someone's wallet by punching them, which caused minor injury." The mean response to this scenario was 6. Question 1.16 provides the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." The mean response to this scenario was 6.2, only slightly higher than the mean response for unarmed robbery. Question 1.17 provides the scenario, "Robbing someone's wallet by displaying a gun and threatening to kill them." The mean response to this scenario was a 7. The responses to these three scenarios suggest that the public believes that while actually displaying or using a weapon while committing robbery justifies an increase in penalty severity by one class, there is relatively little distinction between an unarmed robbery and robbery while possessing, but not displaying or using, a weapon.

USAO recommends that the RCC should include an affirmative defense that "the accused was negligent as to the fact that the victim was a protected person at the time of the offense." USAO also recommends that this defense must "be established by a preponderance of the evidence." As applied to this statute, this recommendation would change the element in sub-subparagraph (a)(2)(B)(i) under aggravated criminal restraint.

- The RCC does not incorporate this recommendation for the reasons described in response to the identical recommendation regarding the RCC murder statute.

(3) *The CCRC recommends re-drafting the exclusions to liability under (c)(1), (c)(2)(B)(ii), and (c)(2)(C)(ii) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends re-drafting the exclusion to liability under subparagraph (c)(2)(C) to include persons who reasonably believe they are acting at the direction of a close relative. This change improves the clarity and may improve the proportionality of the revised statutes.*

- This revision will distinguish between the revised criminal restraint statute and the revised parental kidnapping statute. The CCRC recommends this change for the same reasons discussed in the identical change to the revised kidnapping statute.

Blackmail. RCC § 22E-1403.

(1) *OAG, at App. C. 436-437, recommends revising the blackmail statute to require an "intent to extort." OAG raises concerns that, as drafted, the blackmail statute may criminalize speech that is protected under the First Amendment.*

- The RCC partially incorporates this recommendation by amending the blackmail defense under subsection (c) to address OAG's concerns with respect to overbreadth. The CCRC recommends replacing the words "Take reasonable action to correct the wrong that is the subject of the accusation" with "take or refrain from reasonable action *related* to the wrong that is the subject of the accusation[.]"[424] The revised wording broadens the scope of conduct that falls within the defense. There may be some reasonable demands that are related to the wrong, even if they do not specifically *correct* the wrong that is the subject of the accusation.[425] This change addresses the two hypothetical cases of protected speech in OAG's comments: first, a person who threatens to publicize a business's editorial practices unless the business changes those practices; second, threatening to run ads against an elected official unless the official changes his or her stance on a given issue. In both cases, the actor's purpose was to cause another person to take reasonable action that is related to the wrong that is the subject of the accusation or assertion, and would therefore not be criminalized.
- In addition, commentary to the revised blackmail statute clarifies that the offense does not include threats to reveal *any* information that is embarrassing or harmful to reputation. The commentary notes that "[t]hreats to reveal minimally embarrassing information would not suffice under this form of blackmail. This form of blackmail is intended to include threats to expose secrets or assert facts that would have traditionally constituted blackmail." Although publicizing unsavory editorial practices or running political advertisements against a public official may be embarrassing, these types of threats would not necessarily be sufficiently embarrassing or harmful to a person's reputation to constitute blackmail.
- Other reform jurisdictions have codified analogous offenses that criminalize causing a person to act or refrain from acting by threatening to reveal secrets that subject a person to hatred, contempt, or ridicule, that include a defense similar to that codified in the revised blackmail

[424] *See, State v. Jorgenson*, 934 N.W.2d 362, 375 (Minn. Ct. App. 2019), review granted (Dec. 17, 2019) (In holding that Minnesota's coercion statute, which is similar to the RCC's blackmail offense was facially unconstitutional, the Minnesota Court of Appeals noted that the offense did not include "an affirmative defense of protected speech similar to the Model Penal Code"[.]"

[425] For example, the defense would apply to a person who threatens to run negative political advertisements about a public official if he or she does not vote for a bill, even if the advertisements do not specifically address the bill at issue.

statute.[426] Such drafting has withstood constitutional challenges and is clearer than reference to an undefined intent to "extort."

(2) *USAO, at App. C. 462 recommends redrafting subsection (a)(1) to read "Purposely causes or intends to cause another person to do or refrain from doing any act." USAO says that liability should depend "on the defendant's intent and actions, rather than what those actions actually cause a complainant to do."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and expand the scope of the offense to include constitutionally protected speech.
- Lowering the culpable mental state for blackmail would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail. For example, when a person threatens to report a crime, he or she may know that as a result the person engaging in the crime will engage in or refrain from some act, such as destroying evidence or going into hiding. Mere knowledge that the threat to report criminal activity will cause the other person to act is not sufficient to warrant criminal liability. Although "intent and action" may be sufficient for attempt liability, the RCC generally requires that the actor actually cause the prohibited result in order for complete liability to apply.

(3) *USAO, at App. C. 463, recommends amending subparagraph (a)(2)(E) to read "Impair the reputation of another person, including a deceased person[.]" Under USAO's proposal the revised blackmail statute would include threats to impair the reputation of living, as well as deceased, persons.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC blackmail language, may authorize disproportionate punishments, and may expand the scope of the offense to include constitutionally protected speech. With respect to living persons, the RCC blackmail statute already separately includes threats to accuse a person of a crime, or to "[e]xpose a secret, publicize an asserted fact, or distribute a photograph, video or audio recording, regardless of the truth or authenticity of the secret, fact, or item, that tends to subject another person to, or perpetuate . . . [h]atred, contempt, ridicule, or other significant injury to personal reputation[.]" This more specific language limits the ways in which reputational harm may constitute a crime, eliminating the overlap in the current D.C. Code provisions' multiple references to reputational harms,[427] Expanding blackmail liability to reach any impairment of reputation also would exacerbate concerns (including those raised by OAG) with respect to criminalization of protected speech, and conduct that does not warrant criminalization would constitute blackmail.

[426] E.g. Alaska Stat. Ann. § 11.41.530; Ky. Rev. Stat. Ann. § 509.080; 18 Pa. Stat. and Cons. Stat. Ann. § 2906; N.J. Stat. Ann. § 2C:13-5. See also, § 20.4(a)Statutory extortion or blackmail, 3 Subst. Crim. L. § 20.4(a) (3d ed.) (noting that most blackmail and extortion statutes "threats to expose some disgraceful defect or secret of the victim which, when known, would subject him to public ridicule or disgrace").

[427] D.C. Code § 22-3252 (a)(2)-(4).

(4) *The CCRC recommends replacing the words "impair the reputation of a deceased person" with the words "significantly impair the reputation of a deceased person."*

- This change clarifies that threats to impair a deceased person's reputation trivially is not sufficient for blackmail. This makes the offense more consistent with respect to threats to impair the reputation of living and deceased persons.
- Requiring that the threat would significantly impair a deceased person's reputation also addresses OAG's concern with criminalizing protected speech. For example, threatening to reveal that a deceased politician had been a rude and demanding employer may impair that person's reputation without doing *significant* injury to that person's reputation.

Chapter 15. Abuse and Neglect of Vulnerable Persons.

RCC § 22E-1501. Criminal Abuse of a Minor.

(1) *USAO, App. C at 334-335, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is "[r]eckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age" and requiring elsewhere in the offense that the complainant "in fact" is under 18 years of age. With this change, the RCC criminal abuse of a minor statute would require only that the complainant, in fact, be under the age of 18 years, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is "a change from current law and is not warranted." USAO refers to the current child cruelty statute, which does not require a relationship between the parties, "both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate." USAO gives as hypotheticals "if a stranger walks up to a child and tips over the child's stroller, or a neighbor hits a child, this behavior is equally culpable as when a person with a relationship with the child engages in the same behavior."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. Code child cruelty statute's provisions concerning physical injury are unclear,[428] but appear to completely overlap with the District's current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant's culpable mental states.[429] It is difficult to precisely compare the current D.C. Code child cruelty and assault statutes, but to the extent the offenses overlap, the child cruelty statute authorizes significantly higher penalties than the current assault statutes. (The current child cruelty statute has a maximum term of imprisonment of 15 years for creating a grave risk of bodily injury to a

[428] The primary ambiguity is the scope of the phrase "Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child" in second degree child cruelty, D.C. Code § 22–1101(b)(1).

[429] D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for "Whoever unlawfully assaults, or threatens another in a menacing manner."); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for "Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another."); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who "(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury."). 22-404.01.

child and in doing so recklessly causes "bodily injury."[430]) The RCC reduces unnecessary overlap between assault and criminal abuse of a minor statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of minors generally and minors to whom the actor has a duty of care.

- The RCC criminal abuse of a minor statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant under the age of 18 years. The RCC, through "protected person" gradations in various offenses against persons, authorizes enhanced penalties when the complainant is under the age of 18 years if the defendant is at least 18 years old and at least four years older. These "protected person" gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Under USAO's hypotheticals of a stranger tipping over a child's stroller or a neighbor hitting a child, there is an enhanced penalty available under the RCC assault statute if the requirements for the offense and the "protected person" gradations are met (such as being a minor). Notably, such a penalty enhancement for bodily injury assault against a minor or other defined "protected person" is a new recommendation in the RCC that does not exist for simple assault in current law.[431] By providing such protected person enhancements, however, the RCC proportionately penalizes assaults against young complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a minor statute where a relationship is required. The key differences between the RCC criminal abuse of a minor and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-minor), and there is a distinct label for harms caused by parents,

[430] D.C. Code § 22-1101(a) ("A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury."); (c)(1) ("Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both."). "Bodily injury" is undefined for the current child cruelty statute, but DCCA case law suggests that it is a low standard for physical harm. *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[431] Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant. These specified crimes include aggravated assault, felony assault, and first degree child cruelty, but not misdemeanor assault. D.C. Code §§ 22-3611(c)(2); 23-1331(4). As is discussed in the RCC commentary to the definition of "protected person" in RCC § 22E-701, the RCC increases the required age gap to four years, but keeps the other age and age gap requirements the same.

caretakers, and others who have a responsibility for the complainant under civil law for the health, welfare, or supervision of the minor complainant.

(2) *USAO, App. C at 335, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) if the RCC criminal abuse of a minor statute retains the requirement that the defendant has a "responsibility under civil law for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(3) *The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a minor. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *USAO, App. C at 335, recommends including in what is now paragraph (c)(2) that the defendant commits "assault, per RCC § 22E-1202," "kidnapping, per RCC § 22E-1401," and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.*[432] *USAO states that assault is "implicitly included" in what was previously subparagraph (c)(2)(C) ("recklessly causes bodily injury to the complainant"), but it should be expressly included to "eliminate confusion." USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that a "primary distinction" between assault and what is now third degree offensive physical contact is "whether the complainant suffered 'bodily injury.'" USAO states "[p]articularly in the case of a child, who could be non-verbal, barely verbal, or reluctant to talk, cases prosecuted under this section may frequently involve third-party witnesses, rather than the testimony of the complainant" and a "third-party witness may not be able to either ascertain or testify beyond a reasonable doubt that the a child was in 'physical pain.'" As a result, USAO states that "what appears to be a clear assault on a child may only be prosecutable" as what is now third degree offensive physical contact.*

[432] When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two "protected person" gradations.

- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires recklessly causing bodily injury to a complainant and is identical to what previously subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of minor and including them would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a minor (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a minor.
- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a minor. Including them in third degree criminal abuse of a minor would authorize a lower penalty for the same conduct.
- The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).

(5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) ("Purposely causes significant emotional distress by confining the complainant."). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a minor statute that prohibit creating a risk of serious mental injury. This change ensures that the revised criminal abuse of a minor statute retains the high threshold for psychological harms that exists in current law.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *USAO, App. C, at 336 recommends in subparagraph (c)(2)(B) changing the culpable mental state from "purposely" to "knowingly" and deleting the words "by confining." With these changes, subparagraph (c)(2)(B) would require that the defendant "knowingly causes significant emotional distress" to the complainant instead of "purposely causes significant emotional distress by confining the complainant." USAO states that "knowingly" is the appropriate culpable mental state because "purposely" is a "mens rea that is too high."*

USAO states that under the current child cruelty statute, the only culpable mental states are intentionally, knowledge, or recklessness. USAO states it is unclear why confinement "is the only way to cause significant emotional distress under the statute" and that "USAO believes that any time a defendant knowingly causes significant emotional distress to a child, whether by confinement or otherwise, that should constitute Criminal Abuse of a Minor."

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).

(7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) "or engages in conduct that creates a grave risk of causing bodily injury to the complainant." With this change, subparagraph (c)(2)(C) would require "recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant." USAO states that this conduct is included in second degree of the current child cruelty statute "and should be included here." USAO states that the RCC commentary states that this conduct could be prosecuted as an attempt, or criminal neglect of a minor, but "with USAO's changes suggested above that would eliminate the need for a significant relationship in the Criminal Abuse of a Minor Statute, these statutes justifiably no longer have the same overlap. In addition, USAO states that creating a "grave risk" of causing a bodily injury "is a different standard than coming 'dangerously close' to causing bodily injury, so the attempt statute will not encompass every situation that would be covered under current law."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would be inconsistent with the related criminal neglect of a minor statute. The RCC criminal abuse of a minor statute requires that the complainant experience a specified type of harm and generally has higher penalties than the RCC criminal neglect of a minor statute, which is limited to risk creation. It would be both inconsistent with the other provisions in the RCC criminal abuse of a minor statute and disproportionate to include mere risk creation in the statute. The commentary to the RCC criminal abuse of a minor statute recognizes that not every instance of creating a risk of bodily injury will be covered by the criminal neglect of a minor statute or attempted criminal abuse of a minor. The commentary to the RCC criminal abuse of a minor statute has been updated to reflect that the RCC criminal neglect of a minor statute does not include the risk of "bodily injury" because, given the RCC definition of "bodily injury," this may criminalize the risk of comparatively trivial harms that are part of everyday life, such as allowing a child to play on playground monkey bars.

(8) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal abuse of a minor ("likely including attempts."). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of

the Second Draft of Report #41, third degree of the RCC criminal abuse of a minor statute is a Class 9 felony. Although the precise statutory for RCC offenses has not been set, the maximum term of imprisonment for a Class 9 felony in the RCC will satisfy jury demandability requirements under current law, as will the maximum term of imprisonment for an attempted Class 9 felony. Although it is difficult to precisely compare the current D.C. Code child cruelty statute to third degree of the RCC criminal abuse of a minor statute, to the extent they overlap, there is a jury trial under current law for completed first degree and second degree child cruelty[433] and attempted first degree child cruelty.[434] To the extent that third degree of the RCC criminal abuse of a minor statute overlaps with those offense, the RCC is not changing current law for jury demandability, but it is for attempted second degree child cruelty.

(9) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a minor from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a minor from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a minor remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to "serious bodily injury," first degree criminal abuse of a minor has a lower culpable mental state ("recklessly") than first degree assault ("recklessly, with extreme difference to human life."). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing "significant bodily injury," however, keeping second degree criminal abuse of a minor a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a minor. Third degree criminal abuse of a minor, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more*

[433] D.C. Code § 22-1101(c)(1), (c)(2) ("(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

[434] Under D.C. Code § 22-1803, the penalty for an attempt, unless otherwise statutorily specified, is 180 days if the offense is not a "crime of violence" or 5 years maximum for a "crime of violence." "Crime of violence" is defined in D.C. Code § 22-1331(4) and includes first degree child cruelty. Thus, attempted first degree child cruelty would have a maximum term of imprisonment of five years and be jury demandable. Attempted second degree child cruelty would have a maximum term of imprisonment of 180 days not be jury demandable.

D.C. Code § 22-1101(c)(1), (c)(2) ("(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than $10,000 or be imprisoned not more than 15 years, or both. (2) Any person convicted of cruelty to children in the second degree shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 10 years, or both.").

proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).

- This change improves the proportionality of the revised statute.

(10) *OAG, App. C at 255, state that footnote 26 on page 296 of the Commentary say, "If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial risk that the complainant was under 18 years of age." OAG states that the commentary is "equating 'reasonableness' with 'disregarding a substantial risk.'" OAG state that "it is not sure if that is a correct analysis of the proposed element" because a "reasonable belief that the person was not under 18 does not necessarily negate recklessness- not if the person believes that the other person is a minor, but also knows of (and disregards) a significant risk that that is not true." OAG does not recommend any changes to the footnote.*

- The RCC incorporates this recommendation by amending the footnote to add at the end a cross-reference to: "See RCC § 22E-208(b)(3) and accompanying commentary, providing that a reasonable mistake as to a circumstance element negates the existence of recklessness as to that element." Other footnotes in the RCC commentary have been likewise clarified with the addition of this reference. This change improves the clarity of the revised commentary.

RCC § 22E-1502. Criminal Neglect of a Minor.

(1) *USAO, App. C at 336-337, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(2) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(3) *USAO, App. C at 415-419, appears to recommend against creation of a right to a jury trial for third degree criminal neglect of a minor ("including attempts."). USAO states that requiring jury trials in cases that are non-jury demandable under current law will create a tremendous strain on limited judicial resources.*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to jury demandability. As of the Second Draft of Report #41, third degree of the RCC criminal neglect of a minor statute is a Class B felony. In the Second Draft of Report #41, the RCC specifies that in any case in which a person is not constitutionally entitled to a trial by jury, the trial shall be by a single judge, except for the following main offenses: a Class B offense or inchoate (attempt, conspiracy, etc.) forms of a Class B offense; an offense that requires sex-offender registration; or specified offenses in which the complainant is a law enforcement officer. Under this framework, third degree criminal neglect of a minor (a Class B misdemeanor) and attempted third degree criminal neglect of a minor are jury demandable. See the Second Draft of Report #41, for more details. This change improves the consistency of the revised statute.

(4) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a minor. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a minor statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a minor statute be classified as a Class 7 felony. USAO states that first degree and second degree of the RCC criminal neglect of a minor statute "have a higher standard than" first degree of the current child cruelty statute, because they require a risk of serious*

bodily injury, death, or significant bodily injury, whereas first degree of the current child cruelty statute prohibits "creates a grave risk of bodily injury to a child, and thereby causes bodily injury." USAO recognizes that first degree child cruelty requires actual injury and the RCC criminal neglect of a minor statute does not, but states that given the overlap of first degree and second degree of the RCC criminal neglect of a minor statute with first degree child cruelty, the RCC gradations should have the same statutory maximum penalty as first degree child cruelty —15 years imprisonment. USAO also states that it is "concerned" that knowingly abandoning a child in third degree of the RCC criminal neglect of a minor statute be "appropriately punished." USAO states that under current law, this is second degree cruelty to children with a maximum term of imprisonment of 10 years.

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. First degree and second degree of the RCC criminal neglect of a minor statute are limited to creating a risk of a specified type of harm—there need not be any resulting (actual) harm, and if there were such harm it would constitute the more severely punished offense of RCC criminal abuse of a minor. Ranking these offenses as a Class 6 felony would penalize a risk of harm the same as causing actual harm (serious mental injury or serious bodily injury) in first degree criminal abuse of a minor. Similarly, ranking third degree of the RCC criminal neglect of a minor statute as a Class 7 felony would rank knowingly abandoning the complainant the same as causing actual harm (serious mental injury or significant bodily injury) in second degree criminal abuse of a minor. Requiring harm for the RCC criminal abuse of a minor statute and limiting the RCC criminal neglect of a minor statute to risk creation improves the consistency and proportionality of the revised statutes.

(5) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a minor offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree Criminal Neglect of a Minor from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a minor offense, second degree criminal abuse of a minor is now a Class 8 felony and third degree criminal abuse of a minor is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a minor keeps the penalties proportionate as compared to the criminal abuse of a minor offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a minor statute are also proportionate compared to the RCC assault statute.*[435]

[435] Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a minor, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty class lower, a Class A misdemeanor. Sixth degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a minor, which

- This change improves the proportionality of the revised statutes.

prohibits abandonment and recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

RCC § 22E-1503. Criminal Abuse of a Vulnerable Adult or Elderly Person.

(1) *USAO, App. C at 337, recommends deleting paragraphs (a)(1), (b)(1), and (c)(1), which require that the defendant is "[r]eckless as to the fact that he or she has a responsibility under civil law for the health, welfare, or supervision of the complainant who is a vulnerable adult or elderly person" and requiring elsewhere in the offense that the complainant "in fact" is a vulnerable adult or elderly person. With this change, the RCC criminal abuse of a vulnerable adult or elderly person statute would require only that the complainant, in fact, be a vulnerable adult or elderly person, and that the defendant engaged in the prohibited conduct. USAO states that requiring a relationship between the defendant and the complainant is "a change from current law and is not warranted." USAO refers to the current D.C. Code § 22-933, the criminal abuse of a vulnerable adult or elderly person offense, which does not require a relationship between the parties, "both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap between criminal offenses and may authorize disproportionate penalties. The current D.C. criminal abuse of a vulnerable adult statute's provisions concerning physical injury are unclear,[436] but appear to completely overlap with the District's current misdemeanor assault, felony assault, and aggravated assault statutes, which authorize maximum terms of imprisonment of 180 days, three years, or 10 years depending on the severity of the resulting injury, if any, and the defendant's culpable mental states.[437] It is difficult to precisely compare the current criminal abuse of a vulnerable adult and assault statutes, but to the extent the offenses overlap, the criminal abuse of a vulnerable adult statute authorizes higher penalties than the current assault statutes. (The current criminal abuse of a vulnerable adult statute has a maximum term of imprisonment of 180 days for committing the offense with no specified amount of harm required, 10 years for causing "serious bodily injury" or "severe mental distress," and 20 years for causing

[436] The primary ambiguity is the scope of the phrase "Inflicts or threatens to inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means" in D.C. Code § 22–933(1).

[437] D.C. Code §§ 22-404(a)(1) (assault statute authorizing a maximum term of imprisonment of 180 days for "Whoever unlawfully assaults, or threatens another in a menacing manner."); 22-404(a)(2) (felony assault statute authorizing a maximum term of imprisonment of three years for "Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another."); 22-404.01(a)(1), (a)(2), (b) (aggravated assault statute authorizing a maximum term of imprisonment of 10 years for a person who "(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or (2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").
22-404.01.

"permanent bodily harm" or "death."[438]) The RCC reduces unnecessary overlap between assault and criminal abuse of a vulnerable adult statutes by limiting the latter to instances where the actor has a special duty of care toward the complainant—but higher penalties remain for both assaults of vulnerable adults generally and vulnerable adults to whom the actor has a duty of care.

- The RCC criminal abuse of a vulnerable adult or elderly person statute generally authorizes higher penalties for assaultive conduct compared to the RCC assault offense, but improves the proportionality of the higher penalties by requiring that the defendant have a responsibility under civil law for the health, welfare, or supervision of the complainant. The RCC, through "protected person" gradations in various offenses against persons, authorizes enhanced penalties for a complainant that is a "vulnerable adult" or a complainant that is 65 years of age or older when the defendant is at least 10 years younger. These "protected person" gradations provide a penalty enhancement for certain offenses against persons when there is no relationship between the defendant and the complainant.
- Notably, none of the District's current assault statutes have a penalty enhancement for a "vulnerable adult" and the District's current penalty enhancement for complainants over the age of 65 years is limited to aggravated assault, and does not apply to either misdemeanor or felony assault.[439] The RCC penalty enhancement for bodily injury assault against a vulnerable adult or other defined "protected person" is a new recommendation in the RCC. The RCC proportionately penalizes assaults against vulnerable adults and elderly complainants when there is no relationship with the defendant, as compared to the RCC criminal abuse of a vulnerable adult or elderly person statute where a relationship is required. The key differences between the RCC criminal abuse of a vulnerable adult and RCC assault statutes are that the former includes some non-physical injuries, the precise grading and penalties vary (although both provide enhancements as compared to physical injuries to a non-vulnerable adult or non-elderly person), and there is a distinct label for harms caused by parents, children, caretakers, and others who have a

[438] D.C. Code §§ 22-933; 22-936(a), (b), (c) ("(a) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person shall be subject to a fine not more than the amount set forth in § 22-3571.01, imprisoned for not more than 180 days, or both. (b) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury or severe mental distress shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 10 years, or both. (c) A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes permanent bodily harm or death shall be subject to a fine of not more than the amount set forth in § 22-3571.01, imprisoned up to 20 years, or both."). The terms "serious bodily injury" and "permanent bodily harm" are not statutorily defined for the current criminal abuse of a vulnerable adult or elderly person statute and there is no DCCA case law interpreting these terms for the current statute.

[439] D.C. Code § 22-3601(b).

responsibility for the complainant under civil law for the health, welfare, or supervision of the vulnerable adult or elderly complainant.

(2) *USAO, App. C at 337, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant who is under 18 years of age." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(3) *The CCRC recommends adding electronic stalking (RCC § 22E-1802) to the list of offenses included in third degree criminal abuse of a vulnerable adult or elderly person. The list of offenses already includes stalking (RCC § 22E-1801). Electronic stalking is a recently revised offense with a similar scope of conduct and the same penalty.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(4) *USAO, App. C at 337-338, recommends including in what is now paragraph (c)(2) that the defendant commits "assault, per RCC § 22E-1202," "kidnapping, per RCC § 22E-1401," and both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact.*[440] *USAO states that assault is "implicitly included" in what was previously subparagraph (c)(2)(C) ("recklessly causes bodily injury to the complainant"), but it should be expressly included in subparagraph (c)(2)(C) to "eliminate confusion." USAO states that since criminal restraint is included in the list of offenses in what is now paragraph (c)(2), kidnapping should be included as well. Finally, USAO states that "it is important to have a provision" for what is now third degree offensive physical contact because "[l]ike young children, some elderly or vulnerable adults may not be able to articulate whether or not they felt any 'physical pain,' and the government's case will have to rely on the testimony of third party witnesses." USAO states that "[e]ven if it is likely that the complainant suffered bodily injury, the government may not be able to prove it beyond a reasonable doubt."*

- The RCC partially incorporates the recommendation to include assault in the list of specified offenses in paragraph (c)(2) by including sixth degree assault under RCC § 22E-1202(f). Sixth degree assault requires

[440] When USAO submitted its comment, the RCC offensive physical contact offense had two gradations. As is discussed elsewhere in this appendix, the RCC offensive physical contact offense now has three gradations because it includes two "protected person" gradations.

recklessly causing bodily injury to a complainant and is identical to what previously subparagraph (c)(2)(C). The RCC does not include first degree, second degree, or third degree assault because they have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including these assault gradations in paragraph (c)(2) would authorize a lower penalty for substantially similar conduct. The RCC does not include fourth degree assault in paragraph (c)(2) because it now has the same penalty as third degree criminal abuse of a vulnerable adult or elderly person (Class 9 felony) for the same conduct (recklessly causing significant bodily injury). The RCC does not include fifth degree of the RCC assault statute in paragraph (c)(2) because it already includes higher penalty based on the victim's status as a vulnerable adult or elderly person.

- The RCC does not incorporate the recommendation to include kidnapping in the list of specified offenses in paragraph (c)(2). Both kidnapping and aggravated kidnapping in the RCC have higher penalties than third degree criminal abuse of a vulnerable adult or elderly person. Including them in third degree criminal abuse of a vulnerable adult or elderly person would authorize a lower penalty for the same conduct.
- The RCC incorporates the recommendation to include both types of offensive contact prohibited in the RCC offensive physical contact offense (RCC § 1205)—contact with bodily fluid or excrement and general offensive physical contact—by including the offensive physical contact offense in the list of specified offenses in paragraph (c)(2).

(5) *The CCRC recommends deleting what was previously subparagraph (c)(2)(B) ("Purposely causes significant emotional distress by confining the complainant."). An actor that purposely causes significant emotional distress by confining the complainant has likely committed criminal restraint, which is included in the list of offenses in paragraph (c)(2) of the statute. To the extent that an actor purposely causes significant emotional distress by confining the complainant and does not satisfy the requirements of the RCC criminal restraint statute, there may still be liability under the provisions of the statute that prohibit causing serious mental injury (subparagraphs (a)(2)(B) and (b)(2)(A)) or the RCC criminal neglect of a vulnerable adult or elderly person statute that prohibit creating a risk of serious mental injury.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *USAO, App. C, at 338 recommends in subparagraph (c)(2)(B) changing the culpable mental state from "purposely" to "knowingly" and deleting the words "by confining." With these changes, subparagraph (c)(2)(B) would require that the defendant "knowingly causes significant emotional distress" to the complainant instead of "purposely causes significant emotional distress by confining the complainant." USAO states that "knowingly" is the appropriate culpable mental state because "purposely" is a "mens rea that is too high." USAO states that under the current criminal abuse of a vulnerable adult statute, the only culpable mental states are intentionally or knowledge. USAO states it is*

unclear why confinement "is the only way to cause significant emotional distress under the statute" and that "USAO believes that any time a defendant knowingly causes significant emotional distress to a child, whether by confinement or otherwise, that should constitute Criminal Abuse of a Minor."

- The RCC does not incorporate this recommendation because, as is discussed above, the CCRC recommends deleting subparagraph (c)(2)(B).

(7) *USAO, App. C at 336, recommends requiring in subparagraph (c)(2)(C) "or engages in conduct that creates a grave risk of causing bodily injury to the complainant." With this change, subparagraph (c)(2)(C) would require "recklessly causes bodily injury to the complainant, or engages in conduct that creates a grave risk of causing bodily injury to the complainant." USAO states that this language is consistent with USAO's proposed change to the criminal abuse of a minor statute. In addition, USAO states that the current criminal abuse of a vulnerable adult statute includes "threaten[ing] to inflict physical pain or injury," which means no infliction of bodily injury is required, and that this change is "consistent with current law."*

- The RCC does not incorporate this recommendation for the reasons stated above for this recommendation in criminal abuse of a minor. In addition, while the current criminal abuse of a vulnerable adult or elderly person includes threats to inflict pain or injury, the RCC criminal abuse of a vulnerable adult or elderly person statute specifically includes committing threats in paragraph (c)(2) of third degree.

(8) *The CCRC recommends reducing the penalty classification for second degree criminal abuse of a vulnerable adult or elderly person from a Class 7 felony to a Class 8 felony, and reducing the penalty classification for third degree criminal abuse of a vulnerable adult or elderly person from a Class 8 felony to a Class 9 felony. First degree criminal abuse of a vulnerable adult or elderly person remains a Class 6 felony, which is the same classification as first degree of the RCC assault statute. As it pertains to "serious bodily injury," first degree criminal abuse of a vulnerable adult or elderly person has a lower culpable mental state ("recklessly") than first degree assault ("recklessly, with extreme difference to human life."). The fact that the defendant must have a responsibility for the health, welfare, or supervision of the complainant under the criminal abuse of a minor statute justifies the equivalent penalty, despite the lower culpable mental state. As it pertains to recklessly causing "significant bodily injury," however, keeping second degree criminal abuse of a vulnerable adult or elderly person a Class 7 felony is disproportionate to the penalty for fourth degree assault (recklessly causes significant bodily injury to any complainant), which is a Class 9 felony. A Class 8 felony (still higher than the equivalent bodily injury in assault) is more proportionate for second degree criminal abuse of a vulnerable adult or elderly person. Third degree criminal abuse of a vulnerable adult or elderly person, which has been revised to include sixth degree assault (Class B misdemeanor) and all gradations of the offensive physical contact offense (Class B misdemeanor and lower), similarly is more proportionately classified as a Class 9 felony (still higher than the equivalent bodily injury in assault).*

- This change improves the proportionality of the revised statute.

(9) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(10) *The CCRC recommends applying strict liability to the requirements of the defense. The language "in fact" in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*

- This change improves the clarity of the revised statute.

RCC § 22E-1504. Criminal Neglect of a Vulnerable Adult or Elderly Person.

(1) *USAO, App. C at 338-339, recommends deleting "under civil law" from paragraphs (a)(1), (b)(1), and (c)(1) so that they require that the defendant has a "responsibility for the health, welfare, or supervision of the complainant." USAO states that "under civil law" is "confusing and needlessly require[s] a reliance on civil law to understand criminal law."*

- The RCC does not incorporate this recommendation because it would reduce the clarity of the revised statute. Leaving ambiguous the basis for determining what relationships are "responsible for the health, welfare, or supervision of the complainant simply would leave courts to either look to civil law standards, or to create new, piecemeal standards for these relationships in a criminal context with no legislative guidance. Referring to civil law in the statute provides notice and specifies an objective standard for determining when an individual is responsible for a minor and clarifies the revised definition.

(2) *USAO, App. C at 427, recommends increasing the proposed penalties for criminal neglect of a vulnerable adult or elderly person. Specifically, USAO recommends that first degree and second degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as Class 6 felonies and that third degree of the RCC criminal neglect of a vulnerable adult or elderly person statute be classified as a Class 7 felony. USAO relies on its reasoning for this recommendation in the RCC criminal neglect of a minor statute, discussed above.*

- The RCC does not incorporate this recommendation for the reasons discussed above for this recommendation in the RCC criminal abuse of a minor statute.

(3) *The CCRC recommends reducing the penalty classification for second and third degree of the criminal neglect of a vulnerable adult or elderly person offense by one class. Specifically, the CCRC recommends reducing second degree criminal neglect of a minor from a Class 9 felony to a Class A misdemeanor, and reducing third degree criminal neglect of a vulnerable adult or elderly person offense from a Class A misdemeanor to a Class B misdemeanor. As is discussed in this Appendix for the RCC criminal abuse of a vulnerable adult or elderly person offense, second degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 8 felony and third degree criminal abuse of a vulnerable adult or elderly person offense is now a Class 9 felony. Reducing the penalty classification by one class for second and third degree criminal neglect of a vulnerable adult or elderly person offense keeps the penalties proportionate as compared to the criminal abuse of a vulnerable adult or elderly person offense. The reduced penalties for creating a risk of physical harm in the criminal neglect of a vulnerable adult or elderly person statute are also proportionate compared to the RCC assault statute.*[441]

[441] Fourth degree assault prohibits recklessly causing significant bodily injury and is a Class 9 felony. Second degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly creating a risk of significant bodily injury, is now one penalty classification lower, a Class A misdemeanor. Sixth

- This change improves the proportionality of the revised statutes.

(4) *The CCRC recommends deleting the burden of proof requirements for the defense. The RCC has a general provision that addresses the burden of proof for all defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity and consistency of the revised statute.

(5) *The CCRC recommends deleting the jury demandability provisions in subsection (g). The RCC now addresses jury demandability for all RCC offenses in a general provision (RCC § 22E-XX).*

- This revision improves the clarity, consistency, and proportionality of the revised statute.

(6) *The CCRC recommends applying strict liability to the requirements of the defense. The language "in fact" in subsection (d), per the rule of construction in RCC § 22E-207, applies to the elements in paragraph (d)(1) and paragraph (d)(2). The previous version of the effective consent defense did not specify whether a culpable mental state or strict liability applied to these facts.*

- This change improves the clarity of the revised statute.

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degree assault prohibits recklessly causing bodily injury and is a Class B misdemeanor. Third degree criminal neglect of a vulnerable adult or elderly person, which prohibits recklessly failing to provide and would entail risk of bodily harm, is now a Class B misdemeanor.

Chapter 16. Human Trafficking.

Forced Labor or Services. RCC § 22E-1601 & Forced Commercial Sex. RCC § 22E-1602.

(1) *OAG at App. C. 255, and USAO at App. C. 339, notes that the terms "labor" and "debt bondage" are not defined under RCC § 22E-701, and recommends that the terms should be defined.*

- The RCC incorporates this recommendation. This change will improve the clarity of the revised criminal code.

(2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(3) *OAG at App. C. 255, recommends striking the word "ordinary" from the exclusion from liability for threats of employment actions. OAG says that if employment actions are legal, they should still be exempted from liability even if they are not ordinary.*

- The RCC incorporates this recommendation by deleting the word "ordinary." This change will improve the proportionality of the revised criminal code.

(4) *USAO, at App. C. 339 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation because the USAO proposed change would change current District law in a way that is unclear and inconsistent with the RCC general approach to ensuring penalty enhancements help deter targeting certain protected categories of persons.
- First, it is unclear whether or why USAO is recommending elimination of a recklessness requirement as to the age of the complainant for human trafficking offenses. The USAO general comments at App. C 313-315 do not discuss the current human trafficking statutes directly and appear to be based solely on arguments about how proving recklessness as to age would circumvent the District's Rape Shield laws or change evidentiary practices around closely related types of information "not specifically covered by the Rape Shield Act." These Rape Shield evidentiary arguments at App. C 313-315 do not appear applicable to forms of human trafficking offenses (such as RCC § 22E-1601, Forced Labor or Services) that do not involve sexual conduct as an element. Furthermore, the USAO "general comments" at App. C 272-274, which preface all USAO

comments on the First Draft of Report #36, assert what appears to be a somewhat contradictory position about the mental state as to the appropriate mental state as to a minor complainant's age. Without distinguishing human trafficking or sex offenses, USAO App. C at 274 recommends that there be a new affirmative defense applying a negligence standard as to the defendant's age.[442] Lastly, none of the USAO comments address the fact that the one place where current D.C. Code human trafficking offenses refer to age as an element or enhancement, it is to require proof the actor was "knowing or in reckless disregard of the fact that the person has not attained the age of 18 years."[443] The USAO recommendation for strict liability (or negligence), thus appears to be a change in law.

