GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 23, 2020

SUBJECT: First Draft of Report #42, Obscenity, Privacy, and Related Offenses

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #42, Obscenity, Privacy, and Related Offenses.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E-701. DEFINITIONS

On page 3 of the Report it defines "Live performance." It states, "'Live performance' means a play, dance, or other visual presentation or exhibition for an audience." In the Explanatory Note it states "The RCC definition of "live performance" is used in the revised offenses of unlawful creation or possession of a recording, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor." While OAG agrees that the definition works in most cases, it does present an issue of applicability when applied to some of these offenses.

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

For example, the elements of First Degree Attending or Viewing a Live Sexual Performance of a Minor, pursuant to RCC § 22E-1810, is:

(a) … [A]n actor commits attending or viewing a live sexual performance of a minor when that actor:
- (1) Knowingly attends or views a live performance or views-a live broadcast;
- (2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
  - (A) A sexual act or simulated sexual act;
  - (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
  - (C) Masturbation or simulated masturbation; or
  - (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

Plugging in the definition of "live performance" to RCC § 22E-1810(a)(1) we get "Knowingly attends or views a play, dance, or other visual presentation or exhibition for an audience or views a live broadcast. The issue is whether a person who arranges a live sexual performance of a minor for the viewing pleasure of a single person and the single person viewing the live sexual performance are guilty of an offense. The RCC does not define the word "audience." Merriam-Webster defines "audience" as "a group of listeners or spectators."[2] To resolve this issue, OAG suggests that the definition of "Live performance" be amended to say that it "means a play, dance, or other visual presentation or exhibition for an audience, including an audience of one."

RCC § 22E-1803. VOYEURISM

RCC § 22E-1803 (a) states that a person commits first degree voyeurism when they:

- (1) Knowingly:
  - (A) Creates an image, other than a derivative image, of the complainant's nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola; or
  - (B) Creates an image or audio recording, other than a derivative image or audio recording, of the complainant engaging in or submitting to a sexual act or masturbation;
- (2) Without the complainant's effective consent; and
- (3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

The improper creation of an image under subparagraph (A) can happen in two scenarios, 1) where the complainant approves of the person seeing them fully or partially nude but does not

[2] See https://www.merriam-webster.com/dictionary/audience.

give effective consent for the creation of an image and 2) where the complainant is unaware that the person is viewing them or creating the image. Because this can happen in the two scenarios, there is a question about what is meant by "without the complainant's effective consent." Does it apply to creation of the image alone or does it apply to the actual viewing of the nude complainant?[3] To clarify the scope of the effective consent, OAG recommends that subparagraph (a)(2) be redrafted to say, Without the complainant's effective consent to being observed and for the creation of an image."[4]

RCC § 22E-1803(c)(3) provides for the penalty enhancements for the offense of Voyeurism. In addition to the general penalty enhancements that apply, "the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, it is proven that the actor knew the complainant was under 18 years of age." [emphasis added] The Commentary does not explain why the penalty enhancement is limited to situations where the actor "knew" the complainant was under 18. OAG would note that the following offenses and/or their enhancements apply when the complainant is in fact a minor or the actor is negligent as to the fact that the complainant is under 18 years of age (or in some cases a lower age): 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. As the offense of Voyeurism, the creation of a sexual image, is closely related to some of the foregoing offenses when the complainant is a minor and because none of those offenses require that an actor knew the complainant was under a specific age, OAG recommends that RCC § 22E-1803(c)(3) be redrafted to apply when the actor was reckless as to the fact that the complainant was under 18 years of age..

RCC § 22E-1804. UNAUTHORIZED DISCLOSURE OF SEXUAL RECORDINGS

RCC § 22E-1804 (c) provides for an affirmative defense. Subparagraph (2) provides the burden of proof. It states, "The defendant has the burden of proof for an affirmative defense by a preponderance of the evidence." OAG recommends that this provision be redrafted to clarify that defendant has both the he "burden of production" and the "burden of persuasion" (i.e.,Proof by preponderance of the evidence

RCC § 22E-1805. DISTRIBUTION OF AN OBSCENE IMAGE

[3] The same analysis applies to RCC § 22E-1803 (a)(1)(B).

[4] 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."