- Considering the USAO Comments at App. C 313-315 as applied to human trafficking offenses that involve sexual conduct and complainant's age as elements, the USAO evidentiary arguments that requiring recklessness as to age undermines Rape Shield laws are problematic for the reasons described in response to USAO comments as to offenses under Chapter 13. The "recklessly" culpable mental state does not "create a legally sanctioned justification for the introduction by the defense of evidence that would otherwise be precluded by the Rape Shield Laws,"[444] which the

[442] USAO App. C at 274 ("Imposing an affirmative defense of negligence for the circumstance of the complainant's protected person status furthers the statute's purpose of protecting certain classes of individuals based upon their vulnerability (minors, vulnerable adults, senior citizens) or their significant role in providing public services to District residents (police and law enforcement, District officials, transit operators). USAO believes that a negligence standard is appropriate and consistent with current law.").

[443] D.C. Code 22-1834. See Commentary regarding RCC § 22E-1605. Sex Trafficking of Minors:

> "First, the revised sex trafficking of minors statute requires proof that a person was reckless as to the person trafficked being under 18. Subsection (a) of the current sex trafficking of children offense requires the actor to be 'knowing or in reckless disregard of the fact that the person has not attained the age of 18 years,' but does not define the culpable mental state terms. However, subsection (b) of the current statute further states that 'In a prosecution… in which the defendant had a reasonable opportunity to observe the person recruited, enticed… or maintained, the government need not prove that the defendant knew that the person had not attained the age of 18 years.' Consequently, the current statute's drafting is ambiguous as to whether 'recklessness' always suffices to prove liability (as appears to be stated in subsection (a)) or whether a knowing culpable mental state always is required for liability except where there is a reasonable opportunity to view the complainant (as appears to be stated in subsection (b)). There is no case law on point, however legislative history indicates that the latter interpretation of the statute is correct, and recklessness as to the complainant's age is insufficient for liability except when the actor has a reasonable opportunity to observe the complainant." (internal citations omitted).

[444] USAO lists several examples of "evidence that is known to the defendant" that it states would be admissible to prove that the defendant was not reckless as to the age of the complainant, but would not be allowed by the current rape shield statute: "the complainant had a history of engaging in sexual acts with adults, was on birth control, had prior pregnancies, had children, had an abortion, prostituted, and/or engaged in other sexual acts of an adult nature that suggested to the defendant that the complainant was of a legally mature age." USAO, App. C at 314. However, under the current and RCC rape shield statutes, it appears that this evidence would largely be excluded. To the extent that this evidence is evidence of the complainant's "past sexual behavior" and is not reputation or opinion evidence, it is not admissible unless certain procedural requirements are met and the evidence is "constitutionally required to be admitted" D.C.

RCC does not substantively change in any manner, or "extremely prejudicial, and otherwise inadmissible, evidence not specially covered by the Rape Shield Act."[445] Of particular note, the current D.C. Code § 22-1834 Sex trafficking of Children statute *already* combines a recklessness standard with a robust Rape Shield law in § 22–1839.

- Second, the USAO proposal may lead to disproportionate penalties insofar as the recommendation would provide enhanced penalties for conduct involving minors when the actor either could not have reasonably known that the complainant was a minor (in the case of strict liability) or should have known (but didn't) that the complainant was a minor. Human trafficking offenses are among the most serious in the RCC (and current D.C. Code), with age-based enhancements providing a substantial increase in liability of about 5-15 years.

(5) *USAO, at App. C. 339, recommends adding a comma in paragraph (c)(2) after the words "provide services." USAO recommends adding the comma to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide labor, for more than 180 days.*

- The RCC incorporates this recommendation by adding commas as suggested. This change improves the clarity or the revised statute.

(6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (c)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

Code § 22-1839. In addition, even if evidence is constitutionally required to be admitted, the evidence may only be admitted in accordance with the procedures specified in D.C. Code § 22-3022(b). It is unclear whether the hypothetical evidence offered by the USAO in its comments would be constitutionally required to be admitted. Current D.C. Code § 22-1839 does not define "past sexual behavior." However, the current rape shield statutes under Chapter 30 and the RCC define "past sexual behavior" as "sexual behavior other than the sexual behavior with respect to which" certain sex offenses is alleged. D.C. Code § 22-3021(b); RCC § 22E-1311.

[445] USAO lists several examples of "extremely prejudicial, and otherwise inadmissible, evidence not specifically covered by the Rape Shield Act" that it states would be admissible under the RCC sexual assault penalty enhancements: "the victim's reputation, physical characteristics such as weight and size of body parts including breasts, hips, and buttocks, style of dress and speech, use of alcohol or drugs, school attendance, personal associates, compromising photographs on social media, etc."

- This revision improves the clarity of the revised statute.

Forced Commercial Sex. RCC § 22E-1602.

(1) *USAO, at App. C. 339-340 recommends adding a comma after the words "provide commercial sex acts" to clarify that the enhancement will apply if the actor holds the complainant, or causes the person to provide commercial sex acts, for more than 180 days.*

- The RCC incorporates this recommendation. This change improves the clarity of the revised statute.

(2) *CCRC recommends replacing the words "with another person" with "other than with the actor." This change is not intended to substantively change the offense. The words "with another person" were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words "other than with the actor" clarify that the offense includes masturbation.*

- This change improves the clarity of the revised statute.

(3) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E-1603. Trafficking in Labor or Services.

(1) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1). USAO says that "[t]hese changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1).*

- The RCC does not incorporate this recommendation because it would change current law in a way that is inconsistent with the organization of current and RCC offenses, appears to be unnecessary, and may make the revised statute less clear. Although USAO's comment says that, "[t]hese additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise," the plain language of the RCC (and present D.C. Code statute) already covers such conduct in a more direct and clear manner. First, it is unclear what it means to "advertise . . . a person." If the word "advertise" is intended to cover cases in which a person advertises human beings for sale for the purposes of forced labor, that person would be liable under the other statutory language for "recruit[ing]," "provid[ing]," "obtain[ing]," or "maintain[ing]" a person. Alternatively, accomplice or conspiracy liability may apply to a person who advertises on behalf of another party who actually recruits, obtains, transports, etc. persons, knowing they will be caused to provide labor or services by means of coercive threat or debt bondage. Second, it is also unclear what conduct constitutes "patronizing" a person, with intent that as a result the person will be caused to provide labor or services by means of a coercive threat or debt bondage. The term could include receiving the labor or services of a person. But, if the person who performed labor or services did so due to coercive threats or debt bondage, then the patron may be prosecuted under the forced labor or benefitting from human trafficking statutes, depending on the specific facts of the case. Lastly, as described in the Appendix D1 entry regarding RCC § 22E-302, Solicitation, the RCC general solicitation statute has been revised to apply to all offenses against persons, including human trafficking offenses. Consequently, adding the word "solicits" is unnecessary.

(2) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(3) *USAO, at App. C. 340 recommends that the penalty enhancement based on the age of the complainant should be re-drafted to require only strict liability instead of recklessness as to the complainant's age. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(4) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E-1604. Trafficking in Commercial Sex.

(1) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(2) *USAO, at App. C. 340-341 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(3) *USAO, at App. 341, in subsection (c), recommends changing the words "before applying to" to "in addition to" which USAO says is non-substantive and intended to conform with the language of other penalty enhancements in Chapter 16.*

- The RCC incorporates this recommendation by using the "in addition to" language suggested. This change clarifies and improves the consistency of the revised statutes.

(4) *CCRC recommends replacing the words "with another person" with "other than with the actor." This change is not intended to substantively change the offense. The words "with another person" were intended to clarify that the offense does not include intent to cause the complainant to engage in a commercial sex act with the actor. However, that language could be interpreted to exclude masturbation. The words "other than with the actor" clarify that the offense includes masturbation.*

- This change improves the clarity of the revised statute.

(5) *The CCRC recommends re-drafting paragraph (a)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(6) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any*

general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1605. Sex Trafficking of a Minor.

(1) *USAO, at App. C. 341, recommends changing the name of the offense "sex trafficking of minors" to "sex trafficking of a minor." USAO also suggests that language in subsection (a) of the statute be updated to refer to state "An actor commits the offense of sex trafficking of a minor when that actor[.]" USAO notes that this recommendation is not intended to substantively change the offense.*

- The RCC incorporates this recommendation. This change makes the label of the offense consistent with other RCC offenses involving minors.

(2) *USAO, at App. C. 340, recommends adding the words "advertises, patronizes, or solicits" to subsection (a)(1).*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(3) *USAO, at App. C. 341-342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(4) *USAO, at App. C. 342, recommends deleting the words "with another person" from paragraph (a)(2). USAO, at App. C. 342, recommends including "masturbation" in the definition of "commercial sex act."*

- The RCC partially incorporates this recommendation by amending the phrase "with another person" to "other than with the actor." The words "other than with the actor" clarify that the offense includes masturbation. The term "commercial sex act" is defined as "any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received, by any person." Masturbation, insofar as it involves penetration of the anus or vulva, or touching clothed or unclothed genitalia, with desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, constitutes a "commercial sex act" if performed in exchange for anything of value. The requirement that the commercial sex act be "with another person" is intended to exclude cases in which the actor has intent that the complainant engage in a commercial sex act *with the actor*. An actor who acts with intent that the minor will engage in a commercial sex act with the actor may be liable under separate sex offenses codified in Chapter 13.

(5) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (b)(1) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any*

gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.

- This revision improves the clarity of the revised statute.

RCC § 22E-1606. Benefitting from Human Trafficking.

(1) *OAG at App. C. 255-256, recommends changing the statutory language to codify language in the RCC commentary that a person's participation in a group must in some way be related to the group's violation of a human trafficking statute.*

- The RCC incorporates this recommendation by adding as an element to the first and second degrees of the statute a subparagraph (4) that states: "In fact, the actor's participation in the group furthers, in any manner, the conduct that constitutes a human trafficking offense." This change clarifies the revised statute.

RCC § 22E-1607. Misuse of Documents.

(1) *OAG, at App. C. 256, recommends that the commentary should clarify that the words "in order to" do not introduce a new mental state.*

- The RCC incorporates this recommendation by stating in the commentary that the words "in order to" do not introduce a new mental state. This change clarifies the RCC commentary.

(2) *OAG, at App. C. 406, recommends that the misuse of documents offense be divided into two penalty gradations, with the first degree version requiring intent to maintain the performance of a commercial sex act, and second degree version requiring intent to maintain labor or services. OAG also recommends that the penalties for misuse of documents should be the same as for benefitting from human trafficking.*

- The RCC partially incorporates this recommendation by dividing the misuse of documents offense into two penalty grades, based on whether the actor had intent to cause a person to engage in commercial sex acts, or labor or services. This change improves the proportionality of the revised criminal code.
- However, the RCC does not incorporate OAG's recommendation that the two grades of misuse of documents be the same as for the corresponding penalties for benefitting from human trafficking because doing so may authorize disproportionate penalties. Misuse of documents is a semi-inchoate offense, and does not require that any person actually provided labor or services, or engaged in a commercial sex act. In contrast, the higher penalty classification for benefitting from human trafficking requires that a person was actually coerced into providing labor or services, or engaging in a commercial sex act. Notably, under the RCC, a person may be liable for both benefitting from human trafficking and misuse of documents and sentenced consecutively for these crimes.

RCC § 22E-1608. Commercial Sex with a Trafficked Person.

(1) *USAO, at App. C. 342 recommends that subsection (c) should be re-drafted to require only strict liability instead of recklessness as to the complainant status as a protected person. USAO says, by way of explanation, that it "relies on the rationale set forth above in the General Comments to Chapter 13."*

- The RCC does not incorporate this recommendation for the reasons stated above regarding the USAO identical recommendation regarding Trafficking in Labor or Services, RCC § 22E-1603 and Forced Commercial Sex, RCC § 22E-1602.

(2) *The CCRC recommends re-drafting paragraphs (a)(2) and (b)(2) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

RCC § 22E-1609. Forfeiture.

[No advisory group comments or CCRC recommended changes.]

RCC § 22E-1610. Reputation or Opinion Evidence.

[No advisory group comments or CCRC recommended changes.]

RCC § 22E-1611. Civil Action.

(1) *The CRCC recommends replacing the word "and" with "or" in subsection (a). This change clarifies that an individual who was the victim of any of the statutes listed in subsection (a) may bring a civil action. This change clarifies the revised statute.*

RCC § 22E-1612. Limitation on Liabilities and Sentencing for RCC Chapter 16 Offenses

(1) *OAG, at App. C. 257, recommends amending the limitation on liabilities and sentencing statute only to bar convictions for conduct that occurs while the person is being trafficked. USAO, at App. C. 342, recommends deleting RCC § 22E-1612.*

- The RCC partially incorporates the OAG recommendation by requiring the person to have been subjected to human trafficking by the principal "within the past 3 years prior to either the conduct constituting the offense by the principal, or the formation of the conspiracy. However, the RCC does not incorporate the USAO recommendation because it may authorize disproportionate penalties. Victims of human trafficking offenses may still have diminished culpability even after the initial trafficking offense has been completed due to the principal's ongoing influence over the victim. However, recognizing that such influence may diminish over time when the victim is no longer being trafficked, the revised statute has a three year time limitation. Notably, a prior victim of human trafficking remains liable as: 1) a principal engaged in human trafficking; 2) as an accomplice or co-conspirator when the principal was not the perpetrator of the original trafficking offense; or 3) as a principal, accomplice, or co-conspirator for another offense against persons in the RCC.

Chapter 18. Stalking, Obscenity, and Invasions of Privacy.

RCC § 22E-1801. Stalking.

(1) *OAG, App. C at 249 n. 7, recommends either striking the exclusion from liability for protected speech or providing a specific example of a stalking fact pattern that involves protected speech. USAO, App. C at 311, states, "USAO believes that subsection (b)(1) encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all for the concerns articulated in subsection (b)(3) as well."*

- The RCC incorporates this recommendation by striking the exclusion from liability language as potentially confusing. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(2) *USAO, App. C at 310, recommends requiring knowledge instead of purpose, stating, "Knowingly is the proper intent for the course of contact necessary for a stalking charge. This is particularly the case for the 'communicating to the complainant' prong. It is more appropriate to require proof that the defendant was aware that his actions were 'practically certain' to result in communications, rather than that he 'consciously desired' such a result. This is particularly the case with regard to electronic communications with the complainant."*

- The RCC does not incorporate this recommendation because reducing the culpable mental state to knowingly would criminalize new behavior in a new way that may authorize disproportionate penalties. The USAO comment does not provide a rationale for why knowledge is more appropriate than purpose. A purposeful culpable mental state appears to be the requirement under the current stalking statute in D.C. Code § 22-3133 which states: "It is unlawful for a person to purposefully engage in a course of conduct directed at a specific individual…" A key rationale for providing stalking liability for the negligent infliction of emotional harm—a uniquely low standard in the D.C. Code—is that punishment for such a result is warranted because the actor "purposely" engaged in targeted conduct against the victim.[446]
- Requiring mere knowledge may criminalize behavior that is innocent, constitutionally protected under the First Amendment, or both:
    - Consider, for example, a person who communicates to a large audience via television broadcast or an upload to YouTube. That person may be practically certain that the complainant will watch the broadcast, and negligent as to the fact that the complainant

[446] See the National Center for Victims of Crime, *Model Stalking Statute Revisited* (2007) at 34.

will be distressed by the content, but not consciously desire that the complainant watch.

- Consider also a divorced couple attending a family event, such as a wedding or a funeral. One former spouse may be practically certain that they are maintaining close proximity to the other as they move from the church to the reception hall, and negligent as to the fact that their very presence is distressing, but not consciously desire to physically follow them.[447]

(3) *USAO, App. C at 310-311, recommends eliminating the requirement that communications occur after receiving notice that the contact is unwelcome. USAO notes that: "To be liable for stalking, the defendant still must either intentionally or negligently cause the complainant to be in fear or suffer distress, which implies that the defendant either knew or should have known that the defendant's actions were unwelcome."*

- The RCC partially incorporates this recommendation by eliminating the phrase "after knowingly receiving notice from the complainant, directly or indirectly, to stop such communication" and instead requiring that the person is negligent as to the fact that the contact is without the complainant's effective consent. The USAO comment appears to assume, without objection, that an actor should have known their actions are unwelcome and requiring negligence as to the fact that the contact is without the complainant's effective consent codifies this point. This change eliminates an unnecessary gap in liability.

(4) *USAO, App. C at 311, recommends providing liability for "using another individual's personal identifying information" in the stalking statute.*[448]

- The RCC partially incorporates this recommendation by amending the statute to include "falsely personating" the complainant as a predicate for stalking liability and adding a statutory reference to conduct that constitutes "identity theft" in the reordered subparagraph (a)(1)(D). The revised stalking statute makes it unlawful to assume a victim's likeness and communicate to other people on the victim's behalf (e.g., falsely posing as the complainant in an online forum and making statements that intentionally or negligently inflict fear or emotional stress on the complainant). RCC § 22E-2205 (Identity Theft) makes it unlawful to use personal identifying information not only to obtain property or to avoid payment, but to transfer the information to a third person to facilitate their fraudulent use of the information to obtain property (e.g. posting another's credit card or social security number online). However, identity theft liability does not require intentional or negligent infliction of fear or emotional distress.[449] The revised stalking statute does not provide

[447] "Physically following" is defined in RCC § 22E-701.

[448] *See* D.C. Code § 22-3132(8)(C).

[449] To the extent that the actor commits identity theft as part of stalking those convictions would merge per RCC § 22E-214, consistent with the Council's prior statement that it did not intend for there to be multiple punishments for identity theft and stalking based on the same conduct. *See* Report on Bill 18-151, the

liability for mere use of "personal identifying information" because, as defined in the RCC (and current D.C. Code), that term broadly includes information not only such as account numbers, credit cards, credit ratings, and passwords, but readily available information such as a person's name and home address.[450] Many common uses of a person's name or address (e.g. publication of the name or home address of a person who wishes to remain anonymous) and constitutionally protected speech (e.g. stating in a public place that a named person is immoral or blameworthy) would appear to fall within the scope of stalking if mere use of identifying information is predicate conduct. This change eliminates an unnecessary gap in liability.

(5) *USAO, App. C at 311, recommends removing the exclusion from liability for speech concerning political matters and other matters of public concern to a complainant engaged in their official duties when the complainant is a government official, candidate for elected office, or employee of a business.*[451] *USAO states that the exclusion from liability should not permit a government official to be stalked or harassed in their personal space (e.g., a work call while at home). USAO also notes that "government official" is undefined and "employee of a business that serves the public" could include virtually all businesses, and therefore virtually all employees.*

- The RCC partially incorporates the recommendation regarding government officials and candidates for elected office by limiting the exception for "a government official" to a "District official," a defined term, when the District official is engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter. The location of such a public official—at an office, on the street, or at home—is irrelevant so long as the limitations of the exclusion are met. Harassing calls to District official's personal cell phone or home when the official is not on duty would not be subject to the exclusion under its plain terms. Moreover, while the USAO comment refers to physically following or physically monitoring,[452] the statutory language makes clear that the exception applies only to "a communication."
- The RCC partially incorporates the recommendation to narrow the scope of the exclusion for businesses and employees when those complainants are engaged in their official duties and the communication alleged to constitute stalking concerns a political or public matter.

(6) *USAO, App. C at 311, recommends removing the exclusion from liability for a journalist, law enforcement officer, professional investigator, attorney, process server,* pro se *litigant, or compliance investigator.*[453] *USAO says that the*

"Omnibus Public Safety and Justice Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (June 29, 2009) at Page 46.

[450] RCC § 22E-701.

[451] RCC § 22E-1801(b)(2). [Previously numbered RCC § 22E-1206(b)(2).]

[452] "Physically following" and "physically monitoring" are defined in RCC § 22E-701.

[453] RCC § 22E-1801(b)(3). [Previously numbered RCC § 22E-1206(b)(3).]

exclusion is unnecessary because the exclusion from liability for protected activity "encompasses the constitutional concerns that could otherwise be implicated by this statute, and is an appropriate catch-all…"

- The RCC does not incorporate this recommendation because it would make the revised statute less clear. As the commentary explains, "Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[454] Without a clear exclusion, such legitimate activities may be deemed stalking."[455] It is not inconceivable that a person would otherwise be accused of stalking for conduct that is within the scope of their professional duties or legal obligations.[456]
- The RCC strikes the prior language in favor of the exclusion articulated in paragraph (b)(2) for conduct that is "[a]uthorized…by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty."

(7) *USAO, App. C at 311-312, 415-419, and 426, recommends eliminating the right to a jury trial for attempted stalking. USAO states that it is appropriate to do so, explaining, "There is no particular interest in attempted stalking being jury demandable, as jury trials involve considerable resources that non-jury trials do not."*

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendation. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced stalking as a Class 9 felony and unenhanced stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.
- As the DCCA recently explained in *Coleman v. United States*,[457] the Council "found it 'highly appropriate that a jury of [the defendant's] peers…judge whether the behavior is acceptable or outside the norm and

[454] Many of the professional activities excepted in the RCC stalking statute, e.g. a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).

[455] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.

[456] *See, e.g.*, Eugene Volokh, *How I Was a Criminal Defendant in a N.J. Harassment Case*, REASON (August 22, 2019).

[457] *Coleman v. United States*, 202 A.3d 1127 (D.C. 2019).

> indicative of escalating problems.'"[458] The court went on to explain, "The Council expressly set the maximum penalty for stalking at a level that guaranteed the defendant's right to a jury trial…(explaining that the penalty of twelve months for first-time stalking offenders was established 'so that a defendant will have a right to a jury of [his] peers')."[459] In fact, the Council has long recognized a heightened need to provide jury when "the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt."[460] Additionally, in another recent opinion, the DCCA noted, "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[461]

(7) *OAG, App. C at 250, and USAO, App. C at 312, recommend that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant. OAG and USAO explain that a person may be subject to a court order or condition of release that permits limited contact with the complainant under specified circumstances and does not prohibit contact categorically.*

- The RCC partially incorporates this recommendation by specifying that the enhancement applies when the person's conduct violates a court order or condition of release prohibiting or restricting contact with the complainant. This change eliminates an unnecessary gap in liability.[462]

(8) *USAO, App. C at 312, recommends that the repeat offender enhancement clarify that it applies to a person with "one* or more*" convictions for stalking within 10 years. (Emphasis added.)*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute and does not further change District law.

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[458] *Id*. at 1134 (citing D.C. Council, Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33 (June 26, 2009), http://lims.dccouncil.us/Download/22306/B18-0151-CommitteeReport1.pdf (Committee Report)).

> The current version of the stalking statute was enacted as part of the Omnibus Public Safety and Justice Amendment Act of 2009, D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec. 10, 2009). Citing the 'subjective nature' of stalking, the Council's Committee on Public Safety and the Judiciary deemed it an offense for which 'the community, not a single judge, should sit in judgment…'

[459] *Id*. (Internal citations omitted.)

[460] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

[461] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[462] Violation of a court order or condition of release is separately punishable as contempt. *See, e.g.*, D.C. Code §§ 16-1005(f); 23-1329(c).

(9) *USAO, App. C at 312, recommends that the "requirement that the defendant 'recklessly disregarded' the complainant's age be removed." USAO cites its general comments for all offenses on such penalty enhancements, but does not specify the general comments to which it is referring.*

- The RCC does not incorporate this recommendation because the USAO recommendation may authorize disproportionate penalties.
- First, the intended scope of the USAO comment is unclear. The USAO statutory language proposed in App. C at 312 strikes the revised statute's minimum age *and* age differential requirements but does not discuss these changes and instead refers to the USAO general comments. However, the USAO general comments in App. C at 282 do not appear to say anything about a minimum age and, regarding age differential, appear to take a position the opposite of the language recommended for stalking at App. C at 312. The USAO general comments in App. C at 282 state: "Certain age differential requirements exist in current law, and should remain in the RCC, such as the age differential requirement in the Sex Abuse of a Minor provision (providing, for example, that a defendant must be at least 4 years older than the complainant to be liable for that offense)." In fact, current District law provides for an age differential requirement for the stalking of a minor complainant enhancement.[463] The CCRC does not here address an age-gap requirement on the assumption that USAO did not intend to recommend striking the age-gap requirement from the enhancement for the complainant's status as a minor. The USAO general comments in App. C at 273, however, recommend that there be a new affirmative defense applying a negligence standard as to the defendant's age.
- Second, assuming the USAO intends to recommend a "negligence" standard as to the victim's status as a protected person, the CCRC does not incorporate the recommendation for the reasons stated in the response to the same comment in the RCC murder statute.[464]

(10) *OAG, App. C at 250, recommends revising the sentence in the commentary (p. 130) that states, "The term 'court order' includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim." OAG explains the word "clearly" does not appear in the statutory language and is unclear.*

- The RCC incorporates this recommendation by revising relevant sentence to state, "The term 'court order' includes any judicial directive, oral or written, that restricts contact with the stalking victim." This change clarifies the revised commentary.

(11) *OAG, App. C at 250, recommends revising the repeat offender penalty enhancement to clarify that the prior stalking conviction could be in any jurisdiction.*

[463] D.C. Code § 22-3134(b) ("A person who violates § 22-3133 shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 5 years, or both, if the person: …(3) At the time, was at least 4 years older than the specific individual and the specific individual was less than 18 years of age;).
[464] RCC § 22E-1101.

- The RCC incorporates this recommendation by specifying that enhancement applies to any person who "Has one or more prior convictions within 10 years before the offense for: (i) Stalking under RCC § 22E-1801 or a comparable offense; or (ii) Electronic Stalking under RCC § 22E-1802 or a comparable offense." This change clarifies the revised statute and does not further change District law.

(12) *OAG, App. C at 250, recommends specifying that a defendant is strictly liable for causing more than $2,500 in financial injury.*[465] *OAG notes that the other penalty enhancements include the defined term "in fact"*[466] *to indicate that no culpable mental state applies.*

- The RCC incorporates this recommendation by revising the relevant subparagraph to state, "The person, in fact, caused more than $5,000 in financial injury." (The threshold amount has been increased from $2,500 to $5,000 as noted below.) This change clarifies the revised offense.

(13) *USAO, App. C at 426, recommends reclassifying enhanced stalking as a Class 8 felony. USAO states, "Stalking is serious behavior that can be linked to lethal behavior."*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty.

(14) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $2,500 to $5,000, consistent with the thresholds for the revised property offenses.*[467] *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*[468]

- This change improves the consistency of the revised offenses.

(15) *The CCRC recommends adding the phrase "the complainant" to subparagraphs (a)(1)(A) and (a)(1)(B),*[469] *to improve the grammar in the offense definition.*

- This change clarifies, but does not substantively change, the revised offense.

(16) *The CCRC recommends revising the phrase "Purposely, on 2 or more separate occasions, engages in a course of conduct directed at a complainant…" to instead read: "Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions…," so that it is clear the person does not have to engage in two separate courses of conduct.*

- This change clarifies the revised statute and does not further change District law.

(17) *The CCRC recommends replacing the reference to "a criminal harm involving a trespass, threat, taking of property, or damage to property" with a*

[465] RCC § 22E-1801(e)(2)(D).
[466] RCC § 22E-207.
[467] *See, e.g.*, RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).
[468] RCC § 22E-2201.
[469] [Previously numbered (a)(1)(C).]

specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.

- This change clarifies the revised statute and does not further change District law.

(18) *The CCRC recommends amending the penalty enhancement provision to include an enhancement for a prior conviction for electronic stalking. The RCC electronic stalking offense,*[470] *which was recently issued in the First Draft of Report #42 (November 20, 2019), replaces certain components of the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

- This change eliminates an unnecessary gap in liability.

(19) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

[470] *See* RCC § 22E-1802.

RCC § 22E-1802. Electronic Stalking.

(1) *PDS, App. C at 446, recommends creating two degrees of electronic stalking, differentiating between harm that is intentionally caused and harm that is negligently caused. PDS states, "Negligently causing a complainant to fear for his or her safety or to feel emotional distress is substantially less culpable conduct than intentional action meant to provoke distress and fear.*

- The RCC does not incorporate this recommendation because it may result in inconsistency with the revised stalking offense[471] and disproportionate penalties. The revised statute follows current District law in providing liability for persons who may be acting with beneficent intentions, but nonetheless actually cause emotional harm to another by their behavior. While it is highly unusual in American jurisprudence to provide criminal liability for unintentional wrongdoing, modern stalking statutes in several jurisdictions besides the District provide liability based on negligence. The District's decision in 2009 to provide a low culpable mental state requirement for stalking may be necessary to address some unique fact patterns involved in stalking-type behavior—e.g., involving a person who is unreasonably mistaken about the complainant's love for him or her, following the complainant without knowing that such behavior causes the complainant harm. In the revised statute, negligent and intentional conduct are not treated equally. The lower culpable mental state requirement in subparagraph (a)(2)(B) is paired with a requirement of actual harm, while the higher culpability requirement of subparagraph (a)(2)(A) is inchoate. Consequently, the two means of committing electronic stalking are relatively balanced in the overall seriousness of the conduct.

(2) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[472] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(3) *USAO, App. C at 454, recommends defining the term "course of conduct" to mean "actions taken on two or more occasions," so that it is clear the person does not have to engage in two separate courses of conduct.*

- The RCC partially incorporates this recommendation by revising the phrase "Purposely, on 2 or more separate occasions, engages in a course of

[471] RCC § 22E-1801.

[472] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

conduct directed at a complainant…" to "Purposely engages in a course of conduct directed at a complainant that consists of 2 or more occasions…" This change clarifies the revised statute and does not further change District law.

(4) *USAO, App. C at 454, requests that the RCC clarify the exclusion from liability in subparagraph (b)(2)(A) for persons who are a party to the communication that is being recorded. USAO states, "if a defendant took numerous photos of the complainant, but took a photo in 'selfie' mode and included himself in that photo, it is unclear if this exclusion would means that the defendant was not liable for stalking."*

- The RCC incorporates this recommendation by clarifying in the statutory text that the exclusion from liability applies to audio recordings only. This change clarifies the revised statute.

(5) *USAO, App. C at 454-455, recommends revising the commentary to refer to "engaging in" a pattern of misconduct instead of "causing" a pattern of misconduct. USAO also recommends striking the word "uninterrupted," stating, "Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking."*

- The RCC partially incorporates this recommendation by substituting the phrase "engage in" for "cause" and revising the footnote that accompanies the phrase "uninterrupted purpose." The footnote now explains that it is the purpose, not the conduct, that must be uninterrupted. This change clarifies the revised commentary.

(6) *USAO, App. C at 455, recommends eliminating the right to a jury trial for attempted electronic stalking, consistent with its recommendation for the revised stalking offense.*[473]

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendations. In the First Draft of Report #41 (October 3, 2019), the CCRC recommended that the RCC classify enhanced electronic stalking as a Class 9 felony and unenhanced electronic stalking as a Class A misdemeanor. In the Second Draft of Report #41, the CCRC recommends that the RCC classify all completed and inchoate Class A misdemeanors as jury demandable offenses, improving the consistency of the revised statutes.

(7) *USAO, App. C at 455, recommends that the penalty enhancement for violation of a court order be broadened to include a court order or condition of release that either restricts or prohibits contact with the complainant, consistent with its recommendation for the revised stalking offense.*[474]

- The RCC incorporates this recommendation by amending the penalty enhancement provision to state, "The person, in fact, was subject to a court order or condition of release prohibiting or restricting contact with

[473] RCC § 22E-1801.
[474] RCC § 22E-1801.

the complainant." This change eliminates an unnecessary gap in liability.[475]

(8) *USAO, App. C at 455, recommends that the repeat offender enhancement clarify that it applies to a person with "one* or more*" convictions for electronic stalking within 10 years. (Emphasis added.)*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute and does not further change District law.

(9) *USAO, App. C at 455, recommends that the "requirement that the defendant 'recklessly disregarded' the complainant's age be removed," consistent with its recommendation for the revised stalking offense.*[476]

- The RCC does not does not incorporate this recommendation for the reasons stated in the response to the same comment in the RCC stalking statute.[477]

(10) *USAO, App. C at 455, recommends stating that "if the victim suffers any harm in the District stemming from the defendant's actions, then there would be jurisdiction to prosecute this offense in the District."*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.[478] The conduct element of this offense is satisfied as soon as the recording or monitoring occurs. The result element of an offense under subparagraph (a)(2)(B) of this offense is satisfied as soon as the fear or emotional distress occurs and, if the complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the recording, monitoring, fear, or distress occurs here. However, the USAO recommendation goes further in recommending a statement that "*any harm…stemming from* the defendant's actions" is sufficient for jurisdiction. Consider, for example, a person who is a victim of stalking conduct in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.

(11) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

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[475] Violation of a court order or condition of release also is separately punishable as contempt. *See, e.g.,* D.C. Code §§ 16-1005(f); 23-1329(c).

[476] RCC § 22E-1801.

[477] RCC § 22E-1801.

[478] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.).

(12) *The CCRC recommends broadening the penalty enhancement for violation of a court order to include a court order or condition of release that either* restricts or *prohibits contact with the complainant, consistent with the revision to the stalking offense.*[479]

- This change eliminates an unnecessary gap in liability.

(13) *The CCRC recommends increasing the value threshold for the financial injury penalty enhancement from $2,500 to $5,000, consistent with the thresholds for the revised property offenses.*[480] *This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.*[481]

- This change improves the consistency of the revised offenses.

(14) *The CCRC recommends specifying that a defendant is strictly liable for causing more than $5,000 in financial injury, consistent with the revision to the stalking offense.* [482]

- This change clarifies the revised offense and does not further change District law.

(15) *The CCRC recommends striking the exclusion from liability for certain types of employment activity in favor of an exclusion for conduct that is "[a]uthorized…by a court order or District statute, regulation, rule, or license; or carrying out a specific, lawful commercial purpose or employment duty, when acting within the reasonable scope of that purpose or duty," consistent with the revision to the stalking offense.*[483]

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(16) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(17) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying electronic stalking as a Class A misdemeanor and recommends classifying all*

[479] RCC § 22E-1801.
[480] *See, e.g.*, RCC §§ 22E-2101 (Theft); 22E-2202 (Fraud); 22E-2205 (Identity Theft).
[481] RCC § 22E-2201.
[482] RCC § 22E-1801.
[483] RCC § 22E-1801.

Class A misdemeanors, and inchoate versions of those offenses, as jury demandable offenses.

- This change improves the consistency of the revised statutes.

(18) *The CCRC recommends striking the phrase "The person engages in the course of conduct," consistent with the stalking offense.*[484]

- This change improves the consistency of the revised statutes and does not further change District law.

[484] RCC § 22E-1801.

RCC § 22E-1803. Voyeurism.

(1) *OAG, App. C at 430-431, recommends that subparagraph (a)(2) be redrafted to state, "Without the complainant's effective consent to being observed and for the creation of an image."*[485] *OAG explains that it is unclear in the current draft whether "without the complainant's effective consent" refers to the creation of the image or to the viewing of the nude complainant.*

- The RCC partially incorporates this recommendation by revising the explanatory note to clarify that "effective consent" in subsection (a) refers to the creation of the image and "effective consent" in subsection (b) refers to the observation. The proposed statutory language is not incorporated because it may make the statute more confusing. This change clarifies the revised commentary.

(2) *OAG, App. C at 431, and USAO, App. C at 456, recommend amending the penalty enhancement to include actors who are reckless as to the age of the complainant instead of only those who know the age of the complainant. OAG notes that other RCC provisions require mere negligence as to the complainant's age.*[486]

- The RCC incorporates this recommendation by revising the penalty enhancement to require that "the actor is reckless as to the fact that a complainant is under 18 years of age." This change improves the consistency of the revised statutes.

(3) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[487] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(4) *USAO, App. C at 455 recommends criminalizing the observation or recording of any "female breast," as opposed to a "developed female breast." USAO states, "A girl who has not yet begun puberty, and thus does not even have a 'developing' female breast, may still have an interest in privacy in her breast. Likewise, if an adult woman undergoes a mastectomy, there could be a question as to whether her breast is 'developed.'"*

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[485] To make the effective consent provision in second degree voyeurism parallel, OAG also suggests that (b)(2) be amended to read "Without the complainant's effective consent to be observed."

[486] RCC § 22E-1302, Sexual Abuse of a Minor; RCC § 22E-1304, Sexually Suggestive Conduct with a Minor; RCC § 22E-1305, Enticing a Minor into Sexual Conduct; RCC § 22E-1306, Arranging for Sexual Conduct with a Minor; RCC § 22E-1605, Sex Trafficking of Minors; RCC § 22E-1806, Distribution of an Obscene Image to a Minor; RCC § 22E-1807, Trafficking an Obscene Image of a Minor; RCC § 22E-1808, Possession of an Obscene Image of a Minor; RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor; and RCC § 22E-1810, Attending or Viewing a Live Sexual Performance of a Minor.

[487] Merriam-Webster.com, *"derivative"*, 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

- The RCC incorporates this recommendation by deleting the modifier "developed" and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. The revised statute's requirement that there be a reasonable expectation of privacy will continue to bar liability for observing or recording an undeveloped female chest (such as a child wearing only a diaper) in many situations. This change clarifies the revised commentary and may eliminate a gap in liability.

(5) *USAO, App. C at 455-456, recommends criminalizing the observation or recording of a person "using a toilet or a urinal." USAO says that using the bathroom is "a very intimate and private experience."*

- The RCC partially incorporates this recommendation by amending the statute to provide liability for observation or recording of a person "urinating or defecating". While it may be rare that a person will observe or record someone urinating or defecating without also observing or recording (or come dangerously close to observing or recording[488]) the person's nude or undergarment-clad genitals,[489] such conduct may occur. To clarify the scope of the statute the revision is limited to the acts of urinating and defecating instead of using more ambiguous language of "using the bathroom" or "using a toilet or a urinal" which may include other actions (e.g., vomiting, disposing of garbage). This change clarifies and eliminates a possible gap in liability in the revised statutes.

(6) *USAO, App. C at 456, recommends criminalizing the observation or recording of a sexual contact. USAO says that sexual contact can be an intimate and private experience. USAO also says that it is strange that voyeurism liability attaches for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attaches for a defendant creating an image of someone else touching that person's genitalia (sexual contact).*

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, observing or recording a sexual contact (which would include, for example, someone playfully grabbing their spouse's buttocks) does not amount to an offense unless there is an observation or recording of: nude or undergarment-clad private areas, sadomasochistic abuse, masturbation, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct that commonly considered to be most private.

(7) *USAO, App. C at 457, recommends the RCC expressly codify upskirting as a basis for voyeurism liability. USAO provides three examples in which a woman is sitting on the steps of the Lincoln Memorial, sitting with her legs slightly ajar on the Metrorail, or standing on an escalator. USAO does not propose any specific statutory language.*

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[488] *See* RCC § 22E-301, Criminal Attempt.

[489] *See also* RCC § 22E-1802, Electronic Stalking, providing liability where a course of electronic monitoring is intended to cause or causes significant emotional distress.

- The RCC does not incorporate this recommendation because the current language provides liability for "upskirting"-type conduct and an additional, general reference to "upskirting" may render the statute unconstitutionally vague. The general term "upskirting" is undefined and may include behavior that is innocent, constitutionally-protected, or both. The revised statute punishes upskirting in all of the scenarios noted in USAO's comment—the Lincoln Memorial, a Metrorail car, and an escalator—provided that the victim has a reasonable expectation of privacy under the circumstances.

(8) *USAO, App. C at 457, notes that the commentary states, "[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202." However, because the RCC definition of "assault" requires bodily injury to the complainant, it is unclear how this could constitute an assault.*

- The RCC addresses this comment by revising the footnote to state, "Chasing a woman and lifting her skirt would also be punished as offensive physical contact under RCC § 22E-1205." This change clarifies the revised commentary.

(9) *The CCRC recommends adding the word "or" at the end of subparagraph (b)(1)(A) because it was omitted in error.*

- This change clarifies the revised statute and does not further change District law.

(10) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(11) *The CCRC recommends specifying in the statutory language that a person must "directly" observe a complainant to commit second degree voyeurism. This clarifies that a person does not commit second degree voyeurism by viewing an image or listening to an audio recording that was previously created.*

- This change clarifies the revised statute and does not further change District law.

RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

(1) *OAG, App. C at 431, recommends clarifying that the defendant has the burden of production and the burden of persuasion for the affirmative defense.*

- The RCC incorporates this recommendation by specifying the burden of proof for all defenses and exclusions in the RCC § 22E-201 in the General Part. This change improves the clarity and consistency of the revised statutes.

(2) *PDS, App. C at 446-447, recommends expanding the affirmative defense to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*

- The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase "school counselor" is used instead of the word "counselor," to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.

(3) *USAO, App. C at 457, recommends renaming the offense, to clarify that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense.*

- The RCC incorporates this recommendation by adopting USAO's proposed title. This change clarifies and does not substantively change the revised offense.

(4) *USAO, App. C at 457-458, recommends specifying in the statutory text that a person commits an offense who "causes to be distributed or displayed" or "causes to be made accessible" a sexual recording. USAO notes that current D.C. Code § 22-3531(f)(2) that provides liability for distributing images "directly or indirectly, by any means" and provides an example in which a defendant asks another person to distribute a sexual recording.*

- The RCC does not incorporate this recommendation because it is not necessary to provide liability for the instances cited by USAO and would be inconsistent with the RCC's general provisions on accomplice liability and causing crime by an innocent or irresponsible person. RCC § 22E-210 provides liability for someone who (1) Purposely assists another person with the planning or commission of conduct constituting [an] offense; or (2) Purposely encourages another person to engage in specific

conduct constituting [an] offense. RCC § 22E-211 provides liability for the conduct of another when, acting with the culpability required by an offense, the person causes an innocent or irresponsible person to engage in conduct constituting an offense.

(5) *USAO, App. C at 458, recommends removing the word "developed" from the phrase "developed female breast," and clarifying that a "female breast" means the breast of both a cisgender and a transfeminine woman.*

- The RCC incorporates this recommendation by deleting the modifier "developed" and clarifying in commentary that the statute would include a woman who is transfeminine or has had a mastectomy. This change clarifies the revised commentary and may eliminate a gap in liability.

(6) *USAO, App. C at 458, recommends expanding the revised statute to include recordings of a sexual contact, as defined in the RCC. USAO states, "a sexual contact can be an intimate, private experience…even if nude genitalia are not visible."*

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. Under the revised statute, disclosing a recording of a sexual contact (which would include, for example, someone playfully grabbing their spouse's buttocks) does not amount to an offense unless there is a recording of: nude or undergarment-clad private areas, masturbation, sadomasochistic abuse, a sexual act, urination, or defecation. Rather, the revised offense is limited to the types of exposure and conduct commonly considered to be most private.

(7) *USAO, App. C at 458-459, recommends specifying in the statutory text that an agreement or understanding may be "explicit or implicit." USAO states that a married couple that exchanges nude photos via text messages has an implicit understanding that they will not be shared.*

The RCC incorporates this recommendation by substituting the phrase "explicit or implicit agreement" for the phrase "agreement or understanding." This change is consistent with the RCC definition (and current D.C. Code definition) of consent. However, the CCRC also notes in the commentary that determination of whether there is or is not an understanding or agreement between the actor and complainant is an issue of fact that must be determined by the factfinder in the circumstances of a particular case. Unlike the USAO example, the existence of a marital relationship alone is not a sufficient basis for determining there to be an understanding or agreement not to share photos: "For example, if a married couple exchanges nude photos of themselves via text message, there is an implicit agreement that neither party will share the photos. But if one of the parties later discloses the photos to another person, they have violated that implicit agreement or understanding, even if there was no explicit agreement or understanding in place."

(8) *USAO, App. C at 459, recommends striking the word "sexually" from the phrase "sexually abuse, humiliate, harass, or degrade the complainant." USAO states, "there should be no requirement that the defendant have a sexual intent" and*

explains, "their intent is frequently to harass or humiliate the complainant, or to seek revenge."

- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. The revised statute does not require that the defendant have a sexual intent. One means of committing the revised offense is for the defendant to intend to "alarm" the complainant. "Alarm" is generally understood to broadly include "disturb," "excite," or "strike with fear."[490] This appears to cover the example raised by USAO regarding a person intends to "seek revenge." A person who acts with a motive to avenge a past wrong appears to act with intent to alarm the complainant. Alternatively, a second means of committing the offense is to act with intent to "sexually abuse, humiliate, harass, or degrade" the complainant. The use of the modifier "sexually" in the revised statute is consistent with the use of that term throughout the RCC to modify the words "abuse, humiliate, harass, or degrade." For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier "sexually" for the words "abuse, humiliate, harass, or degrade" in the revised definition of "sexual act" and "sexual contact."

(9) *USAO, App. C at 458, recommends that subparagraphs (c)(1)(A) and (c)(2)(B) be joined by the word "and."*

- The RCC incorporates this recommendation by adopting USAO's proposed language. This change clarifies the revised statute.

(10) *USAO, App. C at 458, recommends clarifying that "if the victim suffers any harm in the District stemming from the defendant's actions, then there would be jurisdiction to prosecute this offense in the District."*

- The RCC does not incorporate this recommendation because it may render the statute unconstitutional. Generally, a state has jurisdiction over crimes if the conduct takes place or the result happens within its territorial limits.[491] The result element of this offense is satisfied as soon as the disclosure occurs and, if the actor or complainant is in the District at that time, there would be jurisdiction. In sum, under existing law the District may exercise jurisdiction only if the disclosure occurs here. However, the USAO recommendation goes further in recommending a statement that "*any harm…stemming from* the defendant's actions" is sufficient for jurisdiction. Consider, for example, a person who is a victim of unlawful disclosure conduct that occurs wholly in California who travels to the District of Columbia months later, while still experiencing significant emotional distress. Such an attenuated connection to the District would not be a sufficient or constitutionally sound basis for jurisdiction.

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[490] Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

[491] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

(11) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(12) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(13) *The CCRC recommends revising the phrasing of the penalty enhancement provision to state, "In addition to the general penalty enhancements* under this title*, the classification for this offense* is *increased by one class when…" Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This change clarifies the revised statute and does not further change District law.

(14) *The CCRC recommends revising the phrase "by conduct that constitutes" to state, "by committing a District offense that is, in fact," consistent with other revised statutes.*

- This change clarifies the revised statute and does not further change District law.

(15) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(16) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1805. Distribution of an Obscene Image.

(1) *OAG, App. C at 432, recommends clarifying in the statutory language that the phrase "sexual or sexualized image" pertains to the image that is eventually distributed, not what the person who was filmed was actually doing. OAG explains, "through the use of electronic equipment a person can focus in on the complainant in such a way, or edit otherwise non-sexual behavior, to make it appear sexual (or sexualized)." OAG does not recommend any specific statutory language.*

- The RCC partially incorporates this recommendation by clarifying in a footnote in the commentary's explanatory note that: "The word 'sexualized' in the phrase 'sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering' refers to a display that may not have been sexual to the person in the image, but due to the actor's manipulation of the image a reasonable person would understand the display to be sexual." This change clarifies the revised commentary.

(2) *OAG, App. C at 432, recommends revising the commentary to state, "the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted, and in other situations were effective consent has not been given."*

- The RCC incorporates this recommendation by adopting OAG's proposed change to the commentary. This change clarifies the revised commentary and does not further change District law.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(5) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(6) *The CCRC recommends striking the reference to* Parks v. United States, *294 A.2d 858, 859-60 (D.C. 1972) in the revised commentary as potentially confusing.*

- This change clarifies the revised commentary.

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(1) *OAG, App. C at 432-433, recommends revising the offense element that requires the person to be over 18 years of age and four years older than the complainant to require only that the person is four years older than the complainant. OAG notes that it has "prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Other RCC offenses, such as sexual abuse of a minor,[492] punish older persons engaging in or attempting to engage in sexual acts and sexual contact with minors (including older minors engaging in or attempting to engage in sexual acts and sexual contact with minors). In contrast, this offense is focused on a separate social harm: traumatizing children by exposing them to materials that are shocking and unforgettable. Critically, a child who possesses (or distributes) obscene materials is a victim of the very trauma the statute aims to prevent. In addition, minors may be particularly unable to recognize and distinguish obscene depictions of sexual behavior (that are unlawful under this statute) from non-obscene depictions (which are lawful) because they are still learning community standards regarding such matters.

(2) *OAG, App. C at 433, recommends broadening the affirmative defense for an employee of a school, museum, library, movie theater to include an employee of any "other venue." OAG says, "there are other venues that also show movies and the employees of those venues should be able to avail themselves of this affirmative defense as well."*

- The RCC incorporates this recommendation by adopting OAG's proposed statutory language. This change improves the proportionality of the revised offense.

(3) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(4) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

[492] RCC § 22E-1302.

(5) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying distribution of an obscene image as a Class B misdemeanor and recommends classifying all Class B misdemeanors as jury demandable offenses.*

- This change improves the consistency of the revised statutes and does not further change District law.

RCC § 22E-1807. Creating or Trafficking an Obscene Image of a Minor. [Previously Trafficking an Obscene Image of a Minor].

(1) *USAO, App. C at 459, recommends changing the name of the offense (previously "Trafficking an Obscene Image of a Minor."). USAO states that "not all conduct that falls within the offense constitutes 'trafficking,'" because "'trafficking' implies some level of distribution." USAO does not recommend an alternative name.*

- The RCC incorporates this recommendation by changing the offense name to "creating or trafficking an obscene image of a minor." This change improves the clarity of the revised statute.

(2) *USAO, App. C at 459-450, recommends revising the gradations "based on the defendant's role in creating and distributing the image." USAO recommends that "the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image." USAO states that this is "consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252." USAO states that a "defendant should be penalized more severely for creating an image than for distributing an image." USAO states that it "does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the images."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically more severe conduct than distributing an image because distributing the image further violates the complainant's privacy. For example, PDS, App. C at 447-448, states that the first category of conduct in the offense—creating an image—is "dissimilar and typically less severe than the other actions encompassed" by the offense because in these other categories of conduct "the minor complainant's privacy is further violated." Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.

(3) *PDS, App. C at 447-448, recommends "separating the conduct defined in [subparagraphs (a)(1)(A) and (b)(1)(A); creating, producing, or directing a non-derivative image] into a lesser included offense." PDS states that this "first category of action is dissimilar and typically less severe than the other actions encompassed" by the offense because in these other categories of conduct "the minor complainant's privacy is further violated."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and lead to inconsistent liability. It is unclear that creating an image is categorically less severe conduct than distributing an image because creating the image is a clear and direct form of harm to the complainant's privacy (as compared to more speculative

harms that may arise from downstream distribution of an image that may or may not be viewed by others).[493] For example, USAO, App. C at 447-448, states that "the most serious gradation be for creating an image (production), then for advertising an image, then for distributing an image." Given the differences in determining which category of conduct is most severe, the RCC creating or trafficking an obscene image statute instead grades the offense solely based on the type of image at issue. A defendant that creates an image or gives effective consent for the creation of an image will likely have additional liability for the underlying sexual conduct in the RCC sex offenses, which reflects in a more proportionate and consistent way the sexual nature of this conduct.

(4) *USAO, App. C at 460, recommends replacing "obscene" with "sexually explicit" because "obscene" "can be a vague standard." USAO states that the federal child pornography law uses "sexually explicit" instead of "obscene" and cites to 18 U.S.C. § 2251. USAO states that this change "would create an analogue with federal law for criminalization of child pornography [and] could draw on the case law regarding the definition of 'sexually explicit' that would help guide interpretations" of the RCC statute.*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and could lead to inconsistent liability. "Obscene" is a defined term in RCC § 22E-701 that is based on longstanding Supreme Court case law. The USAO reference to "sexually explicit" and citation to 18 U.S.C. § 2251 is unclear as to whether and to what extent USAO wishes the RCC to track federal law. The federal pornography statute in 18 U.S.C. § 2251 and case law on the statute does refer to the noun "sexually explicit conduct," but not a separate "sexually explicit" adjective. Moreover, the term "sexually explicit conduct" is defined in another federal statute[494] in a manner that seems incompatible

[493] *See, e.g., New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[494] 18 U.S.C. § 2256 (2)(A) ("Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated-- (i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the anus, genitals, or pubic area of any person; (B) For purposes of subsection 8(B)1 of this section, "sexually explicit conduct" means-- (i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited; (ii) graphic or lascivious simulated; (I) bestiality; (II) masturbation; or (III) sadistic or masochistic abuse; or (iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic area of any person;"); 18 U.S.C. § 2256 (8) ("'child pornography' means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where-- (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.").

with a replacement of "obscene" for the types of sexual contact and display in the RCC. For example, the federal definition of "sexually explicit conduct" doesn't reach "sexual contact" at all (at least in the way that is defined in the RCC to include clothed body parts). Replacing "obscene" with "sexually explicit" would potentially include within the RCC creating or trafficking an obscene image statute creating, displaying, distributing, selling, or advertising images that include a minor touching another minor's covered buttocks—conduct that while perhaps not to be encouraged frequently occurs among teenagers in public places. In contrast, the reference to "obscene" in the RCC creating or trafficking an obscene image statute is limited to the conduct in second degree—an "obscene" sexual contact and an "obscene" sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than an opaque covering. The high threshold of "obscene" is appropriate to ensure that the revised statute prohibits exploitative images but does not criminalize broadly all images of nudity and common sexual contact.

(5) *PDS, App. C at 446, recommends defining the term "derivative image" in the statutory text. PDS does not propose a particular definition but notes the examples given in the commentary.*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[495] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(6) *USAO, App. C at 460, recommends codifying a definition of "derivative image." USAO states that a separate definition of "derivative image" would "limit potential future confusion."*

- The RCC partially incorporates this recommendation by amending the commentary to note that the word "derivative" has its common meaning. When used as an adjective, the word "derivative" is commonly understood to mean "having parts that originate from another source."[496] Accordingly, the phrase "derivative image" means an image derived from another source, such as a photograph of a photograph or a screenshot. This change clarifies the revised commentary.

(7) *USAO, App. C at 460, recommends replacing "manufactures" with "produces" in subparagraphs (a)(1)(C) and (b)(1)(C) so they prohibit "displays, distributes, or produces with intent to distribute an image." USAO states that it is "unclear what the difference is between 'manufacturing' and 'producing,' and both terms*

[495] Merriam-Webster.com, "*derivative*", 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

[496] Merriam-Webster.com, "*derivative*", 2020, *available at* https://www.merriam-webster.com/dictionary/derivative.

are used" in the RCC statute (subparagraphs (a)(1)(A) and (b)(1)(A) prohibit producing an image, other than a derivative image). USAO says that, "Federal law, by contrast, uses the word 'producing.' 18 U.S.C. § 2251." USAO states that replacing "manufactures" with "produces" "creates consistency within the statute, aligns the statutory wording with federal child pornography law, and allows this offense to draw on the case law regarding 'production' to help guide interpretations" of the RCC statute.

- The RCC does not incorporate this recommendation because it would create ambiguity in the statute. First, while USAO recommends eliminating "manufacturing" in favor of "producing" and cites to federal pornography statute in 18 U.S.C. § 2251, the term "producing" in that statute is a defined term that actually includes "manufactures."[497] Second, assuming that USAO was not recommending defining "producing" to include "manufacturing," CCRC notes that replacing "manufactures" with "produces" would result in "produces" being used in the RCC statute in two different contexts—producing the creation of a non-derivative image in subparagraphs (a)(1)(A) and (b)(1)(A) and displaying, distributing, or producing with intent to distribute an image in subparagraphs (a)(1)(C) and (b)(1)(C). The RCC commentary to the statute has been updated to reflect that "producing" is intended to include giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance.

(8) *USAO, App. C at 460, recommends in subparagraphs (a)(1)(E) and (b)(1)(E) replacing "sells or advertises an image" with "makes, prints, or publishes, or causes to be made, printed, or published, any notice or advertisement seeking or offering to receive, exchange, or buy an image of a minor." USAO states that this wording is "consistent with federal child pornography law" in 18 U.S.C. § 2251(d)(1) and that, as stated in its earlier comments for the RCC creating or trafficking offense, "it is useful to track federal statutory language in this respect."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties and would create inconsistent liability. The scope of "makes . . . or causes to be made . . . a notice or advertisement" in the proposed language is unclear, and the proposed language appears limited to written, printed, or published advertisements. Under the RCC statute, an individual that stands on a street corner and discretely informs passerbys that the individual is selling prohibited images would clearly be liable for advertising, whereas it is unclear if this conduct constitutes making a notice or advertisement.

(9) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is*

[497] 18 U.S.C. § 2256 (3) ("'producing' means producing, directing, manufacturing, issuing, publishing, or advertising;").

consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.

- This change improves the clarity, consistency, and proportionality of the revised statute.

(10) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: "However, this exclusion does not apply if the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger." With this change, an actor that is under the age of 18 years may be prosecuted for creating or trafficking a prohibited image if: 1) the actor is at least 4 years older than the minor complainant who is, or who will be, depicted in the image; or 2) the complainant is 8 years of age or younger. OAG refers to its earlier comments concerning the decriminalization in the RCC of distribution of an obscene image to a minor, App. C at 432-433. OAG states that, in addition, OAG "does not believe that young children are capable of giving effective consent to the distribution of their sexual images." As a hypothetical, OAG states a "17 year old knowingly makes an image of an 8 year old, whom they have groomed, engaging in a sexual act accessible to an audience on an electric [sic] platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent." OAG states that "because the 8 year old was groomed, the 8 year old gave consent that was not 'induced by physical force, a coercive threat, or deception.'"*

- The RCC does not incorporate this recommendations because it may authorize disproportionate penalties and lead to inconsistent liability.
- First, as a threshold matter, the RCC provides criminal liability for a 17 year old who engages in a sexual act with an 8 year old or causes an 8 year old to engage in or submit to a sexual act—whether or not an image is created of the act—as first degree sex abuse of a minor, one of the most severely punished offenses in the RCC. Effective consent is not a defense or consideration for this offense. In the OAG hypothetical, if the17 year old caused the 8 year old to engage in the sex act due to grooming (or otherwise), such conduct would be criminal under the RCC, and subject to severe penalties.
- Second, while the RCC does not adopt the OAG recommendation to categorically establish liability for creating or trafficking images for certain complainants under the age of 18 based solely upon the age of the parties, the RCC may provide liability depending on the facts of the case. As is explained further in the commentary, the RCC statute expands the exceptions to liability for persons under 18 years of age that are in the current statute. This expansion is warranted because legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[498] However, establishing per se categories of liability based

[498] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a

solely on age may make the revised statute both over-inclusive—making individuals liable even if their conduct is not blameworthy—and under-inclusive—excluding individuals from liability when their conduct is blameworthy. Age is only one factor in evaluating sexual maturity (physical and psychological) and in evaluating ability to give effective consent to sexual conduct. Instead of per se categories of liability, the RCC creating or trafficking an obscene image statute relies on the RCC definitions of "effective consent" and "consent." As OAG notes, the definition of "effective consent" may not adequately account for the youth of a complainant, particularly a complainant that has been groomed. However, the RCC definition of "effective consent" incorporates the RCC definition of "consent," which requires that the consent "not [be] given by a person who . . . [b]ecause of youth . . . is known to the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct to constitute the offense or to the result thereof." The requirements of the RCC definition of "consent" ensure that complainants under the age of 18 years have liability for creating or trafficking images of other minors only if the minor that is depicted, or will be depicted, is unable to give meaningful consent, and that the defendant knows this.

(11) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. USAO states that the defense "relates to the obscenity definition, and it is hard to imagine an instance in which a sexually explicit image of a minor could have serious, literary, artistic, political, or scientific value."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties, lead to inconsistent liability, and unconstitutionally criminalize conduct in some instances. The affirmative defense requires that the "image has, or will have, serious literary, artistic, political, or scientific value, when considered *as a whole*" (emphasis added). Without such a defense, the statute could criminalize the creation,

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contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

sale, or promotion of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. The defense is based in Supreme Court case law[499] and ensures the constitutionality, consistency, and proportionality of the revised statute. In addition, as is noted in the RCC commentary, notwithstanding the defense, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[500]

(12) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2). PDS states that, as currently drafted, the statute would "hold criminally liable a 25 year old who during the course of a consensual relationship with a 17 year old creates a sexually explicit image at the request of the 17 year old" despite the fact that the "25 year old created the image at the request of the minor and did not share the image with anyone." PDS states that "the current code [D.C. Code § 22-3001] and the RCC [D.C. Code § 22-1301(e)] deem 16 year olds capable of consenting to sexual activity, the RCC should similarly deem that an individual who has reached the age of consent for sexual activity can consent to the creation of explicit images that are not shared with any other individuals without his or her separate consent." PDS states that the "RCC should only criminalize the consensual creation or exchange of explicit images between a consenting 16 year old and an adult who is more than 4 years older than the 16 year old when the adult is in a position of trust or authority over the minor." PDS does not recommend any specific revised language.*

- The RCC partially incorporates this recommendation by requiring: 1) in subparagraph (d)(3)(A) that the actor is, in fact, at least 18 years of age; and 2) in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) that the

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[499] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

[500] Depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force, threats, or involuntary intoxication involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or solicitation (RCC § 22E-302) of sexual abuse of a minor or sexual assault of a minor.

actor is in a romantic, dating, or sexual relationship with the complainant, and is not at least 4 years older than a complainant who is under 16 years of age, or is not in a position of trust with or authority over a complainant under the age of 18 years, and at least 4 years older than the complainant. An actor that is under the age of 18 years, regardless of the actor's relationship to the complainant, does not need this defense because the broader affirmative defense for any actor under the age of 18 years in paragraph (d)(2) applies. The changes in sub-subparagraphs (d)(3)(A)(ii)(a) and (d)(3)(A)(ii)(b) provide an affirmative defense for an actor that is at least 18 years of age and in a romantic relationship with a complainant under the age of 18 years unless there would be liability under the RCC sexual abuse of a minor statute—either because the complainant is under the age of 16 years and the actor is at least four years older than the complainant, or the complainant is under the age of 18 years and the actor is at least four years older and in a position of trust with or authority over the complainant. Under PDS's hypothetical, of 25 year old that is in a consensual relationship with a complainant under the age of 17 years, there would be no liability because the actor is not in a position of trust with or authority over the complainant.

- It is unclear whether PDS recommends expanding the affirmative defense to include instances where an actor that is over the age of 18 years shares images of a complainant that is under the age of 18 years with the complainant's effective consent. To the extent that PDS makes this recommendation, the RCC does not incorporate it, because an actor that is at least 18 years of age that shares images of a complainant under the age of 18 years, even with that complainant's effective consent, is contributing to the demand for sexually explicit and obscene images of minors.

(13) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include "or other cultural institution." PDS states that, as currently drafted, the affirmative defense includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images."*

- The RCC incorporates this recommendation by including "or other venue" as recommended by OAG, discussed below. "Cultural institution" may be unnecessarily narrow and inconsistent with the references to a "school" or "movie theater" in the current defense.

(14) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any "other venue." OAG says, "there are other venues that also show movies and the employees of those venues should be able to avail themselves of this affirmative defense as well."*

- The RCC incorporates this recommendation by adopting OAG's proposed statutory language. This change improves the proportionality of the revised offense.

(15) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(3) limiting the number of images that would qualify for the defense. USAO states that under current law there is a limit of 6 still photographs or 1*

motion picture that allow a defendant to invoke this defense. USAO recommends that "there be some limit on the amount of images that a person may have to invoke this defense," but does not recommend a specific number.

- The RCC does not incorporate this recommendation because it would reduce the clarity and proportionality of the defense. The defense is meant to facilitate individuals reporting possible illegal conduct or seeking legal counsel from any attorney. The defense has an expanded scope compared to current law, and limiting the number of images or motion pictures would undermine the expanded scope. As the RCC commentary notes, the number of images or motion pictures that a person has may be used by a fact finder to assess whether the defendant had the required intent "exclusively and in good faith" to report possible illegal conduct or to seek legal counsel from any attorney." However, a person who seeks to report possible illegal conduct or legal counsel and forwards two video clips should not be rendered criminally liable because there are "two" versus "one" such clip.

(16) *PDS, App. C at 446-447, recommends expanding the affirmative defense in paragraph (d)(4) to include distributions to a teacher, a counselor, or a person that the defendant reasonably believed had a special responsibility for someone depicted in the image or involved in its creation.*

- The CCRC partially incorporates this recommendation by revising the affirmative defense to include distributions made to a person the actor reasonably believes to be a law enforcement officer, prosecutor, attorney, teacher, school counselor, school administrator, or person with a responsibility under civil law for the health, welfare, or supervision of someone who is depicted in the image or is involved in the creation of the image. The phrase "school counselor" is used instead of the word "counselor," to avoid confusion with other kinds of counselors. This change improves the clarity and consistency of the revised statutes by specifying the mental state applicable to each element of the affirmative defense.

(17) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(18) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(19) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(20) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(1) *USAO, App. C at 460, recommends replacing "obscene" with "sexually explicit" for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(2) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(4)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(4)(B) add a sentence that states: "However, this exclusion does not apply if the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger." OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *USAO, App. C at 460, recommends removing the affirmative defense in paragraph (d)(1) for an image that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(5) *USAO, App. C at 460-461, recommends in the affirmative defense in subsection (d)(4) limiting the number of images that would qualify for the defense, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(6) *PDS, App. C at 448, recommends expanding the affirmative defense in paragraph (d)(2) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(7) *PDS, App. C at 447, recommends expanding the affirmative defense in paragraph (d)(4) in the manner recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC partially incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(8) *PDS recommends expanding the affirmative defense in paragraph (d)(5) to include "or other cultural institution" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation by including "or other venue" for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (d)(5) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.

(12) *The CCRC recommends replacing the phrase "law enforcement agency" with the term "law enforcement officer," which is a defined in RCC § 22E-701.*

- This change improves the clarity and consistency of the revised statute.

(13) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(1) *USAO, App. C at 461, recommends replacing "obscene" with "sexually explicit" for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(2) *USAO, App. C at 461, recommends in subparagraphs (a)(1)(A) and (b)(1)(A) including a "live broadcast" in addition to a "live performance." USAO states that it is "equally culpable for a person to arrange a live performance as to arrange a live broadcast." USAO gives as a hypothetical "[i]f . . . a defendant creates a chatroom, and livestreams to that chatroom a video of a child engaging in a sexual act, that defendant should be held liable for the more serious offense of arranging a live sexual performance of a minor."*

- The RCC does not incorporate this recommendation because it creates unnecessary overlap with the RCC creating or trafficking an obscene image of a minor statute. A "live broadcast" is included in the scope of the RCC definition of "image" and arranging a live broadcast falls under the creating or trafficking an obscene image of a minor statute. Under USAO's hypothetical, a defendant that creates a chatroom and livestreams a video of a child engaging in a sexual act, is distributing an obscene image to a minor.

(3) *USAO, App. C at 461, recommends removing the affirmative defense in paragraph (d)(1) for a live performance that has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole, for the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends adding subparagraphs (a)(1)(B) and (b)(1)(B) to the affirmative defense in paragraph (c)(2), which applies to any actor under the age of 18 years. The previous version of this provision (as an exclusion for liability) erroneously omitted this conduct (a person responsible under civil law for the complainant giving effective consent for the complainant to engage in or submit to the creation of a live performance). This matches the scope of the affirmative defense in the RCC creating or trafficking an obscene image statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(6) *OAG, App. C at 433-434, recommends that what was previously subparagraph (c)(2)(B) add a sentence that states: "However, this exclusion does not apply if the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger." OAG relies on the reasons stated above for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC does not incorporate this recommendation for the reasons stated in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(7) *OAG, App. C at 435, comments on the affirmative defense in what is now paragraph (c)(4). OAG states that a person who "creates, produces, or directs" a live performance "must have some level of 'control' over its creation" and that "either the employee will never be able to meet the requirements of (d)(4)(C) or a court will consider this improper burden shifting. In addition, OAG "questions whether an employee of a school, museum, library, or movie theater should have this affirmative [defense]. Unlike the affirmative defenses contained in the offenses pertaining to obscene images, in this offense there is an actual child engaging in sexual acts in the actor's presence." OAG does not make any specific recommendations for revised language.*

- The RCC incorporates this recommendation by limiting this affirmative defense to subparagraphs (a)(1)(C) and (b)(1)(C). A producer or a director will not always some level of control over the creation of a live performance, and it is possible that a live performance will occur outside the presence of an actor, especially when that actor is a producer or director. However, this change is consistent with the scope of the affirmative defense in the RCC creating or trafficking an obscene image of a minor statute which does not apply to creating a prohibited image.

(8) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(9) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(10) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(11) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.
- This change improves the clarity and consistency of the revised statute.

(12) *The CCRC recommends replacing the phrase "District civil law" with the phrase "civil law," consistent with other RCC offenses.*

- This change improves consistency of the revised statute and may eliminate confusion.

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(1) *OAG, App. C. 434, states that it is unclear in the commentary to this offense "what is meant by the terms 'unnatural' and 'unusual'" in the sentence "Mere nudity is not sufficient for a 'sexual or sexualized display' in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in the sexual activity or the effect on the viewer" (OAG's emphasis). OAG asks: "if the performance included a 15 year old boy viewing erotica with an exposed erect penis, would the focus on the relevant body part be a 'natural' or 'unnatural,' 'usual' or 'unusual' display"? OAG recommends that the commentary "explain or give examples of what a 'natural' or 'unnatural,' 'usual' or 'unusual' focus on the relevant minor's body parts would be.*

- The RCC does not incorporate this recommendation because it may lead to inconsistency in the revised statutes. The commentary entry cited by OAG appears multiple times in the RCC commentary for a variety of offenses, including: § 22E-1807, Trafficking an Obscene Image of a Minor and 22E-1808, Possession of an Obscene Image of a Minor. In each instance the RCC commentary, paraphrased in OAG's comment, is quoting DCCA case law in Green v. United States, 948 A.2d 554, 562 (D.C. 2008) which in turn cites to federal case law providing an extensive list of factors that are relevant to the analysis of whether an image has an "unnatural" focus on genitalia. The CCRC declines to specify further what may constitute an "unusual" or "unnatural" focus for the RCC § 22E-1810 offense that OAG comments on, or other offenses. Instead, the RCC relies on District and federal case law cited in the commentary to provide further analysis of the relevant standards.

(2) *The CCRC recommends expanding the defense for marriage, domestic partnership, and a romantic relationship in the manner PDS recommended for this affirmative defense in the RCC creating or trafficking an obscene image of a minor statute. This change is discussed in detail in this appendix for the RCC creating or trafficking an obscene image of a minor statute.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(3) *OAG, App. C at 433, recommends broadening the affirmative defense in paragraph (c)(4) for an employee of a school, museum, library, movie theater to include an employee of any "other venue" for the reasons stated for the RCC creating or trafficking an obscene image of a minor statute.*

- The RCC incorporates this recommendation for the reasons stated above in this entry for the RCC creating or trafficking an obscene image of a minor statute.

(4) *The CCRC recommends making the exclusion for an actor that is under the age of 18 years (previously in paragraph (c)(2)) an affirmative defense. This is consistent with the other affirmative defenses that are based on the actor's conduct, as opposed to the exclusions for licensee or interactive computer service.*

- This change improves the clarity, consistency, and proportionality of the revised statute.

(5) *The CCRC recommends striking the exclusion from liability for protected speech as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(6) *The CCRC recommends striking the burden of proof paragraph in the affirmative defense provision and instead specifying the burden of proof for all affirmative defenses in RCC § 22E-201.*

- This change improves the consistency of the revised statutes and does not further change District law.
- This change improves the clarity and consistency of the revised statute.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

(1) *PDS, App. C at 449, recommends raising the age for this exemption to age 14. With this change, a person under the age of 14, as opposed to under the age of 12, would not be subject to prosecution for offenses in chapter 18. PDS states "[b]y raising the age to 14, children will not typically be subject to prosecution until they have reached 8th grade. By 8th grade, children frequently have had some exposure to sex education classes and to the concept of affirmative consent which is now being taught in more jurisdictions."*

- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as a floor. The provision does not suggest that prosecution is appropriate in every case or most cases of children ages 12 and 13. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.[501] RCC § 22E-1308, "Limitations on Liability for RCC Chapter 13 Offenses," categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code[502] and RCC offenses[503] that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.

[501] E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys' Manual.

[502] *See, e.g.*, D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense;").

[503] *See, e.g.*, RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor ("In fact: The complainant is under 12 years of age;").