The first element of this offense includes when the actor “Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated… Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering…”[5] This provision is clear in situations where the complainant is engaging in behavior that is sexual (or sexualized) in nature. However, 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). While OAG believes that this offense would cover such manipulated images, to avoid any ambiguity, OAG suggests that this provision be redrafted to make clear that the language pertaining to sexual or sexualized image pertains to the image that is eventually distributed, not what the person who was filmed was actually doing.

Paragraph (2) requires that the person act without the complainant’s effective consent. To explain this in the context of “Relation to Current District Law, the Commentary, states, “.,.the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted.” However, these two statements are not coextensive because lack of effective consent can occur in more situations than where materials are distributed “unsolicited, unwelcome, and wanted. To clarify the Commentary, OAG suggests that this phrase be redrafted 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.”

RCC § 22E-1806. DISTRIBUTION OF AN OBSCENE IMAGE TO A MINOR

RCC § 22E-1806 decriminalizes the distribution of obscene images to a minor by a person under the age of 18 to a complainant who is under 16 years of age. Paragraph (a)(3) states that the offense only applies when “[I]n fact, the actor is 18 years of age or older and at least 4 years older than the complainant. However, the Commentary does not explain why it should not be an offense for a teenager to show obscene images to a young child. Showing obscene imagines to a child is frequently done as part of grooming the child for sexual relations. OAG has prosecuted teenagers aged 14 to 17 for child sexual assault of children between the ages of 4 and 8 in

---

[5] The full text of RCC § 22E-1805 is:

(a) An actor commits distribution of an obscene image when that actor:
- (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
  - (A) Sexual act;
  - (B) Sadomasochistic abuse;
  - (C) Masturbation;
  - (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
  - (E) Sexual contact; or
  - (F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;
- (2) Without the complainant’s effective consent; and
- (3) Reckless as to the fact that the image is obscene.

situations where prior to the sexual assaults the teenager showed the younger child pornography on numerous occasions. The goal of the juvenile justice system is to rehabilitate youth so that they do not commit offenses when they become adults. By failing to treat a teenager who grooms younger children by showing them sexually explicit movies, we are not only failing to treat the teenager, and thus rehabilitate them, prior to them committing sexual offenses as adults for the same behavior, but we are failing to address the victimization of those future younger children who need not have been groomed or assaulted. This is not to say that OAG believes that this offense should apply when a child distributes or displays such an image to a friend of similar age. To address this problem, OAG suggests that paragraph (a)(3) be redrafted to say, "I]n fact, the actor is at least 4 years older than the complainant."

RCC § 22E-1806 (c) creates an affirmative defense for a defendant who "(A) Is an employee of a school, museum, library, or movie theater (B) is acting in within the reasonable scope of that role; and (C) Has no control over the selection of the image." As these individuals do not have a choice concerning what films their employers show, OAG agrees that these individuals should be able to avail themselves of this affirmative defense. However, 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. For example, movies in the District are shown at the convention centers, RFK Stadium Armory, Gateway DC, and at outdoor venues. Rather than litigate whether these facilities are movie theaters, OAG recommends that RCC § 22E-1806 (c)(A) be amended to include a catchall provision as follows, "Is an employee of a school, museum, library, movie theater, or other venue."[6]

RCC § 22E-1807. TRAFFICKING AN OBSCENE IMAGE OF A MINOR[7]

RCC § 22E-1807 presents a similar issue as the decriminalization of distribution of obscene images to a minor explained above. Paragraph (c)(4)(B) excludes from liability an actor who is under 18 years of age and who "[a]cted with the effective consent of every person under 18 years of age who is, or who will be, depicted in the image, or reasonably believed that every person under 18 years of age who is, or who will be, depicted in the image gave effective consent." An example may be helpful to highlight the issue. Say 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 platform. The 17 year old would not be guilty of this offense if the 8 year old gave effective consent. 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."[8] In addition to the arguments that OAG made concerning the decriminalization of distribution of obscene images to a minor explained above, OAG does not believe that young children are capable of giving effective consent to the distribution of their sexual images. To resolve these issues OAG proposes that

[6] OAG suggests that this language also be incorporated into the other offenses in Report #42 that have the same affirmative defense.
[7] The same comment, analysis, and suggestion should be applied to paragraph (c)(4)(B) of RCC § 22E-1808, Possession of an Obscene Image of a Minor and paragraph (c)(2)(B) of RCC § 22E-1809, Arranging a Live Sexual Performance of a Minor."
[8] RCC § 22E-701 states that "'Effective consent' means consent other than consent induced by physical force, a coercive threat, or deception."

paragraph (c)(4)(B) add a sentence that says, "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."