Chapter 20. Property Offense Subtitle Provisions.

RCC § 22E-2001. Aggregation to Determine Property Offense Grades.

[No advisory group comments or CCRC recommended changes.]

RCC § 22E-2002. Definition of "Person" for Property Offenses.

(1) *OAG, App. C at 257, comments that, while it "has no comments concerning the text of the definition," it is "concerned about its placement in subtitle III." First, OAG states that "people who are unfamiliar with the RCC with look to RCC § 22E-701 if they have a question about how the term 'person' is defined for property offenses, rather than to the beginning of subtitle III," particularly given that neither Subtitle II nor Subtitle IV of the RCC have a definition as the first statute. Second, "if people are interpreting offenses that occur in [Subtitle II or Subtitle IV], they will need to know that they should be looking to D.C. Code § 45-605 for the definition of a 'person.'" Finally, "by placing the definition in RCC § 22E-701 the definitions paragraph that is associated with each substantive offense can refer the reader to RCC § 22E-701 for the definition of 'person' along with the other applicable definitions."*

- The RCC incorporates these comments by moving the definition of "person" for property offenses from Subtitle III to the general definitions statute in RCC § 22E-701 and removing the phrase "Notwithstanding the definition of "person" in D.C. Code § 45-604". This change improves the clarity of the revised statutes.

Chapter 21. Theft.

RCC § 22E-2101. Theft.

(1) *OAG, App. C at 257-258, recommends changing the value requirements for a motor vehicle in second degree theft so that the motor vehicle must have a value of $15,000 or more, but less than $25,000. As previously drafted, second degree theft required either that the property has a value of $25,000 or more, or that the property is a motor vehicle with a value of $25,000 or more. Third degree theft for a motor vehicle merely required that the property be a motor vehicle. OAG states that "there is too wide a gap between a vehicle that is worth $25,000 and [a] vehicle that has almost no value." OAG states that "the value of a car to a theft victim is worth more than its fair market value" and "[c]onsidering the impact of the loss on the victim, a loss of an automobile that is valued at $15,000 may be worth more to a victim than the loss of other property valued at $25,000." In the alternative, OAG recommends removing the reference to a motor vehicle in second degree theft because it is superfluous.*

- The RCC incorporates this recommendation by deleting the reference to a motor vehicle in second degree theft. With this revision, second degree of the RCC theft statute requires that the value of any property be $50,000 or more. Third degree theft requires either that the property has a value of $5,000 or more, or be a "motor vehicle" of any value. All motor vehicles, except luxury motor vehicles with a value of $50,000 or more, are included in third degree of the RCC theft statute. This provides greater punishment for lower-value motor vehicles and recognizes that the loss of such a motor effects the complainant beyond the loss of the fair market value.

(2) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree theft to $500; $5,000; $50,000; and $500,000, respectively.*

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree theft has been increased from $2,500 to $5,000. Third degree theft is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[504] Research by the Pew Charitable Trusts evaluating changes to felony theft

[504] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.[505] This change improves the proportionality of the revised criminal code.

(3) *USAO, App. C at 343, recommends decreasing the number of gradations for theft because "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits theft and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(4) *USAO, App. C at 427, recommends decreasing the monetary thresholds in each gradation of theft. USAO states that it does not oppose the highest gradation of theft being a Class 7 offense, "but the monetary thresholds for each gradation are so high that the top gradations will likely only be used very rarely, if ever." Specifically, USAO "proposes eliminating the top gradation of $500,000, and creating only four gradations" and that "car theft be punished more severely than currently proposed." With these changes, USAO states that first degree theft would have a threshold of $50,000 and remain a class 7 felony, second degree theft would be $5,000 or any motor vehicle and remain a class 8 felony, third degree theft would be $1,000 and remain a class 9 felony, and 4th degree would require "any value" and be a misdemeanor.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of theft will very rarely be used. However, the penalties authorized for first degree theft, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree theft under current law was 3 years.[506] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[507]

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[505] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

[506] *See,* Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[507] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone

(5) *USAO, App. C at 343, recommends deleting subparagraph (b)(4)(B), which establishes that for second degree theft, the property, if it is a motor vehicle, must have a value of $50,000 or more.*[508] *USAO states that this is a "superfluous provision" because subparagraph (b)(4)(A) provides that any property for second degree theft must have a value of $50,000 or more, and any property includes motor vehicles.*

- The RCC incorporates this recommendation by deleting subparagraph (b)(4)(B). This change improves the clarity, consistency and proportionality of the revised statute.

(6) *USAO, App. C at 343-344, recommends that, if the CCRC accepts "USAO's recommendations in the Robbery statute," the CCRC should delete subparagraph (c)(4)(C) and sub-subparagraphs (c)(4)(C)(i) and (c)(4)(C)(ii) of the revised theft statute, which contain a gradation for theft from a person or from a person's immediate physical control. USAO, App. C at 300-301, recommends that the RCC robbery statute retains the provision for a sudden or stealthy seizure or snatching that is in the current D.C. Code robbery statute. USAO states that this conduct is "akin to robbery" and should be included in the RCC robbery statute instead of theft. USAO states that the RCC robbery commentary "acknowledges that so-called 'pick-pocketing' can morph into robbery in at least some circumstances."*

- The RCC does not incorporate this recommendation for the reasons described as to why the RCC does not incorporate USAO's recommendation for robbery. The RCC robbery statute does not retain the provision for a sudden or stealthy seizure that is in the current robbery statute and instead includes this conduct as third degree theft. Under the RCC robbery does not include non-violent takings from a person which, instead, are liable as theft. This is discussed further in the entries on the RCC robbery statute in this appendix.

(7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

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corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

[508] USAO's comment uses $25,000 as the value requirement for the motor vehicle provision in second degree theft. That number has since been increased to $50,000, but subparagraph (b)(4)(B) is otherwise unchanged.

RCC § 22E-2102. Unauthorized Use of Property.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unauthorized use of property as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2103. Unauthorized Use of a Motor Vehicle.

(1) USAO, App. C at 344, recommends replacing "operates a motor vehicle" in paragraph (a)(1) with "operates or uses a motor vehicle." USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), the revised UUV statute should include "use" in addition to "operate," noting that "use" is included in the title of the revised statute.

- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute and may authorize disproportionate penalties. It is unclear exactly what conduct constitutes "use" of a motor vehicle but does not constitute "operating" it. Possible examples of "use"—but not operation—might include passively sitting in or on a motor vehicle, but it appears that, to the extent a person can "use" a motor vehicle without also operating it, that conduct is more proportionally penalized as third degree trespass involving a motor vehicle (RCC § 22E-2601). The revised statute maintains "use" in the title of the offense as a more plain language and familiar terminology. The commentary to the RCC UUV statute has been updated to reflect that the RCC UUV statute deletes "uses" from the current UUV statute and that it is intended to be a clarificatory change.

(2) USAO, App. C at 344, recommends adding to paragraph (a)(1) "causes a motor vehicle to be operated or used." USAO states that, consistent with the current UUV statute in D.C. Code § 22-3215(b), "it is appropriate to retain liability for someone who 'causes' a motor vehicle to be used or operated."

- The RCC does not incorporate this recommendation because it creates ambiguity in the revised statute. As the commentary to the revised UUV statute states, it is unclear what the "causes" language in the current UUV statute could mean other than codifying liability for aiding and abetting. The RCC addresses accomplice liability for all offenses in RCC § 22E-210. The commentary to the revised UUV statute also notes that "Deleting the language is not intended to change the scope of the revised offense." For the reasons discussed in the commentary, the revised statute eliminates the separate offense of "UUV passenger" recognized in current case law and relies on accomplice liability to cover passengers' misconduct, where appropriate. Against this backdrop, to ensure clarity about the need to establish accomplice liability for a passenger, the revised UUV statute is not drafted to state "causes."

(3) USAO, App. C at 344, recommends including "a provision penalizing the use of a stolen vehicle in the commission of a crime of violence" that is consistent with the provision in the current UUV statute in D.C. Code § 22-3215(d)(2)(A). USAO states that the RCC other jurisdiction research in Appendix J "recognizes that at least some states prohibit the use of a motor vehicle during the commission of a felony." USAO states that including such a provision is important "because the use of a vehicle in fleeing (or attempting to flee) from the scene of a crime is

inherently dangerous, and increases the risk that innocent bystanders will be harmed on top of any harm caused by the crime of violence itself."[509]

- The RCC does not incorporate this recommendation because it is inconsistent with other offenses' penalties and may authorize disproportionate penalties. Under current law and the USAO recommendation, an individual that commits theft of a motor vehicle is not subject to such an enhancement (D.C. Code § 22-3211), but an individual that commits unauthorized use of a motor vehicle or a "joy ride" is (D.C. Code § 22-3215). In contrast, the RCC reserves theft of a motor vehicle for the RCC theft statute and limits the RCC UUV statute to true "joy rides." If an individual uses the motor vehicle during a crime of violence or to facilitate a crime of violence, the defendant will be liable for either theft or UUV, as well as the crime of violence, ensuring that there is added liability for theft of a motor vehicle in conjunction with a crime of violence. To the extent that an actor's UUV in the course of a crime of violence harms a person or comes dangerously close to harming someone, the actor is subject to additional liability for such conduct as an assault or homicide or attempted version of such crime. Notably, while there have been, on average, 3-4 adult convictions annually under the District's current statute for UUV during a crime of violence, nearly all of the sentences for this crime, 89%, have been set to run concurrent with the predicate crime of violence.[510] While data is not currently available as to the facts or other available charges in the three or four instances in the past decade when UUV crime of violence convictions have had an appreciable effect on an actor's imprisonment, these statistics suggest that elimination of the separate UUV crime of violence enhancement will have little or no[511] practical effect on imprisonment outcomes.

(4) USAO, App. C at 427-428, recommends increasing the punishment for the RCC UUV offense. USAO states that under current law UUV is a felony subject to a five year statutory maximum penalty and a 10 year statutory maximum penalty if the defendant caused the motor vehicle to be taken, used, or operated during the course of or to facilitate a crime of violence. USAO states that UUV should be a Class 8 felony, which will have either a five year or a four year maximum term of imprisonment. USAO states that this ranking is consistent with the place of UUV as a Group 8 offense in the D.C. Sentencing Guidelines. USAO states that making UUV a misdemeanor will "substantially decrease deterrence for auto theft." USAO states that despite the separate punishment for auto theft under the RCC theft statute, "it can be difficult in practice to prove that a person stole a car, even when the person did, in fact, steal a car" and that "when a person, in

[509] USAO, App. C at 344.

[510] For a full description of relevant statistics, see Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions. Notably, most or all of these non-concurrent sentences appear to have occurred in the 2009-2010 years.

[511] In those instances where sentences were not concurrent, it is unclear if other charges were available but dropped (per a plea agreement or otherwise) that would have provided similar or greater liability.

fact, commits carjacking, it may be difficult to prove that the person committed the carjacking." USAO states that "UUV may be the only offense available for prosecution of a person who either carjacked or stole a car."

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The RCC UUV offense does not require an intent to deprive the motor vehicle or the use of force against a person, in contrast to the RCC theft offense (which requires an intent to deprive and has a gradation specifically for motor vehicles) or the RCC robbery statute (which requires the use of physical force, threats, or infliction of bodily injury in taking property from another). Correspondingly, the RCC UUV offense carries substantially lower penalties than these other crimes. A misdemeanor penalty is proportionate when the defendant does not have an intent to deprive the motor vehicle or the intent to deprive cannot be proven, or the motor vehicle is not taken by the use of physical force, threats, or infliction of bodily injury.
- Classifying the RCC UUV offense as a class A misdemeanor, in addition, is consistent with the CCRC public opinion surveys of District voters for the penalty for a person driving a vehicle knowing it is stolen, but not being part of the theft,[512] which voters marked as significantly different from being the person to steal the car, which they rated a significantly more serious offense.[513]
- The RCC's penalty recommendations for UUV reflects a significant decrease from the current D.C. Code statutory penalties of 5 years imprisonment, and current court practice, which issues punishments in line with what the public opinion surveys would indicate is proper for *stealing* a car (even though UUV requires only use without authorization). For all UUV sentences in the Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions, the median sentence (50% of sentences were greater) for UUV was 12 months, including enhancements other than use in a crime of violence or multiple prior convictions. The 75th percentile (25% of sentences were greater) for these UUV offenses was 18 months, the 90th percentile 24 months, the 95th percentile 28 months and the 97.5 percentile was 32 months. What percentage of these convictions could have been charged and convicted as felony under the RCC theft of a motor vehicle is unclear.

[512] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 2.02 provided the scenario: "Driving a car knowing it was stolen, but not being part of the theft." Question 2.02 had a mean response of 4.3, just above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and far below the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). For comparison to a carjacking-type scenario, survey Question 1.14 provided the scenario "Pulling the only person in a car out, causing them minor injury, then stealing it." which received a mean response of 6.2.

[513] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 4.25 provided the scenario: "Stealing a car worth $5,000". Question 4.25 had a mean response of 6.2, just above the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code).

RCC § 22E-2104. Shoplifting.

(1) OAG, App. C at 258, recommends removing the phrase "from one's person" in subparagraph (a)(1)(A), which currently reads "Conceals or holds or carries on one's person." OAG states that, as currently drafted, it is unclear whether "on one's person" only modifies "carries," or whether it also modifies "conceals" and "holds." OAG states that if "on one's person" modifies "conceals," then concealing merchandise in other ways, such as in a shopping cart, would not be covered by the statute. In the alternative, OAG recommends reordering subparagraph (a)(1)(A) so that it reads "carries on one's person, conceals, or holds," although OAG notes that it remains unclear how a person can "carry" something that is not on his or her person.

- The RCC partially incorporates this recommendation by reordering subparagraph (a)(1)(A) to read "Holds or carries on one's person, or conceals." The RCC retains the qualifier "on one's person" because the current shoplifting statute prohibits "possession"[514] and RCC § 22E-701 defines actual possession as to "hold or carry on one's person." This change improves the clarity of the revised statute.

(2) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[514] D.C. Code § 22-3213(a)(1) ("(a) A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person: (1) Knowingly conceals or takes possession of any such property.").

RCC § 22E-2105. Unlawful Creation or Possession of a Recording.

(1) OAG, App. C at 258, recommends deleting the word "unlawful" from paragraphs (a)(4) and (b)(4), which state the required number of "unlawful" recordings. OAG states that the word "unlawful" is "virtually self-referential" because "it is both an element of the offense and describes conduct in violation of the offense." In the alternative, OAG recommends using the word "unauthorized" instead of "unlawful" to match the current statute (D.C. Code § 22-3214(b)).

- The RCC incorporates this recommendation by deleting the word "unlawful from paragraphs (a)(4) and (b)(4). This change improves the clarity of the revised statute.

(2) OAG, at App. C, 407, recommends that unlawful creation or possession of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. (Although not explicit in the OAG comment, the CCRC presumes that OAG's recommendation was with respect to first degree unlawful creation or possession of a recording.)

- The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.

(3) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree unlawful creation or possession of a recording as a Class C misdemeanor and second degree unlawful creation or possession of a recording as a Class D misdemeanor, and generally recommends classifying Class C misdemeanors and Class D misdemeanors as non-jury demandable offenses.

RCC § 22E-2106. Unlawful Operation of a Recording Device in a Motion Picture Theater.

(1) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

Chapter 22. Fraud.

RCC § 22E-2201. Fraud.

(1) *USAO, at App. C. 345, recommends decreasing the number of gradations of fraud. USAO says that "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits fraud and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(2) *USAO, at App. C. 345 recommends replacing the words "that owner" with "an owner." USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*

- The RCC incorporates this recommendation by replacing the words "that owner" with "an owner." This change improves the proportionality of the revised criminal code, and closes a gap in law.

(3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree fraud to $500; $5,000; $50,000; and $500,000, respectively.*

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree fraud has been increased from $2,500 to $5,000. Third degree fraud is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[515] A higher minimum value threshold is justified given the severity of penalties. Research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated

[515] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

with its property crime and larceny rates.[516] This change improves the proportionality of the revised criminal code.

(4) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of fraud, and dividing fraud into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that first degree fraud be classified as a Class 7 felony, second degree fraud as a Class 8 felony, third degree fraud as a Class 9 felony, and fourth degree fraud as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree fraud be classified as a Class A misdemeanor. USAO also recommends that 2nd degree fraud should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree fraud under current law was less than 2 years.[517] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[518]
- The RCC also does not include obtaining a motor vehicle as a factor in grading the fraud offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *defrauded* out of a motor vehicle, the person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and fraud.

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

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[516] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

[517] *See*, Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[518] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2202. Payment Card Fraud.

(1) *OAG at App. C. 259, recommends re-drafting the words "For the employee's or contractor's own purposes, when the payment card was issued to or provided to an employee or contractor for the employer's purposes" with "For the person's own purposes, when the person is an employee or contractor and the payment card was issued to the person for the employer's purposes."*

- The RCC incorporates this recommendation using the language suggested by OAG. This change improves the clarity of the revised criminal code.

(2) *USAO, at App. C. 345, recommends reducing the number of penalty gradations of payment card fraud.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(3) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree payment card fraud to $500; $5,000; $50,000; and $500,000, respectively.*

- This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.

(4) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person to whom a payment card was issued or in whose name the payment card was issued is a resident of, or located in, the District of Columbia; 2) The person who was the target of the offense is a resident of, or located in, the District of Columbia at the time of the fraud; 3) The loss occurred in the District of Columbia; or 4) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.*

- The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[519] If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, other provisions of the subsection establish jurisdiction even if the offense occurred entirely outside of the District.
- Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.[520]

(5) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

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[519] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

[520] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2203. Check Fraud.

(1) *USAO, at App. C. 346, recommends amending the check fraud statute to include "draw[ing]" or "deliver[ing]" a check. USAO notes that it is "concerned that eliminating clearly specified criminal liability for drawing or delivering checks will create a gap in the enforcement of financial crimes."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to attempt liability and may authorize disproportionate penalties. Under the USAO's proposal, attempting to use a fraudulent check would be subject to the same penalties as actually using the check, even though no financial harm has actually occurred.
- USAO notes that forgery and identity theft only require that the actor had intent to obtain property. This distinction is justified due to the fact that both forgery and identity theft require separate wrongful acts. Forgery requires falsification or alteration of a written instrument, and identity theft requires creating, possessing, or using another person's personal identifying information without that person's effective consent. However, there is no separate wrongful act in the check fraud statute.

(2) *USAO, at App. C. 346, recommends lowering the threshold for first degree check fraud from $2,500 to $1,000.*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to grading property offenses and may authorize disproportionate penalties. The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[521]

(3) *OAG, at App. C. 405, recommends that check fraud have the same five penalty grade structure as the RCC's general fraud statute. OAG notes that check fraud that causes a loss of more than $50,000 would be subject to a lower maximum penalty than a general fraud that causes loss of more than $50,000.*

- The RCC partially incorporates this recommendation by adding a gradation for loss of $500 or more and classifying the offense gradations the same as theft. An ordinary (non-certified) check is highly unlikely to be offered or accepted as payment for property or services of $50,000 or more, the next penalty gradation. However, should check fraud occurs on that scale, the RCC's general fraud statute may still apply, provided that the actor obtained property by means of deception. The RCC check fraud statute overlaps substantially with the RCC fraud statute.

[521] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2204. Forgery.

(1) CCRC recommends changing the value threshold required for first degree and second degree forgery to $50,000 and $5,000 respectively.

- The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[522]
- Adopting a $50,000 value threshold for first degree forgery is consistent with the thresholds for other property offenses that are classified in the same penalty classification.

[522] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

RCC § 22E-2205. Identity Theft.

(1) *OAG, at App C. 259, comments that the language under paragraph (g) which tolls the statute of limitations does not define the term "victim," and that the term could refer either to the person whose identifying information was used, or the person who was defrauded using that information. OAG recommends redrafting paragraph (g) to clarify the term "victim"*

- The RCC incorporates this recommendation by amending paragraph (g) to clarify that the statute of limitation tolls until the person whose identifying information was taken, possessed, or used, knows, or reasonably should have known, of the identity theft. This change improves the clarity of the revised statute.

(2) *USAO, at App. C. 347 recommends decreasing the number of gradations of identity theft.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(3) *USAO, at App. C., recommends re-drafting the identity theft offense to include using personal identifying information with intent to "Identify himself of herself at the time of his or her arrest;" "Facilitate or conceal his or her commission of a crime;" or "Avoid detection, apprehension, or prosecution for a crime." USAO says that although using personal identifying information in this manner would constitute obstruction of justice or false statements, those offenses do not properly account for the harm to the person whose personal identifying information has been misappropriated.*

- The RCC does not incorporate this recommendation at this time because it may authorize disproportionate penalties, but the CCRC will review this matter when recommending revisions to the District's false statements and obstruction of justice offenses. As noted in the RCC commentary and in Advisory Group meetings, there are multiple statutes that address conduct described by USAO which revolve around misuse of another person's identity in connection with another crime. Such misuses of identity appear to be addressed as crimes other than property crimes, with the maximum sentences sufficient to also account for the harm to the person whose identifying information is used.

(4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree identity theft to $500; $5,000; $50,000; and $500,000, respectively.*

- This change is made for the reasons described in the identical CCRC recommendation regarding the RCC fraud statute.

(5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of identity theft, and dividing identity theft into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that*

first degree identity theft be classified as a Class 7 felony, second degree identity theft as a Class 8 felony, third degree identity theft as a Class 9 felony, and fourth degree identity theft as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree identity theft be classified as a Class A misdemeanor.[523] *USAO also recommends that 2nd degree identity theft should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of fraud will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 10 years, should also be very rarely used as this is a non-violent property offense. This is consistent with current practice in the District. From 2009-2018, the 97.5th percentile sentence for first degree identity theft under current law was less than 2 years.[524] Setting the $5,000 threshold at a class 9 felony, in addition, is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[525]
- The RCC also does not include obtaining a motor vehicle as a factor in grading the identity theft offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person uses identifying information to *defraud* another person out of a motor vehicle, that person *expects* to transfer the vehicle to another person and is likely to have planned for the event. The harm, consequently, is fundamentally different between obtaining a car by theft and identity theft.

(6) *The CCRC recommends deleting subsection (f), which establishes jurisdiction for payment card fraud if: 1) The person whose personal identifying information is improperly obtained, created, possessed, or used is a resident of, or located in, the District of Columbia; or 2) Any part of the offense takes place in the District of Columbia. This subsection is redundant as general principles of jurisdiction would apply in most circumstances specified. To the extent that general*

[523] USAO had recommended that "proposes that car theft be punished more severely than currently proposed" and that third degree theft should include theft of a motor vehicle, regardless of value. Identity theft requires use of personal identifying information, and it is unclear if USAO's recommendation was for third degree *identity theft* should also include taking a motor vehicle. Even if it do

[524] *See*, Appendix D to Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions.

[525] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

principles of jurisdiction would not apply, extending jurisdiction is inappropriate and potentially unconstitutional.

- The DCCA has generally held that District courts have jurisdiction over alleged offenses if "one of several constituent elements to the complete offense" occurs within the District, "even though the remaining elements occurred outside of the District."[526] If any part of the offense occurs in the District of Columbia, District courts would have jurisdiction under the general principles of jurisdiction. However, subsection (f) establishes jurisdiction even if the offense occurred entirely outside of the District, if the person whose personal information was taken is a resident of, or located in, the District of Columbia.
- Deleting this subsection prevents District courts from exercising extraterritorial jurisdiction in a manner that may be unconstitutional.[527]

(7) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

[526] *United States v. Baish*, 460 A.2d 38, 40–41 (D.C. 1983), abrogated on other grounds by *Carrell v. United States*, 80 A.3d 163 (D.C. 2013).

[527] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a), Common law view of territorial jurisdiction, 1 Subst. Crim. L. § 4.4(a) (3d ed.)

RCC § 22E-2206. Identity Theft Civil Provision.

(1) *USAO notes that RCC § 22E-2206 includes a typographical error, and reference to § 22E-2206 should be changed to § 22E-2205.*

- The RCC incorporates this recommendation, making the suggested change. This change clarifies the revised statutes.

RCC § 22E-2207. Unlawful Labeling of a Recording

(1) *OAG, at App C. 260, recommends redrafting subsection (c) to clarify that certain "actions not people" are excluded from liability.*

- The RCC incorporates this recommendation by adopting the specific language recommended by OAG. This change improves the proportionality of the revised criminal code.

(2) *OAG, at App C. 260-261, recommends moving the unlawful labeling of a recording statute from the fraud chapter to theft chapter, alongside Unlawful Creation or Possession of a Recording and Unlawful Operation of a Recording Device in a Motion Picture Theater.*

- The RCC does not incorporate this recommendation because it is contrary to the logical organization of the revised statutes. The revised statute is not a theft offense, but a fraud offense.

(3) *OAG, at App. C, 407, recommends that unlawful labeling of a recording be classified as a Class C misdemeanor instead of a Class B misdemeanor. Although not explicit in the OAG comment, the CCRC presumes that OAG's recommendation was with respect to first degree unlawful labeling of a recording.*

- The RCC incorporates this recommendation. This change improves the proportionality of the revised criminal code.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2208. Financial Exploitation of a Vulnerable Adult

(1) *OAG, at App C. 261, recommends codifying a definition for the term "undue influence" as used in the financial exploitation of a vulnerable adult (FEVA) statute.*

- The RCC defines the term "undue influence" in RCC § 22E-2208. The term will be defined in RCC § 22E-701, and § 22E-2208 will include a cross reference.

(2) *OAG, at App C. 261, recommends re-drafting the financial exploitation of a vulnerable adult offense to separately include taking property "without the effective consent of an owner."*

- The RCC does not incorporate this recommendation because it may make the revised statute less clear. The revised statute already specifically criminalizes committing any theft, forgery, extortion, fraud, or identity theft with recklessness that the complainant is a vulnerable adult, and these crimes already account for takings without effective consent of the owner.

(3) *USAO, at App. C. 348, recommends reducing the number of penalty gradations for FEVA.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.
- While USAO says that by grading the offense based on value, "the proposed statute penalizes defendants less severely when they take advantage of elderly or vulnerable adults who are not wealthy," this is true of any property offense with penalty grades based on value. The USAO recommendation does not appear, however, to grade on harm other than value. Under current law, the same 10 year maximum penalty applies if a person commits FEVA and obtains property worth $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(4) *USAO recommends re-drafting paragraph (e)(2) to include committing arson, check fraud, criminal damage to property, criminal graffiti, payment card fraud, possession of stolen property, reckless burning, shoplifting, theft, trafficking of stolen property, unauthorized use of a motor vehicle, and unauthorized use of property to a vulnerable person.*

- The RCC partially incorporates this revision by expanding the list of predicate offenses to include check fraud and payment card fraud. The revised statute does not include crimes such as shoplifting and graffiti recommended for inclusion by USAO. Neither the current D.C. Code FEVA statute, nor the revised statute, is intended to serve as general penalty enhancement for all property offenses committed against a vulnerable adult. Rather, FEVA recognizes that vulnerable adults are particularly vulnerable to certain types of theft and fraudulent behaviors.

RCC § 22E-2209. Financial Exploitation of a Vulnerable Adult Civil Provisions.

[No new Advisory Group comments received, or CCRC recommended changes.]

RCC § 22E-2210. Trademark Counterfeiting.

(1) *OAG, at App. C. 438-439, recommends replacing the words "commercial sale" with "sale." OAG notes that it is unclear why the word "commercial" is included.*

- The RCC incorporates this recommendation by deleting the word "commercial." This change improves the clarity of the revised criminal code.

(2) *OAG, at App. C. 439, recommends redrafting the exclusion to liability under subsection (c). OAG recommends replacing the words "Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law" with "Nothing in this section shall be construed to prohibit the legal uses of trademarks." OAG says that the term "civil law" is not defined in the statute, and it is unclear if the term includes anything other than criminal law, or if the meaning is narrower and only includes uses that are legal under trademark law.*

- The RCC partially incorporates this recommendation by updating the commentary to clarify that "legal under civil law" includes not only uses that are non-infringing under trademark law, but that are legal under general civil law. The exclusion is intended to include uses that are legal under general civil law, and is not limited to uses that are legal under *trademark* law. For example, if a person obtains rights to use a trademark through contract, that use would still be excluded from the statute. However, using the words "legal uses of trademarks" would not be clearer than "legal under civil law."

(3) *OAG, at App. C. 439, recommends amending the commentary to clarify that when use of a wrapper, bottle, or packaging does constitute trademark counterfeiting, the value of the property contained within shall be used to determine the value for grading purposes.*

- The RCC incorporates this recommendation by amending the commentary as recommended by OAG. This change improves the clarity of the revised commentary.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

Repeal of Fraudulent Advertising. D.C. Code § 22-1511.

[No new Advisory Group comments received, or CCRC recommended changes.]

Repeal of Fraudulent Registration. D.C. Code § 22-3224.

[No new Advisory Group comments received, or CCRC recommended changes.]

Chapter 23. Extortion.

RCC § 22E-2301. Extortion.

(1) *USAO, at App. C. 349, recommends reducing the number of penalty grades for extortion.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *USAO, at App. C. 349, recommends replacing the words "that owner" with "an owner." USAO states that the current language creates a gap in law, and may fail to criminalize taking jointly owned property by deception.*

- The RCC incorporates this recommendation by replacing the words "that owner" with "an owner." This change improves the proportionality of the revised criminal code, and closes a gap in law.

(3) *The CCRC recommends re-drafting paragraphs (a)(3), (b)(3), (c)(3), (d)(3), and (e)(3) to clarify that the coercive threat may be either explicit or implicit.*

- This does not substantively change the scope of the exclusions. The prior definition of "coercive threat" included explicit or implicit threats. The definition has been revised to omit reference to explicit or implicit threats, and instead the revised statute specifies that explicit and implicit threats are included. This change improves the clarity of the revised code.

(4) *The CCRC recommends changing the value thresholds for fourth, third, second, and first degree extortion to $500; $5,000; $50,000; and $500,000, respectively.*

- This change is made for similar reasons described in the identical CCRC recommendation regarding the RCC fraud statute, and to make the penalty thresholds consistent with other property offenses.
- Extortion is distinguishable from other property offenses in that fourth degree extortion is a felony. The fourth degree version of other property offense are misdemeanors. Raising the value threshold for fourth degree extortion from $250 to $500 helps prevent disproportionately severe penalties.

(5) *USAO, at App. C at 427, recommends eliminating the highest penalty grade of extortion, and dividing extortion into 4 penalty grades. Under USAO's proposal, there would be no penalty grade for property valued at more than $500,000, noting that the threshold is "so high that the top gradations will likely only be used very rarely, if ever." Instead, the highest penalty grade would cover all property valued at more than $50,000. In addition, USAO recommends that first degree extortion be classified as a Class 7 felony, second degree extortion as a Class 8 felony, third degree extortion as a Class 9 felony, and fourth degree extortion as a misdemeanor. USAO's recommendation does not specify which class of misdemeanor, and the CCRC assumes that USAO recommends that fourth degree extortion be classified as a Class A misdemeanor. USAO also recommends that 2nd degree extortion should include taking a motor vehicle, regardless of value.*

- The RCC does not incorporate these recommendations because they may authorize disproportionate penalties. USAO is likely correct that the top gradation of extortion will very rarely be used. However, the penalties authorized for first degree fraud, including imprisonment of up to 15 years, should also be very rarely used as this is a property offense.
- The RCC is already consistent with respect to USAO's recommendation as to penalty classifications for extortion in which property taken is $50,000 or more, or $5,000 or more. USAO recommends that extortion in which $50,000 or more is taken should be classified as a Class 7 felony. Under the RCC, extortion in which $50,000 or more is taken, constitutes second degree extortion which is classified as a Class 7 felony. USAO recommends that extortion in which $5,000 or more is taken should constitutes third degree extortion, which is classified as a Class 8 felony. Under the RCC, extortion in which $5,000 or more is taken is classified as a Class 8 felony.
- The RCC also does not include obtaining a motor vehicle as a factor in grading the extortion offense because it may authorize disproportionate punishment. The RCC includes theft of a motor vehicle as a grading factor in the theft statute, due to the unique importance of motor vehicles in daily life. A person whose car is stolen may suddenly and unexpectedly be unable to commute to work, pick up children from school, or run important errands. However, when a person is *extorted* out of a motor vehicle, the person may expect to transfer the vehicle to another person and is more likely to have planned for the event. The harm, consequently, is different between obtaining a car by theft and fraud.

Chapter 24. Stolen Property.

RCC § 22E-2401. Possession of Stolen Property.

(1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for possession of stolen property.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2402. Trafficking of Stolen Property.

(1) *USAO, at App. C. 350, recommends reducing the number of penalty grades for trafficking of stolen property.*

- The RCC does not incorporate this recommendation for the reasons described in the response to the identical USAO recommendation regarding the RCC fraud statute.

(2) *USAO, at App. C. 350, recommends replacing the words "property" with the words "total property trafficked," in paragraphs (a)(4), (b)(4), (c)(4), and (d)(4). USAO states that this will clarify that each penalty gradation is determined by the aggregate value of the property, as opposed to a requirement that each individual piece of stolen property trafficked must meet the value threshold.*

- The RCC incorporates this recommendation by amending the statute to refer to "total property trafficked." This change improves the clarity of the revised criminal code.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

RCC § 22E-2403. Alteration of Motor Vehicle Identification Number.

(1) The CCRC recommends changing the value threshold for the motor vehicle or motor vehicle part from $2,500 to $5,000 for first degree alteration of a motor vehicle identification number.

- The RCC generally adopts a $5,000 threshold for property crimes to be subject to felony punishment. This threshold is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000.[528]

[528] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

RCC § 22E-2404. Alternation of Bicycle Identification Number.

(1) OAG, at App. C. 407, *recommends that alteration of a bicycle identification number be classified as a Class D misdemeanor instead of a Class C misdemeanor.*

- The RCC incorporates this recommendation by changing the penalty classification. This change improves the proportionality of the revised criminal code.

(2) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying fifth degree theft as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

Chapter 25. Property Damage.

RCC § 22E-2501. Arson.

(1) *OAG, App. C at 261, recommends adding two commas to paragraph (a)(1) in first degree arson*[529] *so that it reads "Knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building" as opposed to the current text without commas ("Knowingly starts a fire or causes an explosion that damages or destroys a dwelling or building.") OAG states, that as currently drafted, it is unclear whether "damages or destroys" modifies both fire and explosion, or just explosion, and that if the Commission intended for "damages or destroys" to modify both, the commas would clarify it.*

- The RCC incorporates this recommendation by adding commas to paragraphs (a)(1) and (b)(1) and subsection (c) so that they require "knowingly starts a fire, or causes an explosion, that damages or destroys a dwelling or building." This clarifies the revised statutes.

(2) *USAO, App. C at 351, recommends deleting from first degree arson and second degree arson the requirement that a victim of the fire or explosion "is not a participant in the crime." With this revision, first degree arson and second degree arson would both require that the defendant is reckless as to the fact that any person is present in the dwelling or building, and first degree arson would have the additional element that the fire or explosion, in fact, causes death or serious bodily injury to any person. USAO quotes the CCRC's other jurisdiction research in Appendix J: "There is limited support in the 50 states for including, with strict liability that a person other than a participant was killed or suffered serious bodily injury as does the revised aggravated arson gradation." USAO states that the commentary "provides no justification for this departure, which serves only to treat the loss of some human life as more important than others" and that "[a]bsent a much clearer justification, USAO urges the Commission" to delete the requirement that the victim be a "person who is not a participant in the crime is present."*

- The RCC does not incorporate this recommendation because it would lead to inconsistent liability within the revised arson statute and with other RCC offenses. The current D.C. Code arson statute is limited to property damage,[530] but District case law requires some endangerment of human

[529] OAG's comment is specific to first degree arson, but also applies to second and third degree.

[530] D.C. Code § 22-301 ("Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.").

life.[531] The revised arson statute is a property crime, but has three gradations that authorize increased penalties based on the seriousness of the risk to others against their will. The revised arson statute excludes participants in the crime because such participants are similarly situated to the actor—their presence is unrelated to the risk the fire or explosion poses to the occupants or residents of the dwelling or building. Just as it would be illogical to increase the penalty on an actor for increasing a risk to the actor's own self, it is illogical to increase the penalty on an actor for increasing a risk to an accomplice. While the USAO comment notes that the offense appears "to treat the loss of some human life as more important than others,"—a treatment that the USAO appears to endorse[532]—the more relevant question is whether the arson offense in particular should provide an additional penalty for risk assumed by a co-participant in a crime. The RCC already provides liability under the RCC assault and homicide statutes if a defendant starts a fire or causes an explosion that injures or kills a participant in the crime. Excluding participants from first degree arson and second degree arson is also consistent with the RCC burglary (RCC § 22E-2701), RCC murder (RCC § 22E-1101), and RCC manslaughter (RCC § 22E-1102) statutes. The commentary to the revised arson statute has been updated to reflect this discussion.

(3) *USAO, App. C at 351, recommends including a "vehicle" in first degree arson and second degree arson. With this revision, first degree arson and second degree arson would require that the fire or explosion damage or destroy a "dwelling, building, or vehicle" and that the defendant was reckless as to the presence of another person in the "dwelling, building, or vehicle." USAO quotes the RCC commentary rationale that fires/explosions in or on property "that are not dwellings do not endanger human life the same way as fires in dwellings or buildings." USAO states that the "Commentary's rationale does not account for the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings." USAO gives as a hypothetical "a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device," stating that this person would not be liable under the RCC arson statute.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. The current D.C. Code arson statute does not categorically include motor vehicles. The RCC arson statute is limited to damaging or destroying a "dwelling" or a "building" because, given the RCC definitions of these

[531] *See, e.g.*, *Phenis*, 909 A.2d at 164 ("With respect to arson, the government must prove that appellant acted intentionally, and not merely negligently or accidentally, while consciously disregarding the risk of endangering human life and offending the security of habitation or occupancy.) (internal citations omitted).

[532] See, e.g., the USAO comment on arson recommending higher penalties for arson that results in the death of protected persons.

terms,[533] there is a significant likelihood of a person being present in these structures at the time of a fire or explosion, and such a person may be unable to timely become aware of the fire and safely exit the structure. In contrast, it is highly unlikely that a person will be inside a vehicle that is not being used as a "dwelling" at the time of a fire or explosion and be unaware of the fire and unable to safely exit the vehicle. In the absence of such an increased risk, including damaging or destroying such vehicles in the revised arson statute would simply penalize mere property damage more severely than other types of property damage in the RCC criminal damage to property statute (RCC § 22E-2503). Under the RCC a person who engages in the type of conduct hypothesized by USAO—"a person who sets explosives underneath a vehicle and lies in wait until the vehicle is occupied before detonating the device"—would be liable for resulting harms (or attempts to cause such harms) under RCC offenses against persons such as assault (RCC § 22E-1202) or murder (RCC § 22E-1101) (in addition to liability for the property damage under the RCC criminal damage to property statute (RCC § 22E-2503)). Arson, a property offense, is not an appropriate or sufficient offense for such conduct.

(4) *USAO, App. C at 352, recommends including a protected person enhancement to "this provision" [presumably the first degree of the RCC arson statute which involves a physical harm to another]. USAO states that under D.C. Code § 22-1331(4), arson is a "crime of violence" and is a "serious crime" because it can cause "serious injury or death to a victim." In addition, USAO notes that first degree of the RCC arson statute requires "death or serious bodily injury." USAO proposes using the language suggested in its General Comments, App. C at 273, which applies strict liability to the fact that the complainant is a "protected person" with an affirmative defense that the accused "was negligent as to the fact that the victim was a protected person at the time of the offense. This defense shall be established by a preponderance of the evidence."*

- The RCC does not incorporate this recommendation because it would lead to disproportionate penalties. The RCC arson offense recognizes the general risk to human life that a fire or explosion poses. For both first degree arson and second degree arson, recklessness that a person other than a participant in the crime is present in the dwelling or building is sufficient and although first degree requires death or serious bodily injury, strict liability is sufficient for this element. A defendant that is reckless that a protected person is present in the dwelling or building warrants greater penalties than the RCC arson statute allows. In addition to liability under the RCC arson statute, that defendant may have liability under other RCC offenses like assault (RCC § 22-1202) or murder (RCC § 22E-1101).

[533] RCC § 22E-701 (defining "building" as a structure affixed to land that is designed to contain one or more natural persons" and "dwelling" as "a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling.").

(5) *The CCRC recommends, by using the phrase "in fact," specifying strict liability for the requirements in the affirmative defense that the actor "has a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit." As is discussed in the commentary to the RCC arson offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*

- This change improves the clarity of the revised statute.

(6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity, consistency, and proportionality of the revised statute.

RCC § 22E-2502. Reckless Burning.

(1) USAO, App. C at 352, recommends renumbering the paragraphs so that instead of starting with paragraph (3), the offense starts with paragraph (1). USAO states that this appears to be a typographical error.

- The RCC incorporates this recommendation by renumbering the paragraphs so the offense starts with paragraph (1). USAO correctly notes that this was a typographical error. This change improves the clarity of the revised statutes.

(2) OAG, App. C at 261-262, comments that, as currently drafted, paragraph (a)(2) is unclear ("With recklessness as to the fact that the fire or explosion damages or destroys a dwelling or building."). OAG states it is unclear whether the offense is satisfied when a person knowingly starts a fire/causes an explosion reckless as to the fact that the fire would damage/destroy a dwelling/building), regardless of whether or not it does, or whether the offense requires that the dwelling/building must be damaged/destroyed. OAG states that if "the drafters intended the former, then subparagraph (a)(2) should be redrafted to state 'With recklessness as to the fact that the fire or explosion would damage or destroy a dwelling or building'" and that if "the intent is the latter, then the Commentary should state that proposition and provide examples of both fact scenarios."

- The RCC incorporates this recommendation by clarifying in the commentary that it must be proven both that the fire or explosion damaged or destroyed the building and that the actor had a reckless culpable mental state as to that result. The commentary also states in a footnote that it would only be an attempted reckless burning if the actor knowingly starts a fire or causes an explosion with recklessness that the fire or explosion would destroy or damage the building or dwelling, but there is no such damage or destruction. This change clarifies the revised commentary.

(3) OAG, App. C at 262, recommends the Commentary for the RCC property offenses be revised so that the phrase "regardless of its occupancy" is struck from a sentence that states the RCC creates a new affirmative defense that "allows a person to recklessly damage or destroy with a fire or explosion a dwelling or building, regardless of its occupancy, with proper government authorization." OAG states that the reckless burning affirmative defense does not contain this exception. In addition, the phrasing "incorrectly implies that a permit allows someone to burn down a building even if there are people in it."

- The RCC incorporates this recommendation by striking the phrase "regardless of its occupancy" from the commentary. This change clarifies the revised statutes.

(4) USAO, App. C at 352, recommends including a "vehicle" in reckless burning. With this revision, the reckless burning statute would require that the fire or explosion damage or destroy a "dwelling, building, or vehicle." USAO quotes the RCC commentary rationale that fires/explosions in or on property "that are not dwellings do not endanger human life the same way as fires in dwellings or buildings." USAO states that the "Commentary's rationale does not account for

the idea that vehicles are intended for use by people, and thus people might be in or near vehicles even if those vehicles are not being used as dwellings."

- The RCC does not incorporate this recommendation for the reasons described for the identical USAO recommendation regarding arson.

(5) *The CCRC recommends, by using the phrase "in fact," specifying strict liability for the requirements in the affirmative defense that the actor "has a valid blasting permit issued by the District Of Columbia Fire and Emergency Medical Services Department, and complied with all the rules and regulations governing the use of such a permit." As is discussed in the commentary to the RCC reckless burning offense, this affirmative defense is new to District law. Strict liability is appropriate because the affirmative defense requires the existence of specific facts regarding compliance with a highly regulated, technical permitting process.*

- This change improves the clarity of the revised statutes.

(6) *The CCRC recommends deleting from the affirmative defense the requirement that the actor prove the affirmative defense by a preponderance of the evidence. The RCC has a general provision that addresses the burden of proof for all affirmative defenses in the RCC (RCC § 22E-XX).*

- This change improves the clarity, consistency, and proportionality of the revised statutes.

RCC § 22E-2503. Criminal Damage to Property.

(1) *USAO, App. C at 352, recommends decreasing the number of gradations for criminal damage to property because "too many property value gradations create confusion—the severity of the penalty is primarily an issue for sentencing."*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC penalty gradations across most property offenses and may authorize disproportionate penalties. Under current law, the same 10 year maximum penalty applies if a person commits malicious destruction of property and the "value" of the property is $1,000, or $1,000,000. Dividing the offense into five penalty grades better aligns the maximum penalties with the degree of loss caused by the offense, and limits the risk of disproportionate or unequal sentences.

(2) OAG, App. C at 262, comments that it is unclear in the text of the criminal damage to property statute that when the property is only partially damaged there are two ways that the amount of damage can be proven—either by the reasonable cost of repairs or proof of the change in the fair market value of the damaged property. OAG states that this is clear in the commentary, but not the text of the statute, which refers only to the "amount of damage." OAG states that "if the drafters wanted to include a statement in the substantive offense that reaches the 'reasonable cost of the repairs' it could do so or it could use the phrase 'financial injury,'" which is a defined term in the RCC but is not used in the criminal damage to property offense.

- The RCC codifies "amount of damage" as a defined term in RCC § 22E-701: "'Amount of damage' means: (A) When property is completely destroyed, the property's fair market value before it was destroyed; or (B) When the property is partially damaged, either: (i) If there are repairs, the reasonable cost of necessary repairs, or (ii) If there are no repairs, the change in the fair market value of the damaged property. (C) Notwithstanding subsection (B), if the reasonable cost of repairs has a greater value than the fair market value of the property before it was damaged, the amount of damage is the fair market value of the property before it was damaged." The definition is generally consistent with DCCA case law for the current malicious destruction of property offense and is discussed in detail in the commentary to RCC § 22E-701. This change improves the clarity of the revised statutes.

(3) The CCRC recommends changing the value thresholds for fourth, third, second, and first degree criminal damage to property to $500; $5,000; $50,000; and $500,000, respectively.

- The RCC changes the property value thresholds to align the harm caused by each grade of the offense with maximum penalties. Most notably, the value threshold for third degree criminal damage to property has been increased from $2,500 to $5,000. Third degree criminal damage to property is a felony offense, subject to the same penalties as fifth degree robbery, first degree menacing, or enhanced stalking. A higher minimum value threshold is justified given the severity of penalties. This threshold

is consistent with the CCRC public opinion surveys of District voters for grading the penalty for theft of $5,000, a crime that similarly entails loss of property.[534] Also for the crime of theft, research by the Pew Charitable Trusts evaluating changes to felony theft thresholds across the country in recent decades concluded that: 1) Raising the felony theft threshold has no impact on overall property crime or larceny rates; 2) States that increased their thresholds reported roughly the same average decrease in crime as the 20 states that did not change their theft laws; and 3) The amount of a state's felony theft threshold—whether it is $500, $1,000, $2,000, or more—is not correlated with its property crime and larceny rates.[535] This change improves the proportionality of the revised criminal code.

(4) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(5) PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends fifth degree criminal damage to property as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

[534] See Advisory Group Memo #27 Appendix A - Survey Responses. Question 1.01 provided the scenario: "Stealing property worth $5,000..". Question 1.01 had a mean response of 5.2, above the 4 milestone corresponding to simple assault involving a minor injury (currently a 6 month offense in the D.C. Code), and the 6 milestone corresponding to significant bodily injury assault (currently a 3 year offense in the D.C. Code). In another survey, Question provided the scenario "Stealing property (other than a car) worth $5,000" which received a mean response of 6.2.

[535] Pew Charitable Trusts, *The Effects of Changing Felony Theft Thresholds* (April 2017) at 1.

RCC § 22E-2504. Criminal Graffiti.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends criminal graffiti as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

Chapter 26. Trespass.

RCC § 22E-2601. Trespass.

(1) *USAO, App. C at 353, recommends striking the phrase "under civil law" from the offense definition. Alternatively, USAO recommends substituting language from current D.C. Code § 22-3302, which instead requires proof that a trespass was "against the will of the lawful occupant or of the person lawfully in charge thereof" or "without lawful authority." USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*

- The RCC does not incorporate this recommendation because doing so would make the statute less clear. Even if the phrase "under civil law" were stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase "under civil law," the statute might be misread to apply to any person who was not granted a privilege or license explicitly.
- As discussed in the RCC Commentary, the current D.C. Code phrase "against the will of the lawful occupant or of the person lawfully in charge thereof" that USAO recommends as an alternative broadly captures conduct that is innocent, protected, or both. There are many instances in which a person is allowed to enter or remain on a property over the objection of a lawful occupant or a person who is lawfully in charge. Consider the following examples:
    - Parent 1 (lawful occupant) demands Parent 2 leave the family home. Parent 2 remains.
    - Landlord (lawfully in charge of property) demands Tenant immediately vacate a property without an eviction order. Tenant remains.[536]
    - Special Police Officer bars Tenant from public housing, in violation of lease agreement and District municipal regulations. Tenant returns.[537]
    - Police Officer (lawfully in charge of property) closes a public building early to obstruct Protestor's demonstration, in violation of the First Amendment. Protestor remains.[538]
    - Roommate A (lawful occupant) demands Roommate B's guest leave the common area of an apartment. Roommate B and guest remain.[539]

[536] *See* D.C. Code § 42-3505.01(a).
[537] *See Foster v. United States*, 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).
[538] *See Wheelock v. United States*, 552 A.2d 503, 505 (D.C. 1988).
[539] *See, e.g., Saidi v. United States*, 110 A.3d 606, 611-12 (D.C. 2015) (discussing the authority of one co-occupant to countermand the invitation of another co-occupant).

(2) *USAO, App. C at 353-354 recommends "narrowing the category of offenses entitled to a jury trial to those offenses which impact an individual's constitutional rights." USAO further says that, "While USAO recognizes the constitutional issues involved, USAO recommends imposing a temporal and spatial limit to narrow the category of offenses entitled to a jury trial in order to streamline prosecutions under this section." Specifically, USAO "recommends removing trespasses in private areas of public buildings or trespasses in public buildings after they are closed to the public from the category of offenses entitled to a jury trial." USAO also says it "recommends removing trespasses in violation of a DCHA baring notice from the category of offenses entitled to a jury trial." At page 415, USAO also "recommends keeping jury demandability requirements for misdemeanors consistent with current law with current District law." USAO recommends excluding three categories of cases in which constitutional rights are unlikely to be implicated: (1) private areas of public buildings; (2) public buildings after they are closed to the public; and (3) DCHA barring notice violations. USAO recommends superseding* United States v. Frey,[540] *by imposing a new temporal and spatial limitation on the jury demandability provision.*

- Assuming USAO's comment at 353-354 is not superseded by its comments at 415, the RCC partially incorporates this recommendation by making trespass of all non-dwellings non-jury demandable. The RCC recommends that first degree trespass (regarding a "dwelling") be a jury demandable Class B misdemeanor, second degree trespass (regarding a "building") be a non-jury demandable Class C misdemeanor, and third degree trespass (regarding "land, a watercraft, or a motor vehicle") be a non-jury demandable Class D misdemeanor. This change clarifies the revised statute and is consistent with the CCRC general approach to jury demandability. See the Second Draft of Report #41, for more details on the CCRC general approach to recommending conferral a right to a jury trial.
- Assuming USAO's comment at 353-354 are superseded by its comments at 415, the RCC does not incorporate the USAO comment because it is inconsistent with the CCRC general approach to recommending conferral a right to a jury trial. The RCC would change District statutory and case law in *United States v. Frey*[541] by categorically making trespass of non-dwelling public buildings non-jury demandable. Notably, while the RCC makes trespasses on public grounds or buildings non-jury demandable, it also significantly decreases the penalties for such conduct from the six months imprisonment authorized under current law.

(3) *OAG, App. C at 408, recommends that all Class A and B misdemeanors be jury demandable, but offenses with a Class C, D, and E penalty, including attempts to commit a Class B misdemeanor not be jury-demandable. With respect to the RCC trespass offenses, this would make attempts to commit first degree trespass non-jury demandable.*

[540] 137 A.3d 1000, 1004 (D.C. 2016).
[541] 137 A.3d 1000, 1004 (D.C. 2016).

- The RCC partially incorporates this recommendation by making first degree trespass jury demandable, but second and third degree trespass non-jury demandable. The Second Draft of Report #41, confers a right to a jury for all completed or attempted Class A and Class B misdemeanors and any other misdemeanor in which the complainant is a law enforcement officer or a conviction for a sex offender registration offense. All other Class C, Class D, and Class E misdemeanors the RCC makes non-jury demandable. Consistent with this approach, attempt first degree trespass is jury demandable, unlike the OAG recommendation.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

a. The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying second degree trespass as a Class C misdemeanor, third degree trespass as a Class D misdemeanor, and generally recommends classifying Class C and D misdemeanors as non-jury demandable offenses.

(5) *OAG, App. C at 263, recommends revising the cross-reference to 14 DCMR § 9600, because the D.C. Municipal Regulations are frequently amended and renumbered.*

a. The RCC incorporates this recommendation by adopting OAG's proposed language: "unless the bar notice was lawfully issued pursuant to the District of Columbia Municipal Regulations on an objectively reasonable basis." This change improves the clarity of the revised code.

(6) *OAG, App. C at 263, recommends clarifying the following sentence in the commentary (p. 136): "A person who has been asked to leave the premises must have a reasonable opportunity to do so before he or she can be found guilty of a remaining-type trespass." OAG explains that a person who surreptitiously remains in a location, knowing they have no privilege or license to be there at that time, commits a trespass offense, even if they are not afforded a reasonable opportunity to leave after being discovered.*

a. The RCC incorporates this recommendation by clarifying in commentary that the "reasonable opportunity" requirement applies only to a person who commits a trespass *by* remaining after a demand to leave. It does not apply to a person who enters unlawfully or to a person who surreptitiously remains. This change clarifies the revised commentary.

(7) *OAG, App. C at 263, recommends removing a reference to* Dist. of Columbia v. Wesby,[542] *in the commentary (p. 139, n. 23). OAG explains that the case discusses indicators of* unlawful *presence but not necessarily* forced *entry.*

a. The RCC incorporates this recommendation by striking the citation to *Wesby* from the relevant footnote. This change clarifies the revised commentary.

(8) *The CCRC recommends revising the commentary to note the DCCA's recent opinions in* Rahman v. United States[543] *and* Foster v. United States[544] *which were issued after the most recent draft language was released.*

[542] 138 S. Ct. 577 (2018).

a. This change clarifies the revised commentary.

(9) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

a. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(10) *The CCRC recommends revising the permissive inference provision to begin with the phrase "In a trial determining a violation under this section."*

a. This change clarifies the revised statute and does not further change District law.

[543] 208 A.3d 734 (D.C. 2019).
[544] 17-CM-994, 2019 WL 5792498 (D.C. Nov. 7, 2019).

Chapter 27. Burglary.

RCC § 22E-2701. Burglary.

(1) *USAO, App. C at 354, recommends "adding a 'while armed' penalty enhancement, consistent with the language proposed in the General Comments, above." In its General Comments, USAO, App. C at 272-273, recommends an enhancement providing additional imprisonment when the person is "armed with or having readily available what, in fact, is a dangerous weapon or imitation dangerous weapon."*[545] *USAO explains that the mere presence of a weapon creates a danger that someone will be frightened or injured, intentionally or inadvertently. USAO also notes that the inclusion of imitation firearms ensures that enhancement is available in cases in which the firearm was not recovered and could not be test-fired. USAO also says that it "believes that it is more clear to include this provision as an enhancement, rather than as an offense gradation."*

- The RCC partially incorporates this recommendation, which predates the RCC's weapon offense recommendations, by including in paragraph (d)(4) a penalty enhancement applicable to all grades of burglary when a person "[k]nowingly holds or carries on the actor's person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location." The RCC burglary weapon enhancement is substantially similar to the language recommended by USAO (which in turn follows current D.C. Code § 22-4502(a)), except that the RCC burglary weapon enhancement requires actual possession of the dangerous weapon or imitation dangerous weapon. The narrowing of the RCC burglary weapon enhancement as compared to the "readily available" language in the USAO General Comments (referring to an area very near the actor but not on their person) is at most a slight change, given that, under current law and the RCC, a burglary is completed as soon as the illegal entry is made with the appropriate intent.[546]
- Addition of the burglary weapon enhancement may significantly increase burglary penalties in some cases. However, it should be noted that, contrary to the USAO assertion at App. C at 354 that "under the RCC, a defendant is equally culpable for an armed burglary and an unarmed burglary," even absent the burglary weapon enhancement, committing a burglary with a dangerous weapon is subject to a higher penalty than committing such a crime without a dangerous weapon. In the First Draft of Report #39 (August 5, 2019), the RCC criminalizes carrying a weapon without a license,[547] possessing a weapon with intent to commit

[545] *See* D.C. Code § 22-4502(a); Crim. Jur. Instr. for D.C. 8.101 (2019).
[546] It would be a rare fact pattern where a person is making such an entry without holding or carrying the dangerous weapon or imitation dangerous weapon, but having it "readily available" at the time of entry.
[547] RCC § 22E-4102.

burglary,[548] and possessing a weapon in furtherance of a burglary.[549] Collectively, these offenses punish behavior that creates a dangerous environment by making it easier to commit a crime or to cause an injury (intentionally or inadvertently). Additionally, the first degree menacing offense[550] punishes using a weapon or imitation weapon to create apprehension of immediate harm and the first, second, third, and fifth degree assault offenses[551] punish using a weapon or imitation weapon to inflict a physical injury. In this way the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense.

- This change clarifies and improves the proportionality of the revised statute.

(2) *USAO, App. C at 354, recommends striking the phrase "under civil law" from the offense definition. USAO states that the reference to civil law may lead to confusion and inconsistent application of the law.*

b. The RCC does not incorporate this recommendation because doing so would make the statute less clear. If the phrase "under civil law" was stricken, parties would be required to look to civil law to determine whether a person has a privilege or license or authority to enter or remain on the property. The cross-reference to civil law makes clear that civil law (not another criminal law) is the authoritative source for determining whether a privilege or license exists. Additionally, without the phrase "under civil law," the statute might be misread to apply to any person who was not granted a privilege or license explicitly.

(3) *OAG, App. C at 264, asks why the offense specifies that a building or business yard is "not open to the general public at the time of the offense" when it already requires that the person does not have a privilege or license to enter or remain.*

- The RCC revises the commentary to clarify why the relevant sections are not redundant. Namely, there are instances in which a person is unauthorized to enter a space that is open to the general public. In those cases, burglary liability will not attach. Consider, for example:
  - A person is barred from a grocery store for shoplifting. That person returns to the same grocery store, in violation of the bar notice, with intent to commit theft, during business hours. That person has committed a trespass,[552] but not a burglary.
  - A person is ordered to stay 100 yards away from a former intimate partner. The person sees the former partner at the

[548] RCC § 22E-4103.
[549] RCC § 22E-4104.
[550] RCC § 22E-1203.
[551] RCC § 22E-1202.
[552] RCC § 22E-2601.

grocery store, approaches her, and assaults her. That person has committed contempt,[553] but not burglary.

- The RCC revises the statutory language to strike the phrase "without a privilege or license to do so under civil law" in subparagraph (c)(1)(A) because the same language is repeated verbatim in paragraph (c)(2). This revision does not substantively change the revised statute.

(4) *OAG, App. C at 406-407, and USAO, App. C at 422-423, recommend that the penalties for Burglary be increased, on grounds that they understate the serious nature of the offense. Both agencies note the sharp decrease from the penalties under current law. OAG notes the potential for harm to a victim that occurs when a person burglarizes an occupied dwelling or building or the potential of harm to property, whether the dwelling is occupied or not. USAO explains that a burglary with intent to commit a minor crime could be very traumatizing, warranting a penalty far above the penalty for the predicate offense if the predicate offense is a low felony or misdemeanor. USAO offered the following examples: "[A] defendant entered a victim's home while the victim and the victim's young children were asleep, and the victim woke up to the defendant punching the victim (6th Degree Assault), threatening to rape the victim's young children (1st Degree Threats), or even threatening to rape the victim at gunpoint (1st Degree Menacing)." OAG does not make a specific recommendation as to how much the penalty for burglary should be increased. USAO "recommends ranking 1st, 2nd, and 3rd Degree Burglary as Class 4, Class 6, and Class 7 offenses, respectively."*

- The RCC partially incorporates this recommendation by providing penalty enhancements where an actor "Knowingly holds or carries on the actor's person a dangerous weapon or imitation firearm while entering or surreptitiously remaining in the location." The enhanced versions of first, second, and third degree burglary are classified as Class 7, Class 8, and Class 9 offenses, respectively. The enhanced penalties have the net effect of substantially increasing authorized penalties for otherwise low-felony and misdemeanor offenses against persons when committed as part of a burglary, or carrying a dangerous weapon as part of a burglary. The enhanced penalties address the examples provided by USAO—in addition to any liability for attempted sexual assault (a major felony) and weapon possession crimes that appears to be within the scope of the USAO's hypothetical fact pattern.
- The RCC's penalty recommendations for burglary reflect a sharp decrease from the current D.C. Code statutory penalties of 30 years imprisonment for unenhanced first degree burglary (60 years if while-armed) and 15 years imprisonment for unenhanced second degree burglary (45 years if while-armed) which are outdated and far more severe than is proportionate under modern national norms, D.C. judicial practice, or public opinion polling of D.C. voters.

[553] D.C. Code § 16-1005(g).

- Nationally, for burglary, 78.3% of prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when the burglary was the most serious crime (so presumably not concurrent to another penalty).[554] These statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon.
- D.C. court data on burglary sentences pose analysis challenges because such a high percentage of the sentences—60% of first degree burglary and 24% of second degree burglary—run concurrent to another sentence for a more serious crime in the case.[555] For all first degree burglary sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) for first degree burglary, including enhancements, was 60 months, and the 75th quantile (25% of sentences were greater) for second degree burglary, including enhancements, was 30 months. Even the most severe (97.5%) Superior court sentences for first degree burglary (180 months, including enhancements) and second degree burglary (76.5 months, including enhancements) are a small fraction of the enhanced burglary penalties authorized by current statute (720 months and 540 months, respectively).
- Polling of District voters also strongly suggests that while the commission of crimes in a dwelling or building merits an increased penalty, this increase is quite modest and is almost entirely washed out by the effect of the predicate offense committed inside for aggravated assault and worse felonies. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[556] Critically, the polling questions asked for an assessment of a

[554] U.S. Department of Justice Bureau of Justice Statistics, Time Served in State Prison, 2016, November 2018 at 3.

[555] The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

[556] Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 10-year offense in the D.C. Code.

hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC.

- Critically important for assessing the proportionality of burglary penalties is the fact that the offense overlaps with attempts to commit, or successful completion of, a wide array of RCC crimes. These predicate crimes that a person attempts or commits in the course of a burglary carry their own penalties and must be considered in establishing proportionate penalties. The RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. This change clarifies and improves the proportionality of the revised statute.

(5) *The CCRC recommends specifying in first degree burglary that a complainant must either directly perceive the actor or enter with the actor, consistent with the similar provision in second degree burglary.*[557]

- This change improves the consistency of the revised statute.

(6) *The CCRC recommends replacing the reference to "a criminal harm involving a bodily injury, a sexual act, a sexual contact, confinement, loss of property, or damage to property" with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*

- This change clarifies the revised statute and does not further change District law.

(7) *The CCRC recommends adding voyeurism as a predicate for burglary.*[558]

- This change eliminates an unnecessary gap in liability.

(8) *The CCRC revises the definition of "dwelling" to include communal areas secured from the general public, in light of the DCCA's recent opinion in* Ruffin v. United States.[559]

- This revision does not substantively change current District law, and it improves the clarity and consistency of the revised statutes.

[557] Consider, for example, a person who enters the lobby and mailroom of a large residential building, undetected by an resident on the fifth floor. That person commits a second degree burglary but not a first degree burglary.

[558] The CCRC issued a recommendation for voyeurism in the First Draft of Report #42 (November 20, 2019).

[559] 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

RCC § 22E-2702. Possession of Tools to Commit Property Crime.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of tools to commit property crime as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends replacing the reference to "a criminal harm involving the trespass, misuse, taking, or damage of property" with a specific list of predicate offenses to clarify that the statute requires a categorical approach and not a conduct-specific approach.*

- This change clarifies the revised statute and does not further change District law.

(3) *The CCRC recommends reclassifying this offense as a Class D misdemeanor, so that this inchoate conduct is not punished more severely than a completed third degree trespass under RCC § 22E-2601(c).*

- This change improves the proportionality of the revised offenses.

Chapter 34. Government Custody.

RCC § 22E-3401. Escape from a Correctional Facility or Officer.

(1) *USAO, App. C at 279-280, recommends adding buildings operated by the U.S. Marshal's Service to the definition of "correctional facility," so that people who escape from the cell block at the Superior Court for the District of Columbia are punished as severely as people who escape from the Central Detention Facility and the Central Treatment Facility.*

- The RCC partially incorporates this recommendation by revising the first degree escape from an institution or officer offense to include an escape from a cellblock operated by the U.S. Marshal's Service. The definition of "correctional facility" remains limited to facilities that are correctional in nature. This change reduces a gap in liability.

(2) *USAO, App. C at 355 and 428, recommends classifying third degree escape from a correctional facility or officer (the failure to report or return to a halfway house) as a felony offense, particularly if the offense for which the person is detained at a halfway house is a felony.*

- The RCC does not incorporate this recommendation because it would result in a disproportionate penalty, treating behavior of different seriousness the same. In the Second Draft of Report #41, the CCRC recommends classifying first degree escape as a Class 8 felony, second degree escape as a Class A misdemeanor, and third degree escape as a Class C misdemeanor offense. This classification improves the consistency and proportionality of the revised offense.[560] The USAO recommendation would punish failing to report or return the same as a prison break or fleeing an arrest. However, these situations are much more likely to create physical danger to another person due to a hot pursuit than a failure to report to or return to a halfway house.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying third degree escape from an institution or officer as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(4) *The CCRC amends first degree escape from a correctional facility or officer to clarify that a person must be subject to an order* and *leave without permission, consistent with the commentary and the other degrees of the offense. The prior draft erroneously included the word "or" instead of "and."*

- This change clarifies the revised statute.

[560] *See, e.g.*, D.C. Code §§ 24-241.05(b) (punishing a violation of work release as a misdemeanor, prosecutable by the Attorney General for the District of Columbia); 23-1329(c) (punishing a violation of a condition of release as a misdemeanor).

RCC § 22E-3402. Tampering with a Detection Device.

(1) *USAO, App C. at 356-357, recommends revising the statute to include people who are being supervised by PSA[561] and CSOSA[562] for offenses that occurred and were prosecuted in other jurisdictions. USAO explains that excluding out-of-state cases "would deprive the government of a means by which it can deter certain offenders from violating their terms of release" and "could jeopardize the safety of the community, since the offenders assigned to GPS monitoring are typically those accused or convicted of serious offenses and/or at high risk of violating their release conditions."*

- The RCC does not incorporate this recommendation because it may result in overlap between criminal offenses. GPS monitoring is not limited to dangerous or high-risk offenders. Although the District's pretrial release statute[563] requires, in many cases, the least restrictive conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community, there is no such judicial finding required before GPS monitoring is ordered as a condition of probation or required as a sanction for a technical violation. Further, the District has no control over the underlying statutes and procedures that allow for the placement of a detection device in a case that originated out of state. Although a person who is being supervised in an out-of-state case may not be prosecuted in the District for tampering with a detection device, other deterrents exist. First, the person's pretrial release, presentence release, probationary sentence, or supervised release may be revoked by the supervising jurisdiction. Second, the person may be charged in the District with criminal damage to property.[564]

(2) *USAO, App. C at 357-358, recommends requiring an intent (instead of purpose) to tamper with the device. USAO offers hypotheticals in which a person allows a device to lose power or to be submerged in water, not because they desire to interfere with GPS monitoring, but because they want to go out and have fun. USAO notes that an intent requirement is more consistent with national legal trends than purpose.*

- The RCC incorporates this recommendation by requiring only intent to interfere with the device. This change eliminates a possible gap in liability.

(3) *USAO, App. C at 358, recommends codifying a definition of the phrase "interferes with the operation of the detection device," for clarity. USAO proposes, "the phrase 'interferes with the operation of the detection device' applies to any form of interference with the emission or detection of the device's*

[561] The Pretrial Services Agency for the District of Columbia does not supervise or monitor out-of-state cases.
[562] "Court Services and Offender Supervision Agency."
[563] D.C. Code § 23-1321(c)(1)(B).
[564] RCC § 22E-2503.

signal and includes failing to charge the power for the device or allowing the device to lose the power required to operate."

- The RCC partially incorporates this recommendation by including in the statute the phrase "emission or detection" instead of "operation." This change clarifies the revised offense.
- Further codification of a definition that refers to "failing to charge" or "allowing the device to lose the power required to operate" is potentially confusing and limits by statute the rules of administration of the device, a matter more properly left to the administering agency. The RCC commentary references failure to charge and loss of power as helpful examples of how the offense might be committed. However, given the likelihood of technology changing over time, the lack of any standard for measuring a partial "failure to charge," differing charging responsibilities for different devices, and the need to defer to agency rules on specifics of how a monitoring device is to used, the RCC does not codify further details.

(4) *USAO, App. C at 358, recommends specifying that information collected by the Pretrial Services Agency for the District of Columbia is admissible on the issue of guilt notwithstanding the confidentiality provision in D.C. Code § 23-1303(d). USAO explains that the confidentiality statute was codified in 1966, long before GPS technology was commonplace. USAO proposes adding a subsection to the offense definition negating the application of the Title 23 statute to this offense.*

- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: "The restriction on divulging detection device information from the Pretrial Services Agency for the District of Columbia under D.C. Code § 23-1303(d) shall not apply to this offense." This change improves the consistency of the revised statute.

(5) *USAO, App. C at 359, recommends including an extraterritorial jurisdiction provision that extends to people who are under supervision in the District but tamper with the device outside of District lines. USAO explains that jurisdiction is appropriate because an element of the offense—the imposition of the monitoring requirement—has occurred in D.C. USAO also notes that, without this provision, "individuals intent on tampering with their detection devices may be incentivized to do so across jurisdictional lines in the hopes of evading criminal liability." USAO notes that the current identity theft and credit card fraud statutes include similar language.*[565]

- The RCC incorporates this recommendation by amending the revised statute to include a subsection stating: "An offense under this section shall be deemed to be committed in the District of Columbia, regardless of whether the offender is physically present in the District of Columbia." This change clarifies the revised offense and may eliminate a gap in liability.

[565] D.C. Code §§ 22-3227.06; 22-3224.01.

(6) *OAG, App. C at 264, recommends revising the statutory language to include children who are on supervised release, probation, or parole, in a District of Columbia delinquency case. OAG notes that the other offense provisions apply to delinquency cases.*

- The RCC partially incorporates this recommendation by adopting language similar to OAG's proposal: "…on supervised release, probation, or parole, in a District case." This revision may change current District law, as described in the revised commentary. This change eliminates an unnecessary gap in liability.

RCC § 22E-3403. Correctional Facility Contraband.

(1) *USAO, App. C at 359, recommends retaining the consecutive sentencing provision that appears in current law.*[566] *USAO says it "believes that allowing this crime to be punished by concurrent sentences would invalidate the deterrent effect of the statute, as it only applies to individuals who are already confined to a correctional facility." USAO notes that the current Bail Reform Act statute*[567] *the revised Escape statute*[568] *require consecutive sentences.*

- The RCC does not incorporate this recommendation because it is inconsistent with other RCC and current D.C. Code offenses and judicial discretion at sentencing. As the RCC commentary explains, the consecutive sentencing provision in the current prison contraband statute has two notable features that distinguish it from any other sentencing provision in the D.C. Code or revised code. "First, it applies to persons who are pre-sentence in any jurisdiction at the time of the contraband offense.[569] Second, it applies to persons who are pre-trial in any jurisdiction at the time of the contraband offense.[570] Legislative history does not clarify why such an infringement on the court's discretion is applied to contraband offenses and not to other correctional facility offenses such as escape." The revised statute does not prohibit a sentencing judge from running a sentence for correctional facility contraband consecutive to another sentence.

(2) *OAG, App. C at 264, recommends classifying civilian clothing as Class B contraband. OAG notes, civilian clothing may be possessed to aid in someone's escape.*

- The RCC not incorporate this recommendation because it may authorize a disproportionate penalty. In the RCC, possession of "a law enforcement officer's uniform, medical staff clothing, or any other uniform" is punished as first degree correctional facility contraband.[571] And, wearing civilian clothing to impersonate a visitor may constitute an attempted escape.[572] However, it would be disproportionate to hold a person criminally liable for possession of a civilian clothing item under circumstances that are unlikely to facilitate an escape. Consider, for example, a person who possesses a single article of clothing—e.g., undergarments, tennis shoes, or a headband. This conduct may subject a

[566] D.C. Code § 22-2603.03(d).
[567] D.C. Code § 23-1327(d).
[568] RCC § 22E-3401(e)(4).
[569] By contrast, the District's escape statute only requires the sentence be consecutive to an original sentence that is being served at the time of the escape. D.C. Code § 22-2601(b).
[570] The United States Supreme Court held that a federal judge did not violate the federal Sentencing Reform Act by running a federal sentence consecutive to an anticipated state sentence after a finding of guilt by the state court. *Setser v. United States*, 566 U.S. 231 (2012).
[571] RCC § 22E-701 ("Class A contraband").
[572] RCC § 22E-301.

person to disciplinary action[573] but it does amount to a criminal offense under the RCC.