RCC § 22E-1810. ATTENDING OR VIEWING A LIVE SEXUAL PERFORMANCE OF A MINOR

The Commentary states, "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 sexual activity or the effect on the viewer." [emphasis added]. It is not clear, however, what is meant by the terms "unnatural" and "unusual" in this context. For example, 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? We recommend that the Commentary explain or give examples of what a "natural", "unnatural", "usual", and "unusual" focus on the relevant minor's body parts would be.

RCC § 22E-4206. INDECENT EXPOSURE

Both First and Second Degree Indecent Exposure requires that the exposure be made "without the complainant's effective consent." See RCC § 22E-1810 (a)(2)(B) and (b)(3)(B). However, there is no exception for when the complainant is a young child. Similar to what OAG noted regarding RCC § 22E-1807, Trafficking an Obscene Image of a Minor, OAG does not believe that young children are capable of giving effective consent to indecent exposure. This position is consistent with the Court's finding in *Parnigoni v. District of Columbia*, 933 A.2d 823 (DC 2007). In that case the defendant was convicted of exposing himself to an eleven-year-old and the child's father. The facts of the case are as follows:

> On the day of the events at issue here, the then--thirty-three-year-old Parnigoni spent the day with the then eleven-year-old O.J. That afternoon, the two were alone in O.J.'s home when Parnigoni suggested that they play a game of ping-pong. O.J. agreed, and they went into the basement where there was a ping-pong table. Parnigoni suggested an additional rule for this particular game of ping-pong: that whoever lost a game would have to play the next game naked. O.J. agreed to play according to that rule and proceeded to beat Parnigoni at the first game they played. Parnigoni then took off all of his clothes and began to play the next match naked. O.J. testified that he was able to see Parnigoni's "whole body except for his legs down," including his "private parts." *Parnigoni,* at 825.

Though the defendant argued that the eleven-year-old had consented to the indecent exposure, the Court held that, under the indecent exposure statute in affect at the time, a child under the age of 16 was incapable of giving consent. OAG suggests that language similar to what it proposed to amend RCC § 22E-1807, Trafficking an Obscene Image of a Minor, also be included for this offense. That language is "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."

One of the elements of Second Degree Indecent Exposure is that the actor is "Reckless as to the fact that the conduct… Alarms or sexually abuses, humiliates, harasses, or degrades any person."[9] The current indecent exposure statute does not require this element and the Commentary does not explain why it should be added.[10] The following example may be helpful. As a crossing guard is approaching the intersection where she assists children in safely crossing the street, she sees a man sitting on a METRO bus bench masturbating. Though the crossing guard does not feel alarmed, sexually abused, humiliated, harassed or degraded, she is concerned that the children coming home from school will soon be walking by and will see the man. As written, the man would not be committing a crime until the children see him. There is no reason to add this limitation. OAG recommends amending this offense to remove this requirement.

RCC § 22E-1809. ARRANGING A LIVE SEXUAL PERFORMANCE OF A MINOR

An element of both degrees of this offense is that the actor knowingly "Creates, produces, or directs a live performance.[11] An affirmative defense, under subparagraph (d)(3), applies when the actor:

(A) Is an employee of a school, museum, library, or movie theater;
(B) Is acting within the reasonable scope of that role;
(C) Has no control over the creation or selection of the live performance; and
(D) Does not record, photograph, or film the live performance.

Because a person who "creates, produces, or directs" a live performance must have some level of "control" over its creation, OAG believes that either the employee will never be able to meet the requirements of (d)(3)(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 offense. 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.[12]

---

[9] See RCC § 22E-4206 (b)(3).
[10] D.C. Code § 22–1312, Lewd, indecent, or obscene acts; sexual proposal to a minor, states in relevant part, "It is unlawful for a person, in public, to make an obscene or indecent exposure of his or her genitalia or anus, to engage in masturbation, or to engage in a sexual act as defined in § 22-3001(8)."
[11] See RCC § 22E-1809 (a)(1)(A) and (b)(1)(A).
[12] The affirmative defenses pertaining to possession or transfer of obscene images can be found in RCC §§ 1805 (c), 1806 (c), 1807(d)(2), and 1808 (d)(2).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 23, 2020