(3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

c. This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[573] *See* Department of Corrections, *Inmate Handbook 2015-2016* at Page 22 (available at https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOC%20PS%204020.1C%20Inmate%20HandBook%202015_0.pdf).

Chapter 41. Weapons and Related Provisions.

RCC § 22E-4101. Possession of a Prohibited Weapon or Accessory.

(1) *OAG, App. C at 383, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[574]

- The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(3) *USAO, App. C at 398, recommends changing the culpable mental state in paragraph (a)(2) from recklessness to strict liability. USAO says: "The items listed in subsection (a)(2) are very dangerous, and there is no legitimate reason for anyone to possess them in the District (unless that person falls into the exception criteria in RCC § 22E-4118). If someone were to possess, for example, a machine gun, that person should be required to know that the item they possess is* [sic] *a machine gun. Further, it is unclear how the government would prove that a defendant was reckless as to the nature of the weapon, aside from showing that the item clearly is a machine gun or other object. With USAO's recommendation, there would still be a requirement that the possession be knowing, so the overall* mens rea *for this offense would require knowledge."*

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC culpable mental state requirements and current District law, and it may authorize disproportionate penalties. With respect to "explosives"—an undefined term whose ordinary meaning includes household and industrial chemicals—there are many legitimate reasons for a person to possess the items. With respect to firearms, there are many persons legitimately able to possess the items under some legal authority, however that authority does not necessarily extend to assault weapons and firearms specifically described in RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory. The USAO recommendation would

[574] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

eliminate a reasonable mistake of fact defense as to the specific nature of a firearm or explosive, contrary to current District law, potentially subjecting persons otherwise authorized to possess ordinary firearms and explosives to felony liability for possession of the item which the person reasonably did not think was a prohibited weapon.[575] In contrast, the RCC requires recklessness (disregard of a substantial and unjustifiable risk) as to the nature of the firearm or explosive being a machine gun. Proof of the defendant's culpable mental state would rely on the same evidence as used throughout the RCC and current D.C. Criminal Code to prove a culpable mental state—e.g. circumstantial evidence that the person had viewed the object and it appeared to be a machine gun, etc.

(4) *USAO, App. C at 398, recommends clarifying prosecutorial authority by revising the commentary (p. 59) to strike the following misstatement of law: "Under current law, possession of an extended clip is criminalized in Title 7's firearm regulations chapter and is prosecuted by the Office of the Attorney General for the District of Columbia."*

- The RCC incorporates this recommendation by striking the relevant paragraph from the commentary. This change clarifies the revised commentary.

(5) *The CCRC recommends relocating the merger provision in subsection (d) to a paragraph in the penalties subsection.*

- This change improves the logical organization of the statute and does not substantively change its meaning.

[575] In some instances, the unlawful attribute is not apparent on visual inspection. For example, a semiautomatic weapon may be converted, either by internal modification or simply by wear and tear, into a machine gun within the meaning of the statute. *Staples v. United States*, 511 U.S. 600, 614-15 (1994). The revised statute requires that a person consciously disregard a substantial risk that the item has the characteristics of a prohibited weapon or accessory.

RCC § 22E-4102. Carrying a Dangerous Weapon.

(1) *OAG, App. C at 383, recommends revising the statutory language to clarify that the radius of the gun-free zone is calculated from the property line and not the perimeter of a building. OAG proposes, "Within 300 feet of the property line of a school, college, university, public swimming pool, public playground, public youth center, public library, or children's day care center."*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(2) *OAG, App. C at 383-384, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[576]

- The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *PDS, App. C at 412-414, recommends that all Class B misdemeanors be jury-demandable.*

b. The RCC incorporates this recommendation consistent with the CCRC general approach to jury demandability. As of the Second Draft of Report #41, the CCRC recommends classifying all Class B misdemeanors as jury demandable offenses.

(5) *USAO, App. C at 423-424, recommends classifying first degree carrying a dangerous weapon as a Class 7 felony and second degree carrying a dangerous weapon as a Class 8 felony. USAO compares the penalties for the revised offense to the penalties and sentencing guidelines for the offense in current D.C. Code § 22-4504(a).*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties.
- D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to

[576] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

another sentence for a more serious crime in the case.[577] However, for all CDW sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 75th quantile (25% of sentences were greater) of all imposed sentences (including enhancements) was 24 months or less. Actual time-to-serve was considerably less.

- Polling of District voters also strongly suggests that while carrying a firearm in a public place may warrant felony punishment, without more (e.g. display or use of the weapon), such conduct should be subject to the lowest felony class. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[578] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes.
- Notably, under the RCC, a person who possesses a firearm and has a prior conviction for a crime of violence commits first degree RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person, a Class 8 felony.

(6) *The CCRC recommends reordering the offense elements to clarify that the weapon must be conveniently accessible and within reach and the actor must be in a prohibited location.*

- This change clarifies, but does not substantively change, the revised offense.

[577] The CCRC will seek to conduct an analysis of non-concurrently sentenced burglary sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

[578] Question 4.11 provided the scenario: "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: "Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not involved in any crime." Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Question 4.14 provided the scenario: "Carrying a concealed pistol without a license to carry a pistol as required by law while in a school or on a playground. The gun is not involved in any crime." Question 4.14 had a mean response of 6.4, above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.12 provided the scenario: "Carrying a concealed pistol without a license as required by law while walking within 1000 feet (about 3 football fields) of a school or playground. The gun is not involved in any crime." Question 4.13 provided the scenario: "Carrying a concealed pistol without a license to carry a pistol as required by law while walking within 300 feet (about 1 football field) of a school or playground. The gun is not involved in any crime." Questions 4.12 and 4.13 had mean responses of 5.9, just under the 6.0 milestone corresponding to felony assault, currently a 3 year offense in the D.C. Code.

RCC § 22E-4103. Possession of a Dangerous Weapon with Intent to Commit Crime.

(1) *USAO, App. C at 399, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person "engaged in the prohibited conduct with a weapon that the actor believed to be a dangerous weapon, but was not in fact a dangerous weapon."*

- The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.

(2) *The CCRC recommends substituting the noun "item" for "object," consistent with other RCC provisions.*

- This change improves the consistency of the revised statutes and does not further change District law.

RCC § 22E-4104. Possession of a Dangerous Weapon During a Crime.

(1) *USAO, App. C at 399, recommends grading possession of a firearm and possession of an imitation firearm the same. USAO says that, "If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm." USAO raises the hypothetical, that "a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation), it will, practically, be impossible to prove whether that gun was real or imitation" and says a "defendant should not be subject to a more favorable gradation simply because the defendant flees the scene and officers are not able to recover the gun."*

- The RCC does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties.
- First, where a dangerous weapon or imitation dangerous weapon is used against or displayed to a person (as in the USAO hypothetical), the RCC provides additional punishment for that conduct in its offenses against persons in Subtitle II, regardless of whether it was a real or imitation weapon. For example, the RCC raises the penalty otherwise applicable to an assault causing significant bodily injury from fourth degree to third degree.[579] The separate crime of merely possessing—but not using or displaying—a dangerous weapon in RCC § 22E-4104 is thus primarily intended to capture conduct that is unknown and unseen by the complainant but found on the actor at time of arrest or otherwise subsequently linked to the crime. And, it is precisely in those instances where a weapon is apprehended (though never displayed or used in the crime) that the distinction between an imitation and a real dangerous weapon is a fact available to the prosecution.
- Second, where a weapon is possessed but not used or displayed (and so makes no impression on the complainant), the difference in actual dangerousness between a real and fake dangerous weapon should be reflected in the RCC penalty. The presence of an actual firearm creates a danger that someone will be fatally injured, intentionally or inadvertently. Polling of District voters also suggests that carrying a fake, concealed firearm in a public place is substantially lower level conduct as compared to a real firearm.[580]

[579] Such a person could certainly be charged with both committing an assault using a dangerous or imitation dangerous weapon and possessing a dangerous weapon during a crime, but at sentencing a conviction would not be entered for more than 1 of these overlapping offenses per RCC § 22E-4119, Limitation on Convictions for Multiple Related Weapon Offenses.

[580] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses. Compare the following. Question 4.11 provided the scenario: "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Question 4.11 had a mean response of 5.6, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.15 provided the scenario: "Carrying a concealed, realistic but fake gun while walking down the street. The fake gun is not

(2) *USAO, App. C at 399-400, supports the RCC's expansion of the revised offense to include as predicates all offenses against persons, but recommends retaining all of the predicate offenses in the current definition of "dangerous crime,"*[581] *including drug offenses, arson, and theft. USAO states, "Arson is a very serious offense that can often result in substantial injury to a person or to property" and that certain types of conduct currently penalized as robbery are punished as theft under the RCC. USAO also says that, because in the RCC "certain types of conduct currently penalized as Robbery would not be included in Subtitle II of the Title 22 of the RCC," USAO "recommends including Theft as an additional offense listed in subsections (a)(2) and (b)(2)."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. RCC § 22E-4104, Possession of a Dangerous Weapon During a Crime provides additional liability for some crimes where the mere presence of an unused, un-displayed dangerous weapon raises the risk to a complainant. Such increased risk occurs when there is a reasonable likelihood that the actor will confront a complainant in a violent encounter. Arson is not included as a predicate crime to RCC § 22E-4104 because, unlike current law, the RCC arson statute generally does not require as an element endangerment of human life or any confrontation with another person and is merely a property crime. If a person is attacking another person by means of fire, there would be liability for assault, homicide, or other offenses against persons which are predicates for RCC § 22E-4104. Regarding the USAO recommendation that the predicate crimes include all thefts, under current law and the RCC, thefts do not require as an element any bad intent or confrontation with another person. Forms of robbery under current law that do not involve a violent confrontation between the actor and complainant have been reorganized as forms of theft in the RCC, but it is consistent with limiting RCC § 22E-4104 to conduct involving a violent encounter that theft not be a predicate offense.
- Regarding drug offenses, while RCC § 22E-4104 does not include such offenses as predicates, the RCC separately includes a penalty enhancement for possessing a dangerous weapon during a drug crime.[582]

(3) *USAO, App. C at 400, recommends eliminating the requirement that the defendant possess the weapon "in furtherance" of the underlying crime and instead only require that the defendant possess the weapon "while" committing the underlying crime. USAO states, "A defendant creates an increased risk of danger by* introducing *a weapon to an offense." (Emphasis added.) USAO also explains, "there is an additional level of risk created when a defendant has a weapon* readily available*" and notes that a firearm could cause someone to be injured, intentionally or inadvertently. (Emphasis added.)*

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involved in any crime." Question 4.15 had a mean response of 4.0, the same as the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code.

[581] D.C. Code § 23-1331.

[582] RCC § 22E-48-904.01b(g)(6)(B).

- The RCC does not incorporate this recommendation because it would introduce an unclear, expansive scope of liability into the revised statutes, and may authorize disproportionate penalties. USAO's proposed language, "while committing" an offense, is unclear and appears to include constructive possession of a weapon far away from the offense. For example, a person who commits a simple assault in one part of the city could be convicted of first degree possession of a weapon during a crime by virtue of having a lawfully registered handgun in their home miles away, even if their possession of the handgun has no connection to the crime and poses not additional threat to the complainant. Even if the dangerous weapon is located near where the crime occurs, the USAO's proposed language also is not restricted to deliberately "introducing" a dangerous weapon into a situation. For example, any assault occurring in or near a location where knives are stored, such as a kitchen, may be subject to liability under the USAO language, given that there is no necessary connection between the weapon and the crime. In contrast, RCC § 22E-4104 requires a link between the possession of the weapon and the crime in some manner. Other RCC crimes provide liability for conduct where an actor brings a dangerous weapon to a location where a crime is committed (e.g. RCC § 22E-4102, Carrying a Dangerous Weapon) or displays or uses a dangerous weapon (see RCC offenses against persons under Subtitle II with gradations that authorize higher penalties for use or display of a weapon).

(4) *USAO, App. C at 400, recommends eliminating the provision that excludes liability for an attempt to commit an offense under this section. USAO offers a hypothetical in which a person "engaged in the prohibited conduct with a weapon that the actor believed to be a dangerous weapon, but was not in fact a dangerous weapon."*

- The RCC incorporates this recommendation by striking the exclusion for attempts. This change improves the clarity and reduces a possible gap in liability in the revised statutes.

(5) *USAO, App. C at 423-425, recommends classifying first degree possession of a dangerous weapon during a crime as a Class 6 felony and second degree possession of a dangerous weapon during a crime as a Class 7 felony. If the CCRC does not accept USAO's recommendation to include imitation firearms in the first degree of the offense,*[583] *USAO recommends ranking both first and second degree as Class 6 felonies. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4504(b). USAO says it "opposes reducing maximum penalties for firearms offenses at a time when firearms violence is a threat to the public safety of the community." USAO also says the ranking "does not adequately deter either possession of firearms or the use of firearms during the commission of offenses against others."*

[583] App. C at 399.

- The RCC does not incorporate this recommendation because it may authorize a disproportionate penalty. As a threshold matter the CCRC recognizes that firearm violence has been a threat to the public safety of the community not only recently but throughout the past century and recent decades. In this timespan, the laws and penalties and crime rates associated with gun violence have varied widely. The CCRC also notes that, while stating the CCRC's recommendation would not adequately deter commission of the offense, USAO also does not assert that either its proposed penalty rankings for the revised offense or the current mandatory minimum and statutory maximum penalty in the D.C. Code adequately deter either the possession of firearms or the use of firearms during the commission of offenses against others. Unfortunately, neither the current penalties nor prior penalties have, in fact, stopped gun violence. The CCRC wholeheartedly agrees that gun violence is serious and serious efforts to deter[584] gun violence must be taken. However, the relevant question is what the specific penalty should be for this particular offense of possessing a firearm or other dangerous weapon during a crime of violence as compared to other offenses, including the assault, robbery, rape, or homicide itself.
- As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes, such as this one, provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- With regard to the possession of a dangerous weapon during a crime, the CCRC recommendation recognizes that the degree of additional punishment due to the mere possession of a dangerous weapon during a

[584] *See* U.S. Department of Justice, National Institute of Justice, *Five Things About Deterrence*, NCJ 247350 (May 2016) at 1 ("1. The *certainty* of being caught is a vastly more powerful deterrent than the punishment… 2. Sending an individual convicted of a crime to prison isn't a very effective way to deter crime… 3. Police deter crime by increasing the perception that criminals will be caught and punished… 4. Increasing the severity of punishment does little to deter crime… 5. There is no proof that the death penalty deters criminals.").

crime should be less than the display or use of the weapon during the crime. (Indeed, to the extent that penalty differences are a factor in deterring commission of criminal acts, there is a strong social interest in incentivizing those committing crimes to not pull out a gun or knife.) The mere possession crime in RCC § 22E-4104 (and its penalty classification) is not intended to account for the actual use or brandishing of a dangerous weapon, let alone to account for the whole harm done during the crime. At least in the case of serious felonies, the physical injury or sexual intrusion experienced by the complainant almost always far outweighs the means (a dangerous weapon) by which the crime was committed.

- The RCC's penalty recommendations for RCC § 22E-4104 reflect a sharp decrease from the current D.C. Code § 22-4504(b) statutory penalties of 5 (mandatory) to 15 years imprisonment cited by USAO, however that offense is limited to possessing a firearm during a crime of violence. In contrast, RCC § 22E-4104 applies much more broadly and includes minor assaults and other offenses against persons. Yet, even as applied to the possession of firearms during crimes of violence, the statutorily-authorized penalties for D.C. Code § 22-4504(b) appear to be outdated and more severe than is proportionate according to public opinion polling of D.C. voters, and under D.C. judicial practice.
    - D.C. court data on D.C. Code § 22-4504(b) (PFCOV) sentences pose analysis challenges because such an extremely high percentage of the sentences—over 90%—run concurrent to another sentence for a more serious crime in the case.[585] However, for all first PFCOV sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the median sentence (50% of sentences were greater) was 60 months and the 75th quantile (25% of sentences were greater) for was 84 months. That means that between 50-75% of the judicially-imposed sentences were at the 5 year (60-month) mandatory minimum. Even the most severe (97.5%) Superior court sentences for PFCOV (120 months) are far short of the 180-month penalties authorized by current statute.
    - Polling of District voters also strongly suggests that while the mere possession of a dangerous weapon during a crime merits an increased penalty, this increase is quite modest and is almost entirely washed out by the seriousness of the predicate offense for any crime of violence. See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses).[586] Critically, the polling

[585] The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this.

[586] The effect of a dangerous weapon being present during a crime was a primary focus in the design of the CCRC surveys and many questions address such scenarios, including the following questions. Question

questions asked for an assessment of a hypothetical individual's behavior as a whole, not "possessing a dangerous weapon during a crime" specifically, and there would be additional liability for the predicate crimes under the RCC.

1.03 provided the scenario: "Shooting with a gun, causing serious injury." Question 1.03 had a mean response of 9.3, just more than one class above the 8.0 milestone for causing a serious injury by any means (corresponding to aggravated assault, currently a 10-year offense in the D.C. Code). Question 1.16 provided the scenario: "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Question 1.16 had a mean response of 6.2, just barely above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 1.06 provided the scenario: "Entering an occupied home intending to steal property, but fleeing without being seen, and without taking anything. The person secretly carried a gun, but never displayed it." Question 1.06 had a mean response of 5, well below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

RCC § 22E-4105. Possession of a Firearm by an Unauthorized Person.

(1) *OAG, App. C at 384, recommends revising the commentary to clarify the meaning of the phrase "[a] District offense that is* currently *punishable by imprisonment for a term exceeding 1 year, or a comparable offense in another jurisdiction." (Emphasis added.) OAG offers an example in which a person has a conviction for a crime that was (at the time of the conviction) punishable by more than a year but is now (at the time of the unlawful possession) only a misdemeanor. OAG also recommends that the commentary state that "a comparable offense in another jurisdiction" includes a conviction for a federal offense, as well as an offense that occurred in another state.*

- The RCC partially incorporates this recommendation by revising the statutory language to more straightforwardly refer to the defined term "comparable offense," which includes offenses under prior District law and offenses committed in other jurisdictions.[587] This change clarifies the revised statute.

(2) *OAG, App. C at 384 n. 8, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

a. The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change clarifies the revised offense.

(3) *USAO, App. C at 394-195, generally recommends for offenses in Report #39 and #40 that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[588]

a. The RCC partially incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *OAG, App. C at 384-385, recommends revising the statutory language to clarify that a person is strictly liable with respect to being subject to an order to not possess any firearms. OAG explains that, relying on RCC § 22E-207, it is concerned that a court will only apply the "in fact" mental state to the existence of a court order, and not to the type of order that is separately listed.*

a. The RCC partially incorporates this recommendation by revising RCC § 22E-207(a) to state, "Any culpable mental state or strict liability specified

[587] RCC § 22E-701 defines the term "comparable offense" to mean "a crime committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding District crime."
[588] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

in an offense applies to all subsequent result elements and circumstance elements until another culpable mental state or strict liability is specified." This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *USAO, App. C at 400-401, recommends eliminating the requirement that an out-of-state conviction is comparable to a District offense that is punishable by more than one year in jail, instead requiring only that the out-of-state conviction be punishable by more than one year. USAO says requiring the offense to be comparable to a District felony "will lead to extensive litigation." USAO also says, regarding identification of a comparable offense, that "it is unclear whether this would be a question of law for a judge or a question of fact for a jury to consider."*

a. The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Criminal laws vary significantly by jurisdiction. For example, while the District recently decriminalized personal possession of marijuana, possession of similar amounts of marijuana is a felony in some states. Subjecting an actor to criminal penalties in the District under RCC § 22E-4105 because another jurisdiction criminalizes and/or punishes behavior differently would effectively make the values and choices of that jurisdiction applicable to District residents. In contrast, under RCC § 22E-4105, any person who has been convicted of an offense that would be punished by one year if committed in the District, basing liability on the District's specific legislative views on the seriousness of the conduct, irrespective of the maximum penalty in the other jurisdiction. Measuring a conviction in another jurisdiction by reference to District laws establishes a consistent basis for judging the conduct of criminal offenders and is consistent with current D.C. Code § 22-4503(a)(6).[589]

b. The commentary has been updated to clarify that determination of whether a conviction in another jurisdiction is for a "comparable offense" is a matter of law.

(6) *USAO, App. C at 401, recommends eliminating the requirement that an intrafamily offense "requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats." USAO explains that it may not be able to prove that an offense resulted in bodily injury, for example, if a complainant is uncooperative. USAO says that, "[a]t a very minimum, to align with the District's firearm registration requirements set forth in the Commentary (at 93), the statute must include predicate offenses that involve 'the use or attempted use of physical force, or the threatened use of a deadly weapon,' which would include the RCC's offenses of attempted assault and menacing.*

a. The RCC partially incorporates this recommendation by revising the commentary to clarify that the phrase "offense, as defined in D.C. Code §

[589] Current D.C. Code § 22-4503(a)(6) disallows gun ownership by any person who has "been convicted…of an intrafamily offense, *as defined in D.C. Official Code § 16-1001(8)*, or any similar provision in the law of another jurisdiction." (Emphasis added.)

16-1001(8), that requires as an element confinement, nonconsensual sexual conduct, bodily injury, or threats" includes convictions for inchoate (e.g. attempt, solicitation) versions of such an offense. The crimes of attempted assault and menacing, mentioned by USAO in it is comment, fall within the current RCC language and the commentary will be clarified on this point.

b. However, the revised statute retains a limitation on predicate intrafamily offenses to those offenses that require as an element some type of violence or threat, rather than property or other crimes. This aligns the RCC unauthorized person criteria with the District's firearm registration requirements, which define 'misdemeanor crime of domestic violence' to require 'the use or attempted use of physical force, or the threatened use of a deadly weapon.'[590] This is narrower than the District's definition of "interpersonal violence"[591] which broadly includes conduct that falls short of "domestic violence" as it is commonly understood—that is, physical *abuse* of a partner or household member.[592] For example, in the District currently a person may be convicted of domestic violence and lose their right to bear arms by stealing from their roommate or by damaging the property of a stranger who, coincidentally, once dated someone that they once dated.[593]

(7) *USAO, App. C at 401, recommends eliminating the requirement that the defendant "know" that they have a prior conviction or open warrant. USAO says that a defendant "may know that they committed an offense and have not been apprehended for it, or may know that they were in some kind of trouble with the law, but not be aware that there is, in fact, an open warrant." USAO says "The requirement that a defendant 'know' about this limits the eligible conduct too far."*

a. The RCC does not incorporate this recommendation because it is inconsistent with the RCC general approach to culpable mental states and may authorize disproportionate penalties. As recognized in Supreme Court case law and repeated throughout the RCC commentary, an actor is usually required to know the facts that constitute an offense.[594] In RCC § 22E-4105, among the critical facts that may subject a person to felony liability is the person's prior conviction or be subject to a court order.

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[590] *See* 24 DCMR § 2309; *see also United States v. Castleman*, 572 U.S. 157, 162-63 (2014) (holding that Congress incorporated the common-law meaning of "force"—namely, offensive touching—in § 921(a)(33)(A)'s definition of a "misdemeanor crime of domestic violence").

[591] D.C. Code § 16-1001(6). The court does not require the government to prove an interpersonal relationship before assigning a case to a domestic violence calendar or before convicting a person of a domestic violence offense.

[592] Merriam-Webster.com, *"domestic violence"*, 2018, *available at* https://www.merriam-webster.com/dictionary/domesticviolence.

[593] A person may also lose their right to seal their criminal record under D.C. Code § 16-801(9)(A).

[594] *See, Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

Requiring knowledge regarding these elements is logical because such an actor is on notice (at least constructively) of what makes their otherwise legal (and constitutionally protected) possession of a firearm is now illegal.

b. Because no other culpable mental state is mentioned, the USAO recommendation appears to be that a person should be strictly liable as to whether they have a relevant prior conviction or an open warrant. The revised statute does not hold a person strictly liable for possessing a firearm when "there is, in fact, an open warrant" for their arrest. An arrest warrant—which requires only a finding of probable cause—may issue without any notice to the person that they must relinquish their lawfully owned firearms. Consider, for example, a person who is misidentified as the perpetrator of a homicide that they had no reason to know anything about.[595] Under USAO's proposed language, such a person would be guilty unlawfully possessing their otherwise-legal firearm even after being exonerated of the homicide offense. In contrast, the revised offense applies only to a person who is on the run from the law and knows that they are the subject of an arrest warrant.

(8) *USAO, App. C at 402, recommends including conditional pleas in the definition of "prior conviction." USAO explains that it is inconsistent to exclude conditional pleas but include convictions after a trial (which may also be reversed on appeal).*

a. The RCC incorporates this recommendation by striking the exclusion for conditional pleas from the definition of "prior conviction" in the revised offense. This change improves the consistency of the revised statutes.

(9) *USAO, App. C at 402, recommends removing the 10-year limitation for prior felony convictions. USAO states, "The nature and seriousness of the crime…is the same, regardless of how much time has passed since the conviction." USAO also notes, "by calculating the 10 years from the date of conviction, instead of from the date of release from incarceration or termination of supervision, a person who receives a 10-year sentence of incarceration under this provision could be permitted to possess a gun immediately upon release from incarceration, even while still on supervision for this offense."*

a. The RCC does not incorporate this recommendation because it may compromise the constitutionality of the statute and may authorize disproportionate penalties. Critically, the 10-year limitation does not apply to crimes of violence, which do not have any time limitation. In the RCC (and under the current D.C. Code, excepting drug crimes) there are virtually no offenses other than crimes of violence that carry a 10-year or more imprisonment penalty. Rather, in the RCC, the 10-year limitation applies chiefly to non-violent drug distribution, weapon possession (without use or display) crimes, and property crimes. Whether commission of these lower-level felonies is sufficiently serious to trigger a lifelong ban on a constitutional right to possess a firearm is a live question

[595] *See, e.g.,* Keith L. Alexander, *Authorities said video showed a man committed murder. He spent 13 days in jail before his defense team proved it didn't.*, WASHINGTON POST (November 22, 2019).

undergoing litigation in multiple jurisdictions.[596] However, limiting the timespan of a person's restriction from possessing a firearm is one means of narrowly tailoring the restriction on a person's Second Amendment rights. In part, this is because the passage of time is highly relevant to whether a person is likely to reoffend, with well-established social science research indicating a strong inverse correlation between age and recidivism.[597] The stronger the connection between deprivation of a right to possess a firearm and a government rationale of protecting public safety, the more likely the statute is to withstand constitutional scrutiny in the years to come. In most instances, a person outside the 10-year window (with no other convictions that would subject them to liability for possession of a firearm by an unauthorized person) is not permitted to obtain a firearm registration certificate or a carry license and would still be subject to criminal liability under RCC § 7-2502.01, Possession of an Unregistered Firearm, Destructive Device, or Ammunition or RCC § 22E-4102, Carrying a Dangerous Weapon.

(10) *USAO, App. C at 423-424, recommends classifying first degree possession of a firearm by an unauthorized person as a Class 6 felony and second degree possession of a firearm by an unauthorized person as a Class 7 felony. USAO compares the penalties for the revised offense to the penalties for the offense in current D.C. Code § 22-4503. USAO further states that possession of a firearm by an unauthorized person should be punished more severely than carrying a dangerous weapon because it "should be a more serious offense to possess a weapon after having been convicted of a crime than to possess a weapon generally."*

a. The RCC partially incorporates this recommendation by classifying first degree possession of a firearm by an unauthorized person as a Class 8 felony and second degree possession of a firearm by an unauthorized person as a Class 9 felony.

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[596] One en banc decision by the 3rd Circuit has held the federal felon-in-possession statute unconstitutional as applied in that case. *Binderup v. Attorney Gen.* U.S., 836 F.3d 336 (3d Cir. 2016) (en banc), cert. denied, 137 S. Ct. 2323 (2017) (No. 16-847). Other federal jurisdictions have generally upheld as applied challenges on a range of facts. The D.C. District Court recently upheld a challenge to the federal felon-in-possession statute but stated:

> "This case thus does not involve some sort of nominal crime that has been labeled a felony, perhaps with the purpose of triggering section 922(g)(1)'s applicability. In such a situation, a lengthy term of imprisonment for a nominal crime—two years in prison for jaywalking or leaving bubble gum on the sidewalk outside the White House, for instance—could be deemed unconstitutional if found to be disproportionate to the underlying conduct such that the crime would no longer qualify for the federal felon-in-possession ban. *See Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.... [A] single day in prison may be unconstitutional in some circumstances.")."

Medina v. Sessions, 279 F. Supp. 3d 281, 291 (D.D.C. 2017), aff'd sub nom. Medina v. Whitaker, 913 F.3d 152 (D.C. Cir. 2019), cert. denied sub nom. Medina v. Barr, No. 19-287, 2019 WL 6689673 (U.S. Dec. 9, 2019)

[597] *See,* U.S. Sentencing Commission, The Effects of Aging on Recidivism Among Federal Offenders, December 2017.

b. D.C. court data on these sentences poses challenges to analysis because such a high percentage of the sentences—about half—run concurrent to another sentence for a more serious crime in the case.[598] However, for all felon in possession sentences in the Advisory Group Memorandum #28 (Statistics on District Adult Criminal Charges and Convictions), the 90th quantile (10% of sentences were greater) of all imposed sentences (including enhancements) was 48 months for those with a prior crime of violence conviction and 36 months for other felons. The 95th quantile (5% of sentences were greater) of all imposed sentences (including enhancements) was 60 months for those with a prior crime of violence conviction and 36 months for other felons. These numbers are significantly below the current D.C. Code penalties of 36 months (mandatory) to 180 months for prior crime of violence convictions and up to 120 months for other felony convictions. The RCC penalty recommendations, while sharply different from the current statutes, reflect only a modest decrease in penalties compared to current court practice.

c. Polling of District voters also strongly suggests that while illegally possessing a firearm and having a felony conviction may warrant felony punishment, without more (e.g., display or use of the weapon), such conduct should be subject to the lowest felony classes. Moreover, polling indicates a significant distinction between prior convictions for violent crimes and non-violent crimes. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[599] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, and so the responses would include additional liability for other crimes (e.g. possession of an unregistered firearm).

(11) *The CCRC recommends revising sub-subparagraph (b)(2)(A)(iii) to include any intrafamily offense that requires as an element sexual conduct, as opposed to only those involving "non-consensual" sexual conduct.*

a. This change eliminates a possible gap in liability.

(12) *The CCRC recommends revising the pronouns in sub-subparagraph (b)(2)(C)(ii) to clarify the actor may not violate a court order that restrains the*

[598] The CCRC will seek to conduct an analysis of non-concurrent sentences in the future. The CCRC's analysis in Advisory Group Memorandum #28 - Statistics on District Adult Criminal Charges and Convictions did not examine this

[599] Question 4.06 provided the scenario: "Possessing at home a loaded pistol that hasn't been registered, as required by law, and having been convicted of non-violent distribution of drugs 15 years ago. The gun is not involved in any crime." Question 4.06 had a mean response of 5.4, below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.05 provided the scenario: "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of non-violent distribution of drugs 5 years ago. The gun is not involved in any crime." Question 4.05 had a mean response of 5.8, again below the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code. Question 4.04 provided the scenario: "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of a violent robbery 15 years ago. The gun is not involved in any crime." Question 4.04 had a mean response of 6.1, just above the 6.0 milestone corresponding to felony assault, currently a 3-year offense in the D.C. Code.

actor from assaulting, harassing, stalking, or threatening any person, provided that the actor had notice and an opportunity to appear before the order was issued.

a. This change clarifies the revised statute and does not further change District law.

(13) *The CCRC recommends relocating the provision prohibiting a repeat offender enhancement to the penalties subsection.*

a. This change improves the logical organization of the statute and does not substantively change its meaning.

(14) *The CCRC recommends replacing the defined term "gun offense" with a reference to any offense under Chapter 41, to clarify the offense by eliminating an unnecessary cross-reference.*

a. This change clarifies the revised statute.

RCC § 22E-4106. Negligent Discharge of Firearm.

(1) *OAG, App. C at 385, recommends expanding the statute to include a second degree for negligent discharge of an air rifle or torpedo. OAG cites to a medical journal that explains, "injuries from air weapons can be serious and even fatal."*

- The RCC does not incorporate this recommendation because it would result in unnecessary overlap between offenses. Recklessly causing an injury by any means is punished as an assault under RCC § 22E-1202. Assaults involving the use of a dangerous weapon—including "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person"[600]—are graded more severely than other assaults. Only firearms, which require either registration or licensure under District law, are a predicate for criminal sanctions for negligent conduct.

[600] RCC § 22E-701.

RCC § 22E-4107. Alteration of a Firearm Identification Mark.

(1) *OAG, App. C at 385-386, comments that it "does not agree that the revised statute would necessarily be prosecutable by USAO. It is our position that, given that OAG prosecutes gun offences that are regulatory in nature, that a determination of which agency will prosecute this offense can only be made after the penalty provision is drafted.*[601]

- The RCC recommends that Alteration of a Firearm Identification Mark be a Class A misdemeanor. Pending further response from OAG or USAO as to how the penalty affects their views of prosecutorial jurisdiction, the RCC maintains assignment of prosecutorial jurisdiction to USAO.

[601] *See* D.C. Code§ 23-101; *In re Prosecution of Hall,* 31 A.3d 453 (2011).

RCC § 22E-4108. Civil Provisions for Prohibitions of Firearms on Public or Private Property.

(1) *The CCRC recommends rephrasing the exception for law enforcement officers to more closely resemble the language in other RCC provisions.*

- This change does not substantively change the revised statute or District law.

RCC § 22E-4109. Civil Provisions for Lawful Transportation of a Firearm or Ammunition.

(1) *The CCRC recommends substituting the phrase "passenger area" for "passenger compartment," consistent with the revised possession of an open container or consumption of alcohol in a motor vehicle offense.*[602]

- This change improves the consistency of the revised statute and does not substantively change its meaning.

[602] RCC § 25-1001.

RCC § 22E-4110. Civil Provisions for Issuance of a License to Carry a Pistol.

(1) *The CCRC recommends revising subsection (b) to apply to a resident of another "state* or subdivision of the United States,*" consistent with subsection (a).*

- This change improves the consistency of the revised statute.

(2) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

RCC § 22E-4111. Unlawful Sale of a Pistol.

(1) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*

- This change improves the proportionality of the revised statute.

RCC § 22E-4112. Unlawful Transfer of a Firearm.

(1) *The CCRC recommends replacing the phrase "licensed dealer" with the phrase "dealer licensed under RCC § 22E-4114" to clarify its meaning, consistent with RCC § 22E-4113.*

- This change improves the clarity and consistency of the revised statute and

(2) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*

- This change improves the proportionality of the revised statute.

RCC § 22E-4113. Sale of Firearm Without a License.

(1) *OAG, App. C at 386, recommends clarifying the meaning of the phrases "retail dealer" and "wholesale dealer," which are undefined.*

- The RCC partially incorporates this recommendation by replacing the phrase "licensed dealer" with the phrase "dealer licensed under RCC § 22E-4114," to eliminate any confusion between "licensed dealer" and other retailers or wholesalers. The phrases "retail dealer" and "wholesale dealer" are not defined in current law, however, there is no indication from District case law or legislative history that they mean something other than their ordinary meanings of "retailer" and "wholesaler." "Retailer" is commonly understood to mean a business that sells small quantities of goods directly to individual consumers and "wholesaler" is commonly understood to mean a business that sells items in bulk to other businesses for resale.[603]

(2) *OAG, App. C at 386, recommends that the commentary (p. 121) be redrafted to say, "'Sells' is an undefined term, intended to include any exchange of a firearm for anything of value," as opposed to "monetary remuneration."*

- The RCC incorporates this recommendation by amending the revised commentary. This change clarifies the revised commentary and eliminates an unnecessary gap in liability.

(3) *The CCRC recommends striking the phrase "to engage in such activity" as superfluous.*

- This change improves the consistency of the revised statutes and does not further change District law.