SUBJECT: First Draft of Report #43, Blackmail

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #43, Blackmail.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 22E- XXXX. BLACKMAIL

RCC § 22E-XXXX (a) states the elements for offense of blackmail. It says:

A person commits blackmail when that person:
(1) Purposely causes another person to do or refrain from doing any act,
(2) By threatening that any person will:
(A) Engage in conduct that, in fact, constitutes:
(i) An offense against persons as defined in subtitle II of Title 22E; or
(ii) A property offense as defined in subtitle III of Title 22E;
(B) Take or withhold action as an official, or cause an official to take or withhold action;
(C) Accuse another person of a crime;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(D) Expose 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:
   (i) Hatred, contempt, ridicule, or other significant injury to personal reputation; or
   (ii) Significant injury to credit or business reputation;
(E) Impair the reputation of a deceased person;
(F) Notify a federal, state, or local government agency or official of, or publicize, another person's immigration or citizenship status;
(G) Restrict a person's access to a controlled substance that the person owns, or restrict a person's access to prescription medication that the person owns.

OAG is concerned that this language appears overly broad. We suggest narrowing it to limit any risk of legal challenge. Much of the conduct this language would forbid – for example, saying, as someone who opposes a business's editorial practices, that I will publicize those practices in newspaper editorials until those practices change, or saying that I will run ads against an elected official so long as he or she continues holding a stance I oppose – is protected by the First Amendment. See *NAACP V. Claiborne Hardware Co*., 458 U.S. 886 (1982); *Organization for a Better Austin v. O'Keefe,* 402 U.S. 415 (1971). It thus risks legal challenge. See, e.g., *Gerhart v. State,* 360 P.3d 1194 (Okla. Crim. App. 2015) (successful as-applied challenge to a state law that reached "caustic," yet protected, political speech). The equivalent federal law avoids such challenges because it applies only when a person acts with "intent to extort," a requirement federal courts have read to limit the statute to wrongful (i.e., malicious) threats.[2] See *United States v. Coss*, 677 F.3d 278, 284 (6th Cir. 2012) (federal law applies only to wrongful threats); *State v. Weinstein*, 898 P.2d 513 (Ariz. Ct. App. 1995) (successful overbreadth challenge to a law that lacked a wrongfulness requirement). The proposed Code language moves in this direction, with exclusions and defenses that shield certain threats[3], but those limited exclusions and defenses fall short of protecting the wide range of constitutionally protected threats. To ensure First Amendment speech is fully protected, we recommend incorporating into this offense a wrongfulness requirement similar to that in federal law. We, therefore, recommend stating that, to commit the offense, the actor must act "with the purpose to extort" (borrowing the federal language noted in footnote 3 and adapting it to the Revised Code's mens rea categories).

[2] 18 USCS § 875(d) provides "Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both." [emphasis added]
[3] See RCC § 22E-XXXX(b) and (c).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: December 18, 2019

SUBJECT: First Draft of Report #44, Trademark Counterfeiting

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #44, Trademark Counterfeiting.[1]

COMMENTS ON THE DRAFT REPORT

Both first and second degree trademark counterfeiting include as an element that the person "[k]nowingly manufactures for commercial sale, possesses with intent to sell, or offers to sell, property bearing or identified by a counterfeit mark." [emphasis added] See RCC § 22E-2210 (a)(1) and (b)(1). It is unclear why the proposal includes the word "commercial." The term is not defined, and its inclusion may cause unnecessary litigation. While a primary definition of commercial is "of or relating to commerce", a secondary definition is "viewed with regard to profit."[2] There should be no question that the government does not have to prove that the manufacturer of counterfeit products turned a profit on its production or sale. OAG believes that this offense should clearly state that it applies to anyone who "knowingly manufactures for sale…" such property. In addition, it should be clear that the term "sale" in this context includes the transfer of the property to a third party for anything of value – and not merely for money. This would also help clarify the portion of the Commentary that states, "By contrast, the revised

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.
[2] See https://www.merriam-webster.com/dictionary/commercial.

statute clarifies that merely using a counterfeit mark, without intent to sell property bearing or identified by a counterfeit mark, is not criminalized."   Finally, to make this clear and for consistency throughout the RCC, OAG proposes that the term "sale" be defined in § 22E-701 to include transfers to third parties for anything of value.[3]

Paragraph (c) contains the exclusion from liability. It states, "Nothing in this section shall be construed to prohibit uses of trademarks that are legal under civil law." The term "civil law" is not defined in either the text of the offense or in the Commentary. It is unclear if what is meant is that "civil law" means anything that is not "criminal law" or if it carries a narrower meaning (e.g. that this provision is meant to exempt only what is legal under trademark law. To clarify this provision, OAG suggests that it be redrafted to say, "Nothing in this section shall be construed to prohibit the legal uses of trademarks."

In the Commentary it states, "Use of wrappers, bottles, or packaging may be covered by the revised statute only if they constitute a "counterfeit mark." To avoid confusion, OAG suggests that the Commentary clarify that while wrappers, bottles and packaging may constitute a counterfeit mark, for purposes of determining whether "the property, in fact, has a total retail value of $5,000 or more" that the value of the property that is contained in the wrapper, bottle, or package is included in the valuation – and not merely the value of the container that bears the counterfeit mark.[4]

---

[3]RCC § 22E-701 does not currently define the term "sale."

[4] One way to commit first degree Trademark Counterfeiting, pursuant to RCC § 22E-2210 (a)(2), is for the property to, in fact, have a total retail value of $5,000 or more.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 23, 2020

SUBJECT: First Draft of Report #46, Possession of an Open Container of Alcohol

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report #46, Possession of an Open Container of Alcohol.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 25-1001. POSSESSION OF AN OPEN CONTAINER OR CONSUMPTION OF ALCOHOL IN A MOTOR VEHICLE

RCC § 25-1001 (a) (2) makes it illegal to possess or consume an alcoholic beverage: "In the passenger area of a motor vehicle on a public highway, or the right-of-way of a public highway." The term "public highway is defined in RCC §22E-701 by referencing 23 U.S.C .§ 101(a).

Subparagraph (11) of the federal law states:

> The term "highway" includes—
> **(A)** a road, street, and parkway;

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

> **(B)** a right-of-way, bridge, railroad-highway crossing, tunnel, drainage structure including public roads on dams, sign, guardrail, and protective structure, in connection with a highway; and
>
> **(C)** a portion of any interstate or international bridge or tunnel and the approaches thereto, the cost of which is assumed by a State transportation department, including such facilities as may be required by the United States Customs and Immigration Services in connection with the operation of an international bridge or tunnel.

There is no reason, however, to incorporate federal law into a provision dealing with alcohol in a motor vehicle when District law already has defined "highway" in our driving while impaired statutes. Having two definitions of "highway" when dealing with a person operating a motor vehicle with an open container or while consuming alcohol, is unnecessary and adversely affects the clarity of District law. D.C. Code § 50-1901 (6) states:

> "Highway" means any street, road, or public thoroughfare, or the entire width between the boundary lines of every publicly or privately maintained way, when any part thereof is open to the use of the public for purposes of vehicular or pedestrian travel.

The following example highlights this issue. A person is drinking alcohol in her car in a McDonalds parking lot. Drinking vodka in a car in a McDonald's parking lot is just as dangerous as drinking on a street. It is unclear from the text of 23 U.S.C .§ 101(a) whether the parking lot is a highway.[2] However, under District law it is clear that such behavior is prohibited as the parking lot is a privately maintained way that is open to the use by the public for purposes of vehicular or pedestrian travel. Therefore, OAG recommends that the definition of "highway" in RCC §22E-701 be amended to reference D.C. Code § 50-1901(6).

RCC § 25-1001 (b) contains exclusions from liability. It states:

> (1) A person shall not be subject to prosecution under this section for conduct in a vehicle that operates on rails.
> (2) A person shall not be subject to prosecution under this section if that person is:
>   (A) Located in:
>   (i) The passenger area of a motor vehicle designed, maintained, or used primarily for the transportation of persons for compensation; or
>   (ii) The living quarters of a house coach or house trailer; and
>   (B) Not operating the motor vehicle.

[2] It is unclear because, though the federal statute does not specifically mention a privately maintained way that is open to vehicular traffic, it utilizes the word "includes."