(4) *The CCRC recommends reclassifying this offense from a Class A misdemeanor to a Class 9 felony, so that the penalty for distribution is more severe than the penalty for simple possession.*

- This change improves the proportionality of the revised statute.

[603] Merriam-Webster.com, *"retail"*, 2020, *available at* https://www.merriam-webster.com/dictionary/retail; Merriam-Webster.com, *"wholesale"*, 2020, *available at* https://www.merriam-webster.com/dictionary/wholesale;

RCC § 22E-4114. Civil Provisions for Licenses of Firearms Dealers.

(1) *OAG, App. C at 386-388, recommends revising the statutory language to prohibit the sale of a pistol to an unknown and unidentified purchaser. OAG explains that current law requires "the purchaser is personally known to the seller or shall present clear evidence of his or her identity."*[604]

- The RCC incorporates this recommendation by revising the statutory language to bar all sales to persons under 21 years of age and persons unknown to the seller who does not present clear evidence of the purchaser's identity. This change improves the clarity and consistency of the revised statutes and eliminates an unnecessary gap in law.

(2) *The CCRC recommends replacing the word "thereof" with the phrase "of a firearm or imitation firearm."*

- This change clarifies the revised statute and does not further change District law.

(3) *The CCRC recommends revising the statutory language to state "firearm sales" rather than "business" shall occur only in the building designated on the license. Read literally, the word "business" may be understood to include work unrelated to firearm transactions, such as accounting, marketing, and banking.*

- This change clarifies the revised statute and may improve its proportionality.

(4) *The CCRC recommends striking the word "color" from paragraph (b)(6). It is unclear why current D.C. Code § 22-4510(a)(5) requires a firearms dealer to record this information. "Color" is a protected trait under the District's Human Rights Act.*[605]

- This change improves the consistency of the revised statute.

(5) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

[604] D.C. Code § 22-4510(a)(3).
[605] D.C. Code § 2-1401.01 et. seq.

RCC § 22E-4115. Unlawful Sale of a Firearm by a Licensed Dealer.

(1) *The CCRC recommends revised the statute to prohibit any violation of subsection RCC § 22E-4414(b), as the reference to paragraphs (b)(1) – (6) in the previous draft was a typographical error.*

- This change clarifies the revised statute.

RCC § 22E-4116. Use of False Information for Purchase or Licensure of a Firearm.

[No Advisory Group comments received.]

RCC § 22E-4117. Civil Provisions for Taking and Destruction of Dangerous Articles.

(1) *OAG, App. C at 388, recommends either defining or striking the phrase "satisfactory evidence." OAG explains, "It is unclear whether this phrase refers to the type of evidence that may be used or if it is an evidentiary standard. OAG could not find any legislative history or case law that shines light on this issue. After reviewing the text, however, OAG is not sure that the phrase is needed."*

- The RCC incorporates this recommendation by striking the phrase "satisfactory evidence." This change clarifies the revised statute.

(2) *The CCRC recommends amending the definition of "dangerous article" to include firearms and restricted explosives (as defined in RCC § 22E-701) and exclude other dangerous weapons. The RCC defines the term "dangerous weapon" to include "[a]ny object, other than a body part or stationary object, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury to a person."*[606] *For example, a motor vehicle, a curling iron, or a bottle of bleach may become a dangerous weapon by virtue of how it is used. The revised statute does not treat these items (which have many uses other than weaponry) as a nuisance that is subject to surrender and destruction.*

- This change clarifies the revised provision and better aligns it with current District law.[607]

(3) *The CCRC recommends amending subsection (c) to include the subheading "Hearing procedures," so that the subsection is not left blank.*

- This change improves the consistency of the revised offenses and does not further change District law.

(4) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

[606] RCC § 22E-701.

[607] D.C. Code § 22-4517 defines "dangerous article" to mean "(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or (2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms."

RCC § 22E-4118. Exclusions from Liability for Weapon Offenses.

(1) *USAO, App. C at 395, recommends revising the statutory language to clarify the burden of proof for each exclusion from liability.*

- The RCC partially incorporates this recommendation by amending RCC § 22E-201 in the General Part to specify the burden of production and proof for exclusions and affirmative defenses throughout the RCC. This change clarifies the revised offense and improves the consistency of the revised statutes.

(2) *USAO, App. C at 402, recommends that the exclusion from liability apply only to military service members in paragraph (b)(1) and Department of Corrections employees in paragraph (b)(6) while they are on duty. USAO states that this recommendation tracks current law.*

- The RCC partially incorporates this recommendation by adding "on-duty" at the beginning of paragraphs (b)(5) and (b)(6). Unlike military members and sworn police officers, special police, campus police, and corrections officers are generally not authorized to carry service weapons or to make arrests outside of the premises they are employed to protect.[608] Notably, however, this may constitute a change in law by contravening prior case law holding that a Department of Corrections employee may carry a firearm whether on or off duty under an application of the last antecedent rule.[609] This change reduces an unnecessary gap in liability.

(3) *The CCRC recommends revising paragraph (b)(4) to strike the phrase "in a location" as potentially confusing.*

- This change clarifies the revised statute and does not further change District law.

[608] *See, e.g.*, D.C. Code § 23-582; 6A DCMR § 1103.

[609] *See United States v. Pritchett*, 470 F.2d 455, 459 (D.C. Cir. 1972) ("We agree that there would be great legislative merit to a statute which prohibited such persons from carrying a pistol when off duty, unless licensed to do so, however, because of the language of the statute and its legislative history, we are unable to find such to be the congressional intent of the present statute for a number of reasons…"). Notably, *Pritchett* is persuasive, not binding, authority as the ruling occurred after establishment of the D.C. Court of Appeals as the District's highest (and only) appellate court.

RCC § 22E-4119. Limitation on Convictions for Multiple Related Weapon Offenses.

(1) *USAO, App. C at 403, recommends wholly eliminating the merger provision. No explanation is provided except for subsection (b), which USAO says it "particularly opposes." USAO says there "is necessarily a greater risk of harm introduced to a situation when a firearm is involved." USAO also states with respect to (b)(3), "it is unclear why subsection (b)(3) includes any offense that includes as an element, of any gradation, that the person displayed or used a dangerous weapon." USAO says, "At a minimum, the person should have been convicted of the while armed provision of that offense; it should not just be a potential gradation of that offense."*

- The revised statute does not incorporate this recommendation because it would be inconsistent with the general RCC approach to structuring penalties for weapon-related crimes and may authorize disproportionate penalties. As described in prior responses (see, e.g., response to USAO comments on § 22E-2701 (Burglary)), the RCC authorizes proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense. With respect to dangerous weapon involvement in an offense, the RCC punishes the actual use or display of a weapon by providing gradations with higher penalties for such conduct (or attempted, solicited, or other inchoate conduct) directly in offenses. Other RCC crimes provide liability when a person only possesses (but does not use or display) a dangerous weapon during a predicate crime or possesses a dangerous weapon with intent at some later time to commit a crime. These many overlapping offenses in the RCC are necessary to ensure liability for involvement of a weapon with a crime, whether far removed or directly involved in a crime. However, these many overlapping offenses aim at the same social harm of involving a dangerous weapon with a crime, and so multiple convictions and multiple punishments for such overlapping crimes would be disproportionate.
- Regarding the USAO statement that a person should have to be convicted of the specific gradation of an offense that involves a dangerous weapon in order for the sentencing for RCC § 22E-4119 to limit convictions, such a change would permit the "stacking" of weapon and other types of penalty enhancements. For instance, the USAO could charge a form of assault that is enhanced on the basis of the complainant's status (e.g. age), and separately charge a weapon crime, subjecting the actor to an aggregate imprisonment penalty that is far greater than if only one enhancement (weapon or victim status) was achieved. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, an assault inflicting significant bodily injury is more serious and arguably deserves some greater

punishment if the complainant is over 65 years of age, the complainant is a District public official, the actor has a prior conviction for felony assault, the actor used a dangerous weapon, and the actor committed the crime based on bias toward the complainant. However, raising the imprisonment penalty for each type of enhancement would result in an increase of four or five penalty classes, equating the conduct with the most serious rapes and forms of homicide—and under the current D.C. Code the penalty liability is equal to that of murder.

- To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC's authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements. The RCC's limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.[610] The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor's conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces.

(2) *The CCRC recommends striking as superfluous the phrase "A person may be found guilty of any combination of the following offenses for which the person satisfies the requirements for liability, provided that…"*

- This change clarifies and does not substantively change the revised statute.

[610] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

RCC § 22E-4120. Severability.

(1) *The CCRC recommends striking this provision. The D.C. Council Office of General Counsel Legislative Drafting Manual at 7.4. Severability clauses, states that courts infer severability into District laws, so a severability clause is not necessary. This construction is also explicitly codified at D.C. Official Code § 45-201.*

Chapter 42. Breaches of Peace.

RCC § 22E-4201. Disorderly Conduct.

(1) *OAG, App. C at 264-265, recommends amending the commentary to cure an explanation that is circular. OAG explains that the commentary defines "abusive speech" to mean "fighting words" and defining "fighting words" to mean "abusive speech."*

- The RCC incorporates this recommendation by revising the commentary to cure the circularity described. The explanatory note now refers only to "abusive speech" and a footnote explains that "abusive speech" has the same meaning as "fighting words" in the *Chaplinsky* line of cases. This change clarifies the revised commentary.

(2) *OAG, App. C at 408, recommends that disorderly conduct be reclassified as a Class D misdemeanor with a penalty of 1 month/10 days.*

- The RCC incorporates this recommendation by reclassifying disorderly conduct as a Class D misdemeanor. This change improves the proportionality of the revised offenses.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying disorderly conduct as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(5) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change clarifies the revised statutes and does not further change District law.

RCC § 22E-4202. Public Nuisance.

(1) *OAG, App. C at 265, recommends clarifying in commentary the meaning of the word "lawful" before the phrase "religious service, funeral, or wedding." OAG offers a hypothetical in which the service runs afoul of a District regulation such as an occupancy limit.*

- The RCC incorporates this recommendation by revising the commentary to clarify that the word "lawful" requires that the gathering or event not violate another District or federal law. Consider, for example, a wedding that is blasting music in violation of the District's noise control regulations.[611] A neighbor who disrupts the event by shouting, "Hey, keep it down!" does not commit a public nuisance offense. The statute also specifies that the actor is strictly liable as to whether the event is lawful. This change clarifies the revised offense.

(2) *OAG, App. C at 265, recommends codifying the definition of "an interruption of quiet enjoyment" that appears in the commentary: "a significant interference with the in-home activities of a person of ordinary sensitivity."*

- The RCC partially incorporates this recommendation by revising the statutory language to clarify that the complainant's enjoyment must be objectively reasonable. The phrase "A person's quiet enjoyment of his or her residence" is amended to, "A person's reasonable, quiet enjoyment of their dwelling…" This change clarifies the revised offense.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying public nuisance as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[611] 20 DCMR § 2701.

RCC § 22E-4203. Blocking a Public Way.

(1) *OAG, App. C at 265-266, recommends revising the statutory language to clarify that it is the person who must be on public land, not the entrance. OAG offers a hypothetical in which a person stands on a public sidewalk blocking access to the entrance to a drug store on private property.*

- The RCC incorporates this recommendation by adopting OAG's proposed language: "While on land or in a building that is owned by a government…"[612] This change clarifies the revised statute.

(2) *OAG, App. C at 266, recommends revising the commentary to clarify that the police are not required to give a new warning each time they see a person blocking the same public way. OAG cites the legislative history,[613] which explains, "It is the Committee's intent that a person can be arrested if he or she reappears in the same place after warning, even if some time later." The Committee offered an example in which a person is asked by the same officer day after day to move away from blocking a store entrance, and then the officer says, "I've told you to move every day, and if I come back here tomorrow and you are blocking this doorway again, you will be arrested." The Committee apparently expected that such a person could be arrested without another warning.*

- The RCC incorporates this recommendation by adding the relevant language from the report to a footnote in the commentary. This change clarifies the revised statute.

(3) *OAG, App. C at 266-267, recommends requiring recklessness (instead of knowledge) that the accused's actions constitute a continuance or resumption of the blocking conduct that was the object of the law enforcement officer order. OAG offers a hypothetical in which a person returns to the same location a half an hour after being told to leave, but is not practically certain that their actions are a resumption of the blocking conduct.*

- The RCC does not incorporate this recommendation because the change would be inconsistent with other offenses. Consistent with the revised disorderly conduct offense,[614] blocking a public way requires that a person is practically certain that they are violating the officer's directive. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[615]

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[612] The corresponding commentary is revised to state, "Paragraph (a)(2) specifies that while the person is doing the blocking he or she must be on land or in a building that is owned by a government, government agency, or government-owned corporation while."

[613] Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Page 7.

[614] RCC § 22E-4201(a)(2)(D) ("Knowingly continues or resumes fighting with another person after receiving a law enforcement officer's order to stop such fighting.").

[615] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560,

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying blocking a public way as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(5) *The CCRC recommends revising the phrases "such conduct" and "such blocking" to instead state "the blocking."*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime." (Internal citation omitted)).

RCC § 22E-4204. Unlawful Demonstration.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

(3) *The CCRC recommends striking the jury trial provision as unnecessary. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful demonstration as a Class D misdemeanor and recommends generally classifying all Class D misdemeanors as non-jury demandable offenses.*

- This change improves the consistency of the revised statutes and does not further change District law.

(4) *The CCRC recommends revising the phrases "such conduct" and "such demonstration" to instead state "the demonstration."*

- This change improves the clarity and consistency of the revised statutes and does not further change District law.

(5) *The CCRC recommends repealing D.C. Code § 10-503.17, because it is identical to language in a federal statute that has been held unconstitutional on First and Fifth Amendment grounds.*[616]

- This change removes a criminal statute that has been held to be unconstitutional.

[616] *Jeannette Rankin Brigade v. Chief of Capitol Police*, 342 F. Supp. 575, 583 (D.D.C. 1972) (concerning 40 U.S.C. § 193g).

RCC § 22E-4205. Breach of Home Privacy.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying breach of home privacy as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends amending the phrase "looks inside a dwelling" to instead state "observes inside a dwelling, by any means," to clarify that the offense may be committed by remotely accessing a camera inside the dwelling.*[617]

- This change clarifies the revised statute and may eliminate an unnecessary gap in liability.

(3) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

[617] *See, e.g.*, Mark Hanrahan, *Ring security camera hacks see homeowners subjected to racial abuse, ransom demands*, ABC (December 12, 2019); Jessica Holley, *Family says hackers accessed a Ring camera in their 8-year-old daughter's room*, WMC5 Action News (December 10, 2019).

RCC § 22E-4206. Indecent Exposure.

(1) *OAG, App. C at 434, recommends revising the statute so that an actor cannot avoid liability when the complainant is a young child who consents to the actor's indecent exposure. Specifically, OAG suggests the inclusion of language stating: "The element of lack of effective consent does not apply if the complainant is under 16 years of age and the actor is at least 4 years older than the complainant or the complainant is 8 years old or younger." OAG says that its recommendation is consistent with the D.C. Court of Appeals decision in* Parnigoni v. District of Columbia, *holding under a prior District indecent exposure statute that consent by a child under 16 years of age was ineffective by that statute.*[618]

- The RCC does not incorporate this recommendation because it would be inconsistent with the RCC general approach to consent by young persons, and may create unnecessary overlap with RCC § 22E-1304, Sexually Suggestive Conduct with a Minor.
- First, the RCC definition of "consent" in RCC § 22E-701 excludes apparent consent by a person who "Because of youth, mental illness or disorder, or intoxication, is unable to make a reasonable judgment as to the nature or harmfulness of the conduct to constitute the offense or to the result thereof." This definition does not set a bright-line age as to the age below which consent is ineffective, as the age at which a person can make a reasonable judgement as to the nature or harmfulness of conduct is a fact-specific inquiry that will vary with many factors, including the type of crime, the complainant, and the information available to the complainant. For example, a 7-year-old may be able to give consent for purposes of some matters (e.g. playing football with a 12-year-old involving what otherwise would be assaultive conduct). Bright-line age limits may improperly shield some persons from liability or fail to protect others. RCC § 22E-1302, Sexual Abuse of a Minor, and several other offenses provide bright-line age limits for sexual contact and sexual acts involving minors, but for non-sex crimes the RCC does not categorically deny minor's ability to give consent.
- Second, RCC § 22E-1304, Sexually Suggestive Conduct with a Minor provides liability (as a sex offense) for adults who cause complainants under 16 to remove clothing with intent to cause the sexual arousal or gratification of any person. The RCC offense expands liability

[618] *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) ("But the argument misses the point. O.J. cannot have consented because he was under the age of sixteen when the events at issue took place; such consent is barred by the statute."). The extant version of D.C. Code § 22-1312 stated: "It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal in the District of Columbia under penalty of not more than $300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense. Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed $1,000, or both, for each and every such offense."

specifically to removal of clothing, likely encompassing the facts in *Parnigoni* and many scenarios of concern.

(2) *OAG, App. C at 435, recommends striking the requirement in subparagraph (b)(3)(C) that the conduct "[a]larms or sexually abuses, humiliates, harasses, or degrades any person." OAG offers an example in which a crossing guard notices a man masturbating and becomes concerned that school children will see him.*

- The RCC partially incorporates OAG's recommendation by clarifying in commentary that the statute provides liability for OAG's hypothetical because, the word "alarms" includes a person like the crossing guard who is alarmed about the actor's effect on the welfare of other potential viewers. The word "alarm" is generally understood to mean "disturb," "excite," or "strike with fear."[619] This change clarifies the revised commentary.

(3) *USAO, App. C at 462, recommends striking paragraph (b)(3) entirely. USAO states, "[I]t is the defendant's actions, rather than the impact of the defendant's actions, that should create liability for this offense." USAO also states, "[I]t may be impossible for the government to prove that the conduct was visible to a complainant, that the complainant did not consent the conduct, and/or that the complainant was alarmed or humiliated, etc."*

- The RCC does not incorporate USAO's recommendation because it may authorize a disproportionate penalty. The scope of the statute includes public restrooms, train compartments, communal areas of multi-unit housing, and unauthorized tents or other dwellings on public land. Eliminating paragraph (b)(3) would categorically criminalize sexual acts, masturbation, and full nudity in these locations even when no one witnesses the conduct (e.g. the only evidence is security camera footage shows the behavior, the actor later admits engaging in the behavior) and no one is offended by the conduct. Such criminalization would particularly affect persons experiencing homelessness and does not distinguish between persons who engage in hidden or consensual activity in a public location and those whose conduct alarms or sexually harasses others.
- The RCC gradations of indecent exposure authorize imprisonment not only for purposely alarming or sexually harassing others, but for doing so recklessly. The USAO comment points out that if "a defendant exposed his genitalia in the middle of a metro car" during rush hour and otherwise meets the requirements as proposed in the RCC, "it is possible that no one will report this to law enforcement, or that an individual will make an anonymous report to law enforcement, or that an individual will make a report with law enforcement but neglect to provide accurate contact information for follow-up investigation." These practical concerns are not unique to indecent exposure, however, and are common to most criminal offenses, particularly low-level conduct where complainants are unwilling,

[619] Merriam-Webster.com, *"alarm"*, 2020, *available at* https://www.merriam-webster.com/dictionary/alarm.

for whatever reason, to report the conduct to law enforcement. If a report is received and law enforcement investigates and witnesses the reported conduct, the officer may themselves be a complainant for purposes of arrest and prosecution. Or, where a person's behavior is due to intoxication, mental illness, or another cause requiring social services, an investigating officer may aid the person in obtaining such services.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying first degree indecent exposure as a Class B misdemeanor, second degree indecent exposure as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(5) *PDS, App. C at 449, recommends raising the age of prosecution. PDS states, "[C]hildren age 12 and 13 may have limited understanding of masturbation and inappropriate public sexual behavior. Their conduct should be addressed outside of the confines of juvenile court where they could be subject to detention, separation from their families, and the trauma of arrest."*

- The RCC does not incorporate this recommendation because it may create a gap in liability and is inconsistent with other RCC and D.C. Code provisions recognizing the age of 12 as a critical age between culpable and non-culpable or enhanced and unenhanced sexual conduct. Different children may reach sexual maturity at different ages and the revised provision merely establishes 12 years old as an absolute floor. The provision does not require the arrest or prosecution of children ages 12 and 13 or suggest that prosecution is appropriate in every case. Rather, the provision assumes that these cases will be reviewed individually and that charging decisions will be guided by applicable rules and standards.[620] RCC § 22E-1308, "Limitations on Liability for RCC Chapter 13 Offenses," categorically precludes liability for sex offenses (other than first degree and third degree sexual assault) for persons under 12 years of age, in accord with ALI Model Penal Code Sex Assault draft recommendations, and other provisions in current D.C. Code[621] and RCC offenses[622] that recognize the age of 12 as the critical age between enhanced and unenhanced sexual conduct.

(6) *USAO, App. C at 461, recommends striking the word "sexually" from the phrase "sexually abuse, humiliate, harass, or degrade the complainant."*

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[620] E.g., ABA Model Rule of Professional Conduct 3.8, ABA Model Code of Professional Responsibility Canon 7 (Ethical Consideration 7-13), ABA Criminal Justice Standards (Prosecution Function), the U.S. Attorneys' Manual.

[621] *See, e.g.*, D.C. Code § 22-3020(a)(1) ("The victim was under the age of 12 years at the time of the offense;").

[622] *See, e.g.*, RCC § 22E-1302(a), First Degree Sexual Abuse of a Minor ("In fact: The complainant is under 12 years of age;").

- The RCC does not incorporate this recommendation it would create inconsistency with the general RCC approach to sexual offenses. For further explanation of this change, see the Appendix D1 entry responding to the USAO comment, App. C at 453-454, recommending the elimination of the modifier "sexually" for the words "abuse, humiliate, harass, or degrade. " in the revised definition of "sexual act" and "sexual contact."

(7) *The CCRC recommends revising the exclusion from liability to specify that it applies only to a person who is inside their own individual dwelling unit, to clarify that it does not apply to a person who is located in the communal area of multi-unit housing.*[623]

- This change clarifies the revised statute and may eliminate a gap in liability.

[623] The CCRC revised the definition of "dwelling" to include communal areas secured from the general public, in light of the DCCA's recent opinion in *Ruffin v. United States*, 15-CF-1378, 2019 WL 6200245, at *3 (D.C. Nov. 21, 2019).

Chapter 43. Group Misconduct.

RCC § 22E-4301. Rioting.

(1) *USAO, App. C at 360, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and rioting under RCC § 22E-4302.*

- The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.

(2) *USAO, App. C at 360, recommends the revised rioting statute specifically punish a person who "urges or incites other persons" to engage in rioting, consistent with current D.C. Code § 22-1322. USAO states that, "As written, the RCC no longer includes criminal liability for inciting or urging others to riot." USAO says it "is concerned that dispensing with specifically enumerated criminal liability for inciting others to riot will create gaps in the ability of law enforcement to address situations where a person or persons are actively encouraging others toward criminal behavior."*

- The RCC does not incorporate this recommendation because it would create unnecessary overlap in District criminal statutes. The RCC does not create a gap in liability for law enforcement to arrest persons actively encouraging others toward criminal behavior. The revised disorderly conduct statute punishes a person who "[p]urposely commands, requests, or tries to persuade any person present to cause immediate criminal harm involving bodily injury, taking of property, or damage to property, reckless as to the fact that the harm is likely to occur."[624] Where a person is actively encouraging others who are present to engage in criminal behavior, they may be also subject to arrest for aiding,[625] attempting,[626] soliciting,[627] conspiring,[628] to commit the underlying offense, be it rioting, assault, criminal damage to property, or another crime. Separately criminalizing urging or inciting a riot may lead to disproportionate punishment of speech that is remote in time or place, hyperbolic, or ineffective.[629]

[624] RCC § 22E-4201(a)(2)(B).
[625] RCC § 22E-210.
[626] RCC § 22E-301.
[627] RCC § 22E-302.
[628] RCC § 22E-303.
[629] Consider, for example, a person in Arizona who publishes a tweet in March stating, "If that candidate wins the election, everyone should riot in D.C.!" That person should not be held criminally responsible for inciting a riot that occurs in November. Consider also a person who stands in the middle of the National

(3) *USAO, App. C at 360, recommends including both misdemeanor and felony gradations of rioting. USAO notes that approximately half of reform jurisdictions include multiple gradations for rioting (First Draft of Report #36, App. J at 446).*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. The unique harm addressed by the rioting statute and not otherwise accounted for by other RCC offenses, stems from the person's criminal behavior occurring in a group context where it has the potential to increase others' criminal behavior. This increased risk, punishable in addition to the punishment from any actual crime or attempted crime (which is punished more directly by other RCC offenses), is relatively low and does not merit a felony gradation. See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.[630]
- Notably, although approximately half of reform jurisdictions include multiple gradations for rioting, most of these jurisdictions grade based on presence or use of a dangerous weapon[631] and only seven grade the offense based on the infliction of physical injury or substantial property damage.[632] The RCC contains multiple crimes that separately authorize punishment for possession of a dangerous weapon in connection with a crime or property damage or bodily injury.

(4) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for a misdemeanor form of rioting.*

- The RCC does not incorporate this recommendation, which predates the RCC's updated jury demandability recommendation, because it is inconsistent with the RCC general approach to jury demandability. First Amendment protections may also apply to conduct that otherwise may constitute rioting.
- As of the Second Draft of Report #41, the CCRC generally recommends that the RCC classify all Class A misdemeanors and inchoate versions of those offenses as jury demandable offenses, improving the consistency of the revised statutes.
- In addition to the general RCC approach to jury demandability, the RCC rioting particularly merits jury demandability because it, in part, is likely

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Mall, urging people to form riot immediately, without drawing any attention at all. That person should not be held criminally responsible for inciting a riot that never occurred at all.

[630] Question 2.19 provided the scenario: "Causing $500 of property damage to a store while in a crowd in which at least ten others are also damaging property." Question 2.19 had a mean response of 4.6, less than one class above the 4.0 milestone corresponding to simple assault, currently a 180-day offense in the D.C. Code. Notably, however, in addition to rioting, a person engaged in this conduct could also be charged with fourth degree criminal damage to property, an offense recommended as a Class A felony.

[631] Ark. Code Ann. § 5-71-202; Colo. Rev. Stat. Ann. § 18-9-104; Ind. Code Ann. § 35-45-1-2(Sec. 2); Minn. Stat. Ann. § 609.71; N.H. Rev. Stat. § 644:1(IV); N.J. Stat. 2C:33-1(a)(3); Ohio Rev. Code Ann. § 2917.02; S.D. Codified Laws § 22-10-5; Utah Code Ann. § 76-9-101(3).

[632] Conn. Gen. Stat. Ann. § 53a-175; 720 Ill. Comp. Stat. Ann. 5/25-1(b)(3); Ky. Rev. Stat. § 525.020; N.H. Rev. Stat. § 644:1(IV); N.Y. Penal Law § 240.06; Tenn. Code Ann. § 39-17-303; Utah Code Ann. § 76-9-101(3).

to impact demonstrators. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[633] The DCCA recently noted, "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[634]

(5) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

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[633] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
>
> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[634] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

RCC § 22E-4302. Failure to Disperse.

(1) *USAO, App. C at 361, recommends requiring the same number of actors to trigger liability for failure to disperse under RCC § 22E-4301 and for rioting under RCC § 22E-4302.*

- The RCC revises the commentary to clarify the alignment of the two statutes. The RCC effectively defines a riot as a group of eight people engaging in lawless conduct in a group. Accordingly, the revised rioting offense requires the defendant behave in a riotous manner with seven other riotous people nearby. However, the revised failure to disperse offense does not require that the person participate in riotous conduct themselves and only requires proximity to the eight-person riot. This change clarifies the revised commentary.

(2) *USAO, App. C at 361 and 415-419, recommends eliminating the right to a jury trial for failure to disperse. USAO says that "the equivalent offense for failure to disperse is subject only to a civil fine, which is not jury demandable. D.C.M.R. § 18-2000.2, 18-2000.9."*

- The CCRC incorporates this change by eliminating jury demandability for this offense. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.
- As explained in the commentary, the revised offense is not equivalent and does not replace 18 DCMR § 2000.2. That offense, prosecutable by the Attorney General for the District of Columbia, remains available as a charge.

(3) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying failure to disperse as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(4) *The CCRC recommends striking the exclusion from liability for protected activity as potentially confusing.*

- This change clarifies but does not substantively change the revised offense. Whether or not the statute refers to the Constitution has no bearing on the fact that the statute is subject to the Constitution. However, referring to the Constitution in only some offenses may cause confusion.

Subtitle VI. Other Offenses.

RCC § 7-2502.01. Possession of an Unregistered Firearm, Destructive Device, or Ammunition.

(1) *OAG, App. C at 379-380, recommends regrading the offense to provide three penalty gradations: first degree for possession of restricted pistol bullets; second degree for possession of a firearm without a registration certificate; and third degree for possession of ammunition without a firearm registration certificate. OAG notes that possession of a restricted bullet is punishable by ten years under current District law.*[635]

- The RCC partially incorporates this recommendation by regrading possession of one or more restricted bullet as first degree. The OAG recommendation to grade possession of restrict bullets separately as a first degree offense would result in a disproportionate penalty by rating the possession higher than a "destructive device"—e.g., an explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device. This change improves the proportionality of the revised statute.

(2) *OAG, App. C at 380, recommends revising the exclusion from liability for voluntary surrender to specify that the object must be surrendered "pursuant to District or federal law," consistent with the commentary.*

- The RCC incorporates this recommendation by adopting OAG's proposed language. This change clarifies the revised offense.

(3) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof. Specifically, with respect to the voluntary surrender exclusions, USAO recommends reclassifying the exclusion as an affirmative defense, with the defense bearing the burden of proof, and including that standard in the revised offense.*[636]

a. The RCC incorporates this recommendation by redrafting the exclusion from liability for voluntary surrender as an affirmative defense. RCC § 22E-201 in the General Part now specifies the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(4) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01(7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known, other than a commercial product that is sold as a self-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."*

[635] D.C. Code § 7-2507.06(a)(3)(A).
[636] *See* Crim. Jur. Instr. for D.C. 6.501(C) (2019).

a. The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators and sternutators (natural and manmade compounds). The exclusion states, "A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator." This change improves the proportionality of the revised offense.

(5) *PDS, App. C at 392, recommends expanding the exclusion from liability for empty cartridge casings or shells to also include spent bullets. PDS explains, spent bullets, which have legitimate uses for jewelry and crafts, do not present a public safety concern because they cannot be readily reused in a firearm.*

a. The RCC incorporates this recommendation by adopting PDS' proposed exclusion. This change improves the clarity and proportionality of the revised offense.

(6) *USAO, App. C at 395, recommends that the RCC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, the Attorney General for the District of Columbia shall prosecute certain offenses "except as otherwise provided in such ordinance, regulation, or statute, or in this section."*[637] *USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG's consent.*

a. The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.[638] The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.

(7) *USAO, App. C at 396, recommends eliminating the right to a jury trial under this section for attempts. USAO states, "[I]t is unclear why this provision raises more potential constitutional concerns than, for example, Carrying a Pistol in an Unlawful Manner, RCC § 7-2509.06, which does not have a similar jury trial mandate."*

a. The RCC does not incorporate this recommendation, which predates the RCC's penalty and jury demandability recommendations, because it is inconsistent with the RCC general approach to jury demandability. In the First Draft of Report #41 (October 3, 2019), the RCC classifies first degree possession of an unregistered firearm, destructive device, or ammunition as a Class A misdemeanor and second degree possession of an unregistered firearm, destructive device, or ammunition as a Class B misdemeanor.[639] In the Second Draft of Report #41, the RCC classifies all

[637] D.C. Code § 23-101.
[638] *See, e.g.*, D.C. Code §§ 22-2305; 22-1319.
[639] Accordingly, the subsection specifying jury demandability is stricken from the offense definition as unnecessary.

Class A and Class B misdemeanors and inchoate versions of those offenses as jury demandable offenses. This improves the clarity and consistency of the revised statutes.

b. The first draft of the revised carrying a pistol in an unlawful manner offense[640] did not include a jury trial provision because it replaces offenses that do not carry any jail time under current law.[641] In the First Draft of Report #41 (October 3, 2019), the RCC classifies carrying a pistol in an unlawful manner as a Class A misdemeanor.

c. The Council has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[642] The DCCA recently noted, "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than in ensuring that courts are as efficient as possible in bringing defendants to trial."[643]

(8) *USAO, App. C at 396, recommends disaggregating possession of a firearm and possession of ammunition. USAO states, "Under current law, these are covered by different offenses" and says that "they relate to different conduct, instead of varying levels of the same conduct."*

a. The RCC does not incorporate this recommendation because it would result in a less logical organization of the revised statutes. Under current law, these offenses are covered by the same, multi-grade penalty provision.[644] The offenses are closely related insofar as, generally, a

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[640] RCC § 7-2509.06.

[641] 24 DCMR §§ 2343.1; 2344.

[642] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7.

> The Council has grappled with so-called 'misdemeanor streamlining' for over a decade. On the one hand, judicial expediency urges that the number of jury-demandable misdemeanor crimes be minimized. On the other hand, the right to a jury trial seems fundamental.
>
> Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties. For instances, the status offense of gang membership (no criminal activity required other than mere membership) is such that the extra layer protection for the liberty of the accused individual, - that is, allowing for a jury trial - is reasonable. Similarly, the penalty for unlawful entry currently is jury demandable. Because this charge is often brought against demonstrators, the protection of trial by jury seems prudent. The newly created prostitution free zones *will permit law enforcement against otherwise permitted activity* - freedom of association, for instance - and thus the bill permits trial by jury. Another concern is whether the elements of the crime are somewhat subjective. In such cases the defendant should be able to present his or her case to representatives of the community (i.e., a jury) to answer the question whether there is guilt beyond a reasonable doubt.

(Emphasis added.)

[643] *Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018) (Washington, J., *concurring*).

[644] D.C. Code § 7-2507.06.

firearm requires ammunition and ammunition requires a firearm to be useful as a lethal weapon.

(9) *USAO, App. C at 396, recommends eliminating the exclusion from liability for possession of a firearm frame, receiver, muffler, or silencer. In the alternative, USAO recommends adding the word "solely" to clarify that possession of any of those items does not preclude liability for possession of a firearm without a registration certificate.*

a. The RCC does not incorporate this recommendation because it would create an inconsistent definition and may be confusing. Both the RCC and current D.C. Code offense defines the term "firearm" using meaning specified in D.C. Code § 7-2501.01, which includes frames, receivers, mufflers, and silencers. Consequently, without an exclusion, the revised statute would criminalize the possession of a frame, receiver, etc. as possession of an unregistered firearm. The RCC separately criminalizes possession of a silencer.[645] Specifying "solely" may raise the question: What, in addition, *would* render possession of a receiver or frame criminal—e.g., a frame and a bullet, or a receiver and a frame?

(10) *USAO, App. C at 397, recommends revising the exclusion from liability for participation in a in a lawful recreational firearm-related activity to require proof that the person was traveling to or from a firearm-related activity, possession of the firearm is lawful in the person's jurisdiction of residence, and the firearm is being transported lawfully.*

a. The RCC does not incorporate this recommendation because it would make the statutory language confusing. The RCC exclusion from liability in subparagraph (c)(2)(A) does not concern transportation of a firearm; it concerns using the firearm during an activity. For example, if the District of Columbia had a gun range, gun show, or shooting contest, a person would not be liable for lawfully participating in that activity. The USAO recommendation would require a person who has arrived at the location of a lawful recreational firearm activity to present proof that "the person is traveling to or from a lawful recreational firearm-related activity outside the District."

[645] RCC § 22E-4101, Possession of a Prohibited Weapon or Accessory.

RCC § 7-2502.15. Possession of a Stun Gun.

(1) *OAG, App. C at 381, recommends revising the commentary to clarify that an offense takes place when a person brings a stun gun into any portion of a building when a part of the building is occupied by the District, a preschool, a primary or secondary school, public youth center, or a children's day care center. OAG proposes adding the following example: "A person commits this offense when the person knowingly takes a stun gun into the restaurant portion of a building that is located on the first floor of a building that has a charter school that is located on the rest of the first floor, as well as on the second and third floors."*

- The RCC does not incorporate this recommendation because it would change current law in a way that reduces the clarity and proportionality of the revised statute. Current D.C. Code § 7-2502.15(c) prohibits possession of a stun gun in "(1) A building or office occupied by the District of Columbia, its agencies, or instrumentalities" as well as "(3) A building or portion thereof, occupied by a children's facility, preschool, or public or private elementary or secondary school." This language appears to prohibit possession only in the office or building part that is actually occupied by a government agency or a facility serving children. It does not, for example, prohibit possession in "a building occupied by a school, *or a part thereof*." Prohibiting stun guns in the entire location would lead to counterintuitive outcomes. Consider, for example, two locations of the same chain of grocery stores, one occupying the ground floor of a District office building at 1100 Fourth Street, SW and the other occupying the ground floor of a privately-owned building at 490 L Street, NW. Each store has its own private entrance. OAG's proposed language would criminalize possession of a stun gun in the first grocery store and not the second, even though there is no increased risk of danger in that location. In such an instance, the RCC prohibits possession of a stun gun only if that store displays clear and conspicuous signage.[646]
- The statutory language and commentary are revised to clarify the scope of the offense.

(2) *OAG, App. C at 381, recommends prohibiting stun guns within the property line of buildings containing schools, daycare facilities, and the like. OAG says, "These facilities use the grounds around their buildings as extensions of those facilities so that children can get outdoor play and exercise."*

- The RCC partially incorporates this recommendation by amending subparagraphs (a)(2)(A) and (B) to include "[a] building, building grounds, or part of a building" that the person knows is occupied by the District or a facility serving children. For the reasons stated in comment #1 above, the statute does not reach the property line of every building that contains such a protected location. This change clarifies the revised statute.

[646] Consider also a sprawling 10-story shopping center that has a daycare with its own secured entrance in the basement. Under OAG's proposal, criminal liability would attach upon entering the retail portion only.

(3) *PDS, App. C at 393, recommends replacing the term "public youth center" with "public recreation center," a more commonly used term in the District.*

- The RCC incorporates this recommendation by adopting PDS' proposed language. This change improves the clarity of the revised offense.

(4) *The CCRC recommends revising the affirmative defense provision to more closely resemble other RCC provisions. Specifically, the word "actor" is substituted for "the accused," the phrase "a person lawfully in charge" is substitute for "the person lawfully in charge," and the defined term "in fact"*[647] *is inserted.*

- This change improves the clarity and consistency of the revised statute.

[647] RCC § 22E-207.

RCC § 7-2502.17. Carrying an Air or Spring Gun.

(1) *PDS, App. C at 392-393, recommends expanding the exclusion from liability for theatrical performances to also include possession "related to" an "educational or cultural presentation." PDS states, "For example, an individual should be exempt from liability when he walks to the National Museum of the American Indian while carrying a blowgun for an educational presentation."*

- The RCC partially incorporates this recommendation by amending the exclusion to apply to possession as part of any lawful "educational or cultural presentation." The phrase "related to" is not included, however, as the term is vague and subparagraph (b)(2)(B) already specifically excludes liability for transporting the instrument or weapon, provided that it is unloaded and securely wrapped.

(2) *USAO, App. C at 394-395, generally recommends for offenses in Report #39 and #40 that the statutory text clarify whether or not the exclusions listed in various provisions are affirmative defenses, the party that must prove or disprove the defense, and the applicable burden of proof.*

- The RCC incorporates this recommendation by stating in RCC § 22E-201, in the General Part, the burden of production and proof for affirmative defenses throughout the RCC. This change clarifies the revised offense.

(3) *USAO, App. C at 395, recommends that the CCRC clarify that prosecutorial authority will remain consistent with current law. USAO specifically recommends revising the prosecutorial authority provision to state, the Attorney General for the District of Columbia shall prosecute certain offenses "except as otherwise provided in such ordinance, regulation, or statute, or in this section."*[648] *USAO explains that D.C. Code § 23-101(d) allows USAO to prosecute some OAG charges with OAG's consent.*

- The RCC does not incorporate this recommendation because it would make the revised statute more ambiguous. The RCC recommendation clearly states that prosecutorial authority lies with the Attorney General. Similar language appears in other current District statutes.[649] The Council has no power, under the Home Rule Act, to alter prosecutorial authority and any misassignment of authority is legally without effect whether or not the RCC (or any Council-passed statute) says it is or provides caveats.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying an air or spring gun as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(5) *The CCRC recommends reordering the offense elements to clarify that it is the actor that must be outside a building and it is the weapon that must be conveniently accessible and within reach.*

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[648] *See* D.C. Code § 23-101.

[649] *See, e.g.*, D.C. Code §§ 22-2305; 22-1319.

- This change clarifies, but does not substantively change, the revised offense.

RCC § 7-2507.02. Unlawful Storage of a Firearm.

(1) *OAG, App. C at 382, recommends revising the offense to include people who possess an unregistered firearm. OAG says, for example, that leaving a firearm in a girlfriend's closet poses the same danger whether the weapon is registered or not.*

- The RCC incorporates this recommendation by striking the limiting language "registered under D.C. Code § 7-2502.07." This change eliminates a gap in liability in the revised statute.

(2) *OAG, App. C at 382-383, recommends revising the offense to include only some (unspecified) premises that are not under the defendant's control. OAG says, for example, that leaving a firearm in a girlfriend's closet may pose an equivalent danger if children can access the firearm in either situation.*

- The RCC incorporates this recommendation by striking the limiting language, "On premises under the actor's control." This change eliminates a gap in liability in the revised statute.

(3) *OAG, App. C at 388-389, recommends redrafting the offense definition to clarify that the word "neither" modifies both sub-subparagraphs that follow.*

- The RCC incorporates this recommendation by revising the statutory language to require that the actor knowingly possesses a firearm that is "(A) Not conveniently accessible and within reach; (B) Not in a securely locked container; and (C) Not in another location that a reasonable person would believe to be secure."

(4) *The CCRC recommends removing gendered pronouns from the statutory text.*

- This change does not further change District law.

RCC § 7-2509.06. Carrying a Pistol in an Unlawful Manner.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying carrying a pistol in an unlawful manner as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

(2) *The CCRC recommends revising the offense to include people who possess a firearm without a license to carry because the unlawful carry method poses the same danger whether the person is licensed or not.*

- This change eliminates a gap in liability in the revised statute.

(3) *The CCRC recommends revising the phrase "Outside a person's home or place of business" to state "Outside* the actor's *home or place of business," to clarify that the offense applies to a person who is inside another person's home or business.*

- This change clarifies the revised statute and does not further change District law.

(4) *The CCRC recommends revising the drafting to clarify that it is the actor (and not the pistol) that must be outside the actor's home or place of business and it is the pistol that must be conveniently accessible and within reach. The words "in a location that is:" are stricken from the first element of the offense. The word "While" is added to the second element of the offense. The phrase "The pistol is" is added to the third element of the offense.*

- This change clarifies, but does not substantively change, the revised statute.

RCC § 16-1021. Parental Kidnapping Definitions.

[No Advisory Group comments received.]

RCC § 16-1022. Parental Kidnapping.

(1) *OAG, at App. C. 30, recommends specifying that certain grades of parental kidnapping are designated as felonies, regardless of the maximum allowable penalty, for the purposes of D.C. Code § 23-563.*

- The RCC incorporates this recommendation by adding to the statute subparagraph (i)(6), which reads: "Notwithstanding the maximum authorized penalties, first and second degree parental kidnapping shall be deemed felonies for purposes of D.C. Code § 22-563." This specifies that the provisions under D.C. Code § 23-563 apply to first and second degree parental kidnapping.

(2) *OAG, at App. C 444, notes that the word "complainant" as used in paragraph (d)(3) is ambiguous, and could refer to either the child taken or concealed, or the parent or guardian of the child. OAG recommends replacing the word "complainant" with the words "person taken, concealed, or detained[.]"*

- The RCC incorporates this recommendation by amending the statute using OAG's suggested language. This change improves the clarity of the revised criminal code.

(3) *OAG at App. C. 444, recommends deleting subsection (h), which specifies that the Office of the Attorney General has prosecutorial authority for parental kidnapping. OAG says that "the Council is without authority to designate OAG as [sic] agency to prosecute this offense."*

- The RCC incorporates this recommendation by deleting subsection (h). The CCRC has not independently researched whether there are corresponding historic police or municipal ordinances or regulations that would provide a basis for OAG reliability and relies on the agreement of USAO and OAG regarding this matter.[650] This change improves the clarity of the revised statute.

(4) *OAG, at App. C 444-445, recommends amending the penalty provision concerning reimbursement of expenses by stating: "Any expenses incurred by the District in returning the child shall be assessed by the court against any person convicted of the violation and reimbursed to the District. Those expenses reasonably incurred by the lawful custodian and child victim as a result of a violation of this section shall be assessed by the court against any person convicted of the violation and reimbursed to the lawful custodian."*

- The RCC incorporates this recommendation by amending the statute using OAG's suggested language. This change improves the clarity of the revised criminal code.

(5) *PDS, at App. C. 450, recommends that gradations of parental kidnapping that require taking or concealing out of the District of Columbia, should also require that the actor did so "with the purpose of avoiding detection[.]" PDS notes that merely taking a child across the border briefly to run an errand would increase the severity of the offense.*

[650] This matter was discussed at the agency's February 5, 2020 Advisory Group meeting, which included an attendee from USAO-DC.

- The RCC partially incorporates this recommendation by amending the statute to require that the actor takes or conceals the person outside of the District for more than 24 hours. Under this revision, first, second, and third degree parental kidnapping would not include briefly taking a child out of the District. This change addresses the specific examples offered by PDS. However, taking a person out of the District for more than 24 hours for any reason would subject the actor to higher punishments because it may make recovery of the child substantially more difficult.[651]

(6) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[651] For example if a person takes a child to California not for the purpose of avoiding detection, but for the purpose of finding a job, that person has still made it substantially more difficult for the child to be recovered.

RCC § 16E-1023. Protective Custody and Return of Child.

[No Advisory Group comments received.]

RCC § 16E-1024. Expungement of Parental Kidnapping Conviction.

[No Advisory Group comments received.]

RCC § 25-1001. Possession of an Open Container or Consumption of Alcohol in a Motor Vehicle.

(1) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying possession of an open container of consumption of alcohol as a Class C misdemeanor and generally recommends classifying Class C misdemeanors as non-jury demandable offenses.

(2) *OAG, App. C at 440-441, recommends revising the definition of "public highway" consistent with the definition of "highway" in Title 50 of the D.C. Code (concerning driving while impaired). OAG notes that the District definition includes a parking lot, whereas the federal definition may not.*

- The RCC incorporates this recommendation by amending the definition of "highway" to have the meaning specified in D.C. Code § 50-2206.01. This change improves the consistency of the revised statute.

(3) *OAG, App. C at 441-442, recommends narrowing the exclusion from liability for vehicles that operate on rails to apply to passengers only. OAG explains, "Person's [sic.] who operate, or who are in physical custody of trains, should be subject to the offense like people who operate, or who are in physical control of, a motor vehicle."*

- The RCC incorporates this recommendation by striking the exclusion from liability for vehicles that operate on rails. Metrorail passengers are sufficiently covered by the exclusion from liability for persons located in the passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation who are not operating the vehicle. This change eliminates an unnecessary gap in liability in the revised statute.

(4) *OAG, App. C at 442, recommends broadening the revised offense to include persons who are operating* or *in physical control of a motor vehicle, consistent with the District's DUI statute.*[652] *OAG does not define or describe the meaning of the phrase "in physical control."*

- The RCC does not incorporate this recommendation at this time. It is not clear how the plain language proposed by OAG, "in physical control," differs from the current RCC "operation," and the CCRC has not yet reviewed the District DUI statute referenced by OAG's comment or other traffic offenses. However, the agency's initial research indicates that at least some District case law concerning the DUI and other traffic statutes treats the phrase "in physical control" as superfluous to the term "operating."[653] Moreover, the DUI statute is governed by a wide array of

[652] D.C. Code § 50-2206.11.

[653] *See Fadul v. D.C.*, 106 A.3d 1093, 1097 (D.C. 2015) ("However, this court's case law makes it clear that "operating" in this context "means being in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement." *Maldonado v. District of Columbia, 594 A.2d 88, 89*

other (not "operating" or "in physical control") specialized definitions.[654] Until the agency has an opportunity to fully review traffic offenses,[655] it does not define "operating" nor adopt the recommended language.

(5) *OAG, App. C at 442, notes that the revised offense treats public consumption of alcohol differently than public consumption of marijuana under D.C. Code § 48-911.01. OAG states, "[S]hould Congress lift the restrictions that it has placed on the ability of the District to further decriminalize marijuana, OAG suggests that the Council consider whether the laws prohibiting the public consumption of marijuana and public intoxication due to marijuana be decriminalized to the same extent recommended in this proposal."*

- The RCC has not yet issued a recommendation for a revision to the District's public consumption of marijuana laws and may do so at a later date, if time allows under the Commission's statutory mandate.

(D.C.1991) (internal quotation marks and citations omitted).*"). See also Maldonado v. D.C.*, 594 A.2d 88, 89 (D.C. 1991) ("This court has held that the term "operating," in a prosecution for operating a vehicle after suspension of a driver's license, means being "in actual physical control of the vehicle, capable of putting the vehicle into movement or preventing its movement…" *Houston v. District of Columbia,* 149 A.2d 790, 792 (D.C.1959), cited with approval in *Jackson v. District of Columbia,* 180 A.2d 885, 887 (D.C.1962); *see also United States v. Weston,* 151 U.S. App. D.C. 264, 268 n. 24, 466 F.2d 435, 439 n. 24 (1972).").

[654] D.C. Code § 50-2206.01. Definitions.

[655] The CCRC may develop recommendations for the District's DUI and other traffic statutes at a later date, if time allows under the Commission's statutory mandate

RCC § 48-904.01a. Possession of a Controlled Substance.

(1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*
- The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of "abusive" or "narcotic" substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.

(2) *PDS, at App. C. 368, recommends decriminalizing simple possession of all controlled substances.*
- The RCC does not incorporate this recommendation because it would create a gap in law. Support among District voters for maintaining criminal penalties for simple possession of controlled substances is apparent in the CCRC public opinion surveys.[656]

(3) *PDS, at App. C. 368, recommends that if simple possession is not decriminalized, RCC § 48-904.01 (e)(1) should be amended to allow judges to defer further proceedings even if the defendant has been previously convicted of a controlled substance offense in the District or in another jurisdiction, or if the defendant has had proceedings previously deferred under this paragraph.*
- The RCC incorporates this recommendation by codifying a provision to allow judges to defer proceedings under § 48-904.01 (e)(1) even if the defendant has been previously convicted of a controlled substance offense, or if the defendant has previously had proceedings deferred under the paragraph. This change improves the proportionality of the revised criminal code.

(4) *PDS, at App. C. 368-369, recommends that the RCC adopt provisions from D.C. Code § 7-403, which provide immunity from prosecution for some drug offenses under circumstances where an individual seeks assistance for himself or other individuals in the event of a suspected drug overdose.*
- The RCC incorporates this recommendation by codifying a provision that allows a person to avoid liability when seeking assistance for a drug overdose. This change will improve the proportionality of the revised criminal code.

(5) *USAO, at App. C. 374, recommends retaining felony penalties for possession of liquid PCP.*

[656] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: "Possessing a small vial of liquid PCP (a controlled substance) for personal use." Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. CCRC public opinion surveys suggest that felony penalties for personal possession of liquid is not supported by most District voters.[657] Higher, felony-level penalties are available under the RCC for possession of liquid PCP of any amount when that possession is with intent to distribute.

(6) *USAO, at App. C. 374, recommends using only one penalty gradation for possession of a controlled substance, which would apply to any controlled substance.*

- The RCC does not incorporate this recommendation because it would change current District law in a way that may authorize disproportionate penalties. Adopting this recommendation would risk disproportionately severe penalties. Dividing possession of a controlled substance into penalty grades recognizes distinctions between substances identified as "abusive" or "narcotic," and other controlled substances. Under the USAO's proposal, possession of Schedule V substances with the lowest risk of harm or abuse would be penalized the same as possession of the most harmful substances.

(7) *USAO, at App. C. 375 recommends that subsection (e) cross reference "RCC § 48-901.02" to "D.C. Code § 48-901.02."*

- The RCC does not incorporate this recommendation at this time because it may reduce the clarity of the revised statute's references, but this matter will be reevaluated when recommendations are finalized for the Council and Mayor. The RCC updates its references to definitions across the RCC. All defined terms are included in RCC § 22E-701, including the terms "controlled substance," "immediate precursor," "opium poppy," "person," and "poppy straw." The cross references in subsection (e) are updated accordingly.

(8) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying shoplifting as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

[657] See, e.g., Advisory Group Memo #27 Appendix A - Survey Responses, Question 3.01 provided the scenario: "Possessing a small vial of liquid PCP (a controlled substance) for personal use." Question 3.01 had a mean response of 5.3, falling between a class 6 milestone corresponding to causing significant bodily injury (corresponding to felony assault, currently a 3 year offense under the D.C. Code), and a class 4 milestone corresponding to causing a minor bodily injury (corresponding to simple assault, currently a 10 year offense in the D.C. Code).

RCC § 48-904.01b. Trafficking of a Controlled Substance.

(1) *OAG, at App. C. 362-363, recommends that first degree possession of a controlled substance should include all substances in Schedules I and II, instead of the list of substances in paragraph (a)(2).*

- The RCC does not incorporate this recommendation because it would change District law in a way that may authorize disproportionate penalties. The substances listed in paragraph (a)(2) have been taken verbatim from the current definitions of "abusive" or "narcotic" substances. Although some of these substances are in Schedule II, current law designates these specific substances for the most severe penalties when they are distributed, manufactured, or possessed with intent to distribute or manufacture.

(2) *OAG, at App. C. 364, recommends that this offense should be subject to an enhancement for committing the offense while armed in addition to one other enhancement.*

- The RCC does not incorporate this recommendation because it would authorize disproportionate penalties. While in principle the stacking of enhancements may appear desirable because it reflects many ways in which a crime may be categorically more serious, in practice the stacking of enhancements can quickly create extremely high punishments that dwarf the predicate conduct. For example, distribution of a controlled substance to a minor generally is considered more serious than distribution to a non-minor and arguably deserves a greater statutory punishment. The same is true, however, for other possible aspects of a case such as, for example, if the actor has a prior felony conviction, the actor carried a dangerous weapon, or the actor committed the crime near a school or playground. However, raising the statutorily authorized imprisonment penalty for each type of enhancement would result in an increase of four penalty classes, equating the conduct with offenses such as second degree sexual assault, kidnapping, or sex trafficking of minors when even such a worst case form of drug trafficking is not equivalent to those offenses. To avoid such disproportionate outcomes, the RCC recommends limiting the stacking of penalty enhancements. Individual offenses incorporate (but cap) several types of possible enhancements, while the general enhancements in RCC Chapter 6 (e.g. repeat offender or hate crimes) do stack additional penalties. Within the RCC's authorized range of statutory penalties, limiting stacking as it does, a sentencing judge retains sufficient discretion to weight the seriousness of the conduct taking into account the seriousness of the particular facts of the case which may or may not be captured in statutorily-specified enhancements.[658] The

[658] While the RCC and current D.C. Code codify an array of circumstances that raise the penalty classification of an offense, these circumstances, even when present, may have little bearing on the seriousness of a particular case. Conversely, circumstances in a particular case that are not captured in a statutory enhancement may be highly relevant to seriousness. Statutory enhancements are just one factor in

RCC's limited form of stacking produces aggregate penalties within the range of most current court sentencing decisions and better accords with polling of District voters.[659]

- The RCC seeks to ensure that the totality of criminal punishment an actor faces for conduct is proportionate to that conduct—but that approach requires examining all the relevant crimes an actor may be charged with (and punished for) based on the actor's conduct. Unlike the current D.C. Code, the RCC does not examine just one crime (and its enhancements) to see if the punishment is proportionate to the conduct, because such a comparison misrepresents the total liability an actor faces. Notably, with respect to trafficking a controlled substance, there are an array of separate weapons offenses in the RCC (and current D.C. Code) that can be charged and provide additional liability for a person who carries a firearm when distributing drugs.[660]

(3) *OAG, at App. C. 364 recommends that sub-subparagraph (g)(6)(C)(i) be amended to clarify that the enhancement applies to offenses committed based on the property line, not the building, and by extending the relevant distance from 100 feet to 300 feet by stating: "within 300 feet of the property line of a school, college, university…"..*

- The RCC incorporates this recommendation by adding the specific language recommended by OAG. This change improves the clarity of the revised criminal code.

(4) *OAG, at App. C. 365, recommends that the defense under paragraph (h)(1) should be amended "to apply to situations where the actor and the other person are about to use the drugs together or where the actor transfers to another person enough controlled substance for a single use." OAG does not recommend specific language.*

- The RCC incorporates this recommendation by revising the statute as suggested by OAG. Specifically, the defense is revised to state: "It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance *and, either the quantity of the controlled substance*

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ensuring proportionate sentencing, and even in the absence of such enhancements judges are provided with a range of possible punishments to determine a proportionate punishment.

[659] See the responses to survey questions in Advisory Group Memo #27 – Public Opinion Surveys on Ordinal Ranking of Offenses.

[660] For this reason, as well as the clear practical effect any factor (whether a statutory enhancement or not) any more serious form of conduct has on a judge's exercise of their discretion in sentencing, the CCRC disagrees with the OAG statement that "a person who plans on selling drugs at a school might as well take a gun with him because there will not be any additional penalty for carrying the firearm while distributing the controlled substance." Retributive measures of proportionality aside, whether the existence of an incrementally higher statutory penalty due to a codified penalty enhancement is a specific deterrent on an individual is also questionable. General research on deterrence summarized by the Department of Justice's National Institute of Justice indicates there is little effect by increasing imprisonment penalties. See https://nij.ojp.gov/topics/articles/five-things-about-deterrence.

distributed does not exceed the amount for a single use by the recipient, or recipient intends to immediately use the controlled substance.". This change may eliminate a gap in liability and improves the proportionality of the revised statutes.

(5) *PDS, at App. C. 369, recommends that since the RCC grades penalties based on weight, the statute be amended to specifically address controlled substances contained within edible products. PDS recommends the following language: For controlled substances that are contained within edible products and that are intended to be consumed as food, candy, or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the controlled substance.*

- The RCC incorporates this recommendation by revising the statute as suggested by PDS. Specifically, the statute is revised to state: "For controlled substances that are contained within edible products and that are intended to be consumed as food or beverages, the total weight of the controlled substance shall be determined by calculating the concentration of the controlled substance contained within the mixture and then calculating the total amount of controlled substance that is present. The weight of the inert edible mixture will not be added to determine the total weight of the compound or mixture containing a controlled substance." This change improves the clarity and proportionality of the revised statutes.

(6) *PDS, at App. C. 370, recommends amending the statute to clarify that the weight of non-consumables, such as containers or by product of consuming the substance, should not be included in the weight of the mixture of the controlled substance.*

- The RCC incorporates this change by revising the statute as suggested by PDS. Specifically, the statute is revised to state: "The weight of a non-consumable container in which a controlled substance is stored or carried shall not be included in the weight of the compound or mixture containing the controlled substance." This change improves the clarity and proportionality of the revised statutes.

(7) *PDS, at App. C. 371, recommends that the penalty enhancement for distribution to a person under the age of 18 should require that the defendant was reckless as to the age of the person to whom the controlled substances were distributed.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the consistency and proportionality of the revised statutes.

(8) *PDS, at App. C. 371, recommends amending the commentary with respect to the age-based penalty enhancement to clarify that the enhancement does not apply if the defendant distributes controlled substance to an adult, who then distributes the substance to a person under the age of 18.*

- The RCC incorporates this recommendation by amending the commentary as suggested. This change improves the clarity of the RCC commentary.

(9) *PDS, at App. C. 371, recommends that the words "public youth center" be replaced with "public recreation center." PDS does not intend for this to substantively change the scope of the enhancement.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.

(10) *PDS, at App. C. 371-372, recommends re-drafting the exclusion to the defense under paragraph (h)(1). PDS recommends changing the words "value or future expectation of financial gain" to "value or expectation of future financial gain[.]" This recommendation is clarificatory, and is not intended to change the scope of the defense.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised criminal code.

(11) *USAO, at App. C. 373, recommends adding the words "a compound or mixture containing [a controlled substance]" to every gradation of controlled substance offenses.*

- The RCC incorporates this recommendation by amending the statute as suggested. This change improves the clarity of the revised statutes.

(12) *USAO, at App. C. 375, opposes including a penalty enhancement for possessing a firearm while committing trafficking of a controlled substance instead of a stand-alone offense for the same conduct and offenses against persons.*

- The RCC does not incorporate this recommendation because it is inconsistent with the RCC approach to differentiating crimes against persons from other less inherently dangerous crimes, does not logically organize offenses, and may authorize disproportionate penalties.

(13) *USAO, at App. C. 375-376, recommends that if the firearm enhancement is retained in the trafficking offense, the words "in furtherance of and" should be deleted.*

- The RCC does not incorporate this recommendation. Trafficking a controlled substance while possessing a weapon that has no relationship to the offense does not warrant a heightened penalty. Under USAO's proposal, a person packaging a controlled substance with a legally registered handgun in the room would be subject to a penalty enhancement, even if the handgun had no relationship to the offense. The fact that an actor possesses a firearm while trafficking a controlled substance may lead to an inference that the actor may use the firearm at some point, in furtherance of the crime, but the RCC does not presume this fact. Illegally possessing a firearm unconnected to the trafficking crime is subject to liability and consecutive punishment under other RCC offenses.

(14) *USAO, at App. C. 376, recommends removing the defense under § 48-901.01b(h)(1) for distribution or possession with intent to distribute where an actor does not do so in exchange for something of value or future expectation of financial gain. USAO specifically notes that in some cases, it will be difficult to*

prove that a person intended to distribute a controlled substance in exchange for something of value.

- The RCC partially incorporate this recommendation by narrowing the defense. Specifically, the defense is revised to state: "It is a defense to prosecution under this section for distribution or possession with intent to distribute that the actor distributes or possesses with intent to distribute a controlled substance but does not do so in exchange for something of value or future expectation of financial gain from distribution of a controlled substance *and, either the quantity of the controlled substance distributed does not exceed the amount for a single use by the recipient, or the recipient intends to immediately use the controlled substance."* This change may eliminate a gap in liability and improves the proportionality of the revised statutes. Notably, under the RCC current law, a person possessing a controlled substance in a quantity consistent with distribution is still free to argue that he intends to consume the substances himself.

(15) *USAO, at App. C. 425, recommends that all gradations of trafficking of a controlled substance be classified as felonies.*

- The RCC does not incorporate this recommendation because it would change current law in a way that may authorize disproportionate penalties. Under the RCC, trafficking of substances that have been designated "abusive" or "narcotic," are all felonies while trafficking substances in schedules that have a lower propensity for harm and addiction, and greater medical benefit constitutes fourth and fifth degree trafficking, which are classified as misdemeanors. This distinction in penalties is warranted by the dangerousness of the controlled substances involved and, in significant part, reflects current law under which trafficking of a Schedule V substance is subject to imprisonment for a maximum of one year.

(16) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (h)(6) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 48-904.01c. Trafficking of a Counterfeit Substance.

(1) *USAO reiterates all of its comments and recommendations with respect to trafficking of a controlled substance.*

- The RCC does or does not incorporate recommendations in accordance with changes to the trafficking of a controlled substance statute, and for the reasons stated there.

(2) *The CCRC recommends revising the phrasing of the penalty enhancement provision in paragraph (g)(6) to state, "In addition to the general penalty enhancements under this title, the penalty classification for this offense is increased by one class when…" instead of "In addition to any general penalty enhancements in RCC §§ 22E-605 – 608, the penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven." Broadening the reference to RCC §§ 22E-605 - 608 to include any general penalty enhancement facilitates the addition of other general enhancements in the future. Specifying that the classification "is increased," instead of "may be increased" clarifies that the maximum penalty is increased (although the penalty is ultimately decided by the sentencing court). The phrase "one or more of the following is proven" is stricken as superfluous because RCC § 22E-605 already makes clear that all elements of the enhancement must be charged and proven.*

- This revision improves the clarity of the revised statute.

RCC § 22E 48-904.10. Possession of Drug Manufacturing Paraphernalia.

(1) *OAG, at App. C. 365-366, recommends amending paragraph (b)(2) to clarify that the exclusion to liability only applies if the actor possessed an item "solely to package or repackage a controlled substance for that person's own use," or with intent to "solely to package or repackage a controlled substance for that person's own use[.]" OAG notes that this will clarify that the exclusion would not apply if a person possesses paraphernalia to package a controlled substance for that person's own use, as well as for other illicit purposes.*

- The RCC incorporates this recommendation by amending the statute as suggested by OAG. This change improves the clarity of the revised statutes.

(2) *PDS, at App. C. 370, recommends amending the offense to exclude possession of items knowing that they have been used to manufacture a controlled substance. PDS argues that many common items can be used to manufacture a controlled substance, and individuals may share homes with people who have used these items for manufacturing.*

- The RCC incorporates this recommendation by deleting the phrase "That has been used to manufacture a controlled substance." Merely possessing items that previously have been used to manufacture a controlled substance, without intent to manufacture additional controlled substances, does not warrant criminalization. Although the RCC often criminalizes possession of various items with intent to use them to commit a criminal offense, the RCC generally does not criminalize possession of items that previously have been used to commit a crime. Logically, a person who has previously actually used an object to manufacture paraphernalia at that time also possessed the object with intent to use the object to manufacture a controlled substance—and so remains liable under the revised statute. Commentary has been updated to clarify that a person who possesses an item and used it to manufacture a controlled substance in the past may still be convicted under this statute. This change improves the proportionality of the revised criminal code.

(3) *USAO, at App. C. 377, says it "opposes decriminalization of drug paraphernalia." (USAO does not provide any specific re-drafting proposal, but presumably recommends that the revised statute be re-drafted to include possession of any items with intent to use the item to ingest or distribute a controlled substance as in current law.) USAO also notes that the draft revised statute did not separately define the term "manufacturing," but if the definition from D.C. Code § 48-901.02 (13) is applied, "this manufacturing definition likely would not include objects routinely used to distribute drugs such as scales, zips, and other objects, because those objects were not necessarily 'designed to' manufacture drugs." USAO says that, "Thus, in addition to decriminalizing drug paraphernalia intended for personal use, the RCC has proposed decriminalizing drug paraphernalia intended for distribution as well."*

- The RCC does not incorporate this recommendation because it may authorize disproportionate penalties. Mere possession of items with intent

to use them to ingest or distribute controlled substances does not warrant criminalization, particularly given the health risks that may arise from use of unsafe objects to ingest or inhale a controlled substance. The RCC maintains criminal penalties for trafficking of drug paraphernalia as provided in RCC § 48-904.11. The RCC will update the revised statute to clarify that the term "manufacture" is defined in RCC § 22-701, and will have the same meaning as under current D.C. Code § 48-901.02 (13). USAO is correct that the revised statute does not criminalize possession of items not intended for use in manufacturing a controlled substance. Substantial criminal penalties remain in other RCC statutes for possession with intent to distribute or distribution of controlled substances.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

RCC § 48-904.11. Trafficking in Drug Paraphernalia.

(1) *OAG, at App. C. 366, says it is unclear why the revised trafficking of paraphernalia offense includes items intended for use in introducing a controlled substance into the human body, but the revised possession of paraphernalia offense does not.*

- The RCC incorporates this recommendation by amending the commentary to note that trafficking in certain types of paraphernalia, the possession of which is not criminal, reflects the greater seriousness of commercial conduct that may facilitate consumption of controlled substances. This change improves the clarity of the RCC commentary.

(2) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include distribution of items that will be used to smoke controlled substances.*

- The RCC incorporates this recommendation by amending the statute to exclude liability for a community organization's distribution of clean supplies for the smoking of a controlled substance. Specifically, the exception for community-based organizations is revised to state: "Is a community-based organization that sells or delivers, or possesses with intent to sell or deliver, testing equipment or other objects used, intended for use, or designed for use in identifying or analyzing the strength, effectiveness, or purity of a controlled substance, *or for the ingestion or inhalation of a controlled substance*[.]" Such an effort to reduce the harm of smoking a controlled substance does not warrant criminal punishment. This change improves the proportionality of the revised statutes.

(3) *PDS, at App. C. 370, recommends that the exclusions to liability under subsection (c) should include the transfer or delivery of clean supplies from one user to another user. As currently drafted, the exclusion applies to community-based organizations, or persons authorized by subsection (b) of D.C. Code § 48-1103.01 to deliver any hypodermic syringe or needle distributed as part of the Needle Exchange Program authorized under D.C. Code § 48-1103.01.*

- The RCC incorporates this recommendation by amending the statute to exclude liability for any sale, distribution or possession with intent to sell or distribute unused hypodermic syringes or needles, regardless of whether the actor is a community based organization or authorized under D.C. Code § 48-1103.01. Specifically, the exclusion for distribution is revised to state: "A person does not commit an offense under this section when that person: . . . Sells, delivers or possesses with intent to sell or deliver an unused hypodermic syringe or needle[.]" This change to decriminalize the sale and distribution of needles and syringes is intended to reduce the harm of using needles and syringes that may transmit HIV, hepatitis, and other diseases. For more information on the public health justification for this change and other jurisdictions' similar efforts, see: https://www.cdc.gov/policy/hst/hi5/cleansyringes/index.html.

(4) *PDS, App. C at 412-414, recommends providing a right to a jury trial all offenses that permit a maximum punishment that includes incarceration.*

- The CCRC does not incorporate this change at this time. As of the Second Draft of Report #41, the CCRC recommends classifying unlawful operation of a recording device as a Class D misdemeanor and generally recommends classifying Class D misdemeanors as non-jury demandable offenses.

D.C. Code Statutes Recommended for Repeal

D.C. Code § 5-115.03. Repeal of Neglect to Make Arrest for Offense Committed in Presence.

Repeal of D.C. Code § 5-115.03 (Neglect to Make Arrest for Offense Committed in Presence).

[No Advisory Group comments received.]

D.C. Code §§ 7-2502.12 and 7-2502.13. Repeal of Possession of Self-Defense Sprays. Repeal of D.C. Code §§ 7-2502.12 (Definition of self-defense sprays) and 7-2502.13 (Possession of self-defense sprays).

(1) *OAG, App. C at 390, recommends a conforming amendment to D.C. Code § 7-2501.01 (7)(C) that clarifies when the use of lacrimators are not considered destructive devices. OAG proposes, "Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name known, other than a commercial product that is sold as a self-defense spray and which is propelled from an aerosol container that is labeled with or accompanied by clearly written instructions as to is use."*

- The RCC partially incorporates this recommendation by revising the possession of an unregistered firearm, destructive device, or ammunition offense to exclude all lacrimators (natural and manmade compounds). The exclusion states, "A person does not commit an offense under subsection (a) of this section for possession of a lacrimator or sternutator." This change improves the proportionality of the revised statute.

D.C. Code § 37-131.08(b). Repeal of Penalties for Illegal Vending.

[No Advisory Group comments received.]

Repeal of D.C. Code § 48-904.03a. Repeal of Maintaining Location to Distribute or Manufacture Controlled Substances.

(1) *OAG, at App. C. 367, recommends that the RCC include a more limited version of the offense that applies to the manufacture of methamphetamine. OAG states that this offense is warranted due to the "dangerousness associated with methamphetamine production[.]"*

- The RCC partially incorporates this recommendation. The RCC includes a new "Maintaining a Place for Methamphetamine Production" offense. The offense makes it an offense to "knowingly maintain[] or open[] any place to manufacture methamphetamine, its salts, isomers, or salts of its isomers." However, the term "manufacturing" is limited by the specific language in the revised statute to exclude maintaining or opening locations with the intent merely to engage in packaging, repackaging, labeling, or relabeling of methamphetamine. These types of manufacturing do not create the safety risks associated with actual production of methamphetamine. Accordingly, the revised offense specifically excludes maintaining or opening a place for only these purposes.

D.C. Code § 48-904.07. Repeal of Enlistment of Minors.

(1) *USAO, at App. C. 377, recommends amending the penalty enhancement under the trafficking of a controlled substance offense regarding trafficking to minors for an actor who "enlists, hires, contracts, or encourages any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of" the actor. USAO notes that this would ensure that "to the extent conduct prohibited by D.C. Code § 48-904.07 is prosecuted under an accomplice liability theory . . . there would be an enhanced penalty for enlisting a minor to distribute a controlled substance."*

a. The RCC incorporates this recommendation by amending the enhancements to the trafficking of a controlled substance offense to substantially include the language suggested by USAO. Specifically, an additional enhancement is included for: "The actor is, in fact, 21 years of age or older, and the actor engages in the conduct constituting the offense by knowingly enlisting, hiring, contracting, or encouraging any person under 18 years of age to sell or distribute any controlled substance for the profit or benefit of the actor."