RCC § 25-1001 (b)(1) categorically excludes from prosecution anyone who is in a vehicle that operates on rails. While OAG does not oppose that exclusion when it comes to passengers, we do not believe that it should reach people who operate or are in physical control of trains, including METRO trains. Person's 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.

RCC § 25-1001 (b)(1)(B) excludes from prosecution someone who is not operating a motor vehicle. While it is certainly a safety matter that a person who is operating a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage, it is equally a safety matter that a person who is in physical control of a motor vehicle not consume an alcoholic beverage or be in possession of an open container of an alcoholic beverage. That's why D.C. Code § 50-2206.11, the DUI statute provides:

> No person shall <u>operate</u> or <u>be in physical control</u> of any vehicle in the District:
> (1) While the person is intoxicated; or
> (2) While the person is under the influence of alcohol or any drug or any combination thereof. [emphasis added]

In light of the DUI statute and the safety issues involved with alcohol use in cars, OAG recommends that the exclusion found in (a)(2) (B) be amended to state "Not operating or being in physical control of the motor vehicle."

While OAG does not oppose the Commission's proposals to decriminalize open container of alcohol outside of a vehicle and public intoxication due to alcohol, we would note that this runs counter to the Council's apparent desire to treat marijuana use the same as alcohol. Therefore, should 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.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General for the District of Columbia

Public Safety Division

MEMORANDUM

TO: Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

FROM: Dave Rosenthal
Senior Assistant Attorney General

DATE: January 23, 2020

SUBJECT: First Draft of Report #49 - Parental Kidnapping and Related Statutes

The Office of the Attorney General for the District of Columbia (OAG) and the other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the First Draft of Report 49, Parental Kidnapping and Related Statutes.[1]

COMMENTS ON THE DRAFT REPORT

RCC § 16-1022. PARENTAL KIDNAPPING CRIMINAL OFFENSE

RCC § 16-1022 (d) describes fourth degree parental kidnapping. This offense is incorporated in all of the higher degrees. Paragraph (d) states:

> A person commits the offense of fourth degree parental kidnapping when that person:
> (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;
> (2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
> (3) The complainant is, in fact, under the age of 16; and

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

The use of the word "complainant" in subparagraph (d)(3) may be ambiguous. Because the offense requires the taking, concealment, or detention of a child by another lawful custodian, one would assume that the complainant is the custodian who is being denied access to their child. However, because the offense is limited to situations where "[t]he complainant is, in fact, under the age of 16", OAG interprets this phrase to refer to the child. The Commentary does not address who the term "complainant" was meant to refer to. For clarity, OAG suggests that this phrase be redrafted to make clear that it refers to the child. One way that this can be done is to amend subparagraph (d)(3) to say, "The person taken, concealed, or detained is, in fact, under the age of 16.[2]

Paragraph (h) designates OAG as the prosecutorial authority. This proposal retains the jurisdiction granted by the Council in 1986. See D.C. Code 16-1025. However, that designation predates the case of *In re Crawley, 978 A.2d 608 (D.C. 2009).* As the Court of Appeals explained, D.C. Code § 23-101 "bifurcates the prosecuting authority for crimes committed in the District." *In re Crawley*, at 609 (internal quotation marks and alteration omitted). OAG may prosecute "violations of all police or municipal ordinances or regulations," "violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year," and certain other offenses not relevant here. D.C. Code § 23-101(a)-(b). "All other criminal prosecutions shall be conducted" by and in the name of the USAO. *Id.* § 23-101(c). Thus, unless the offense of parental kidnapping fits into either of Section 23-101(a)'s prongs, it is an offense properly prosecuted by the USAO.

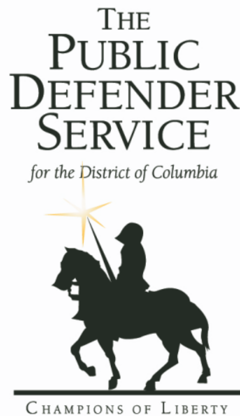
For subsequent cases where the Court of Appeals recognized OAG's authority to prosecute cases, see *In re Hall*, 31 A.3d 453, 456 (D.C. 2011) and *In re Prosecution of Nicco Settles*, 218 A.3d 235 (D.C. 2019). None of the distinctions made in those cases for why the Council had authority to designate OAG as the prosecutorial agency apply to parental kidnapping. Because parental kidnapping does not fall into one of the exceptions noted in *Crawely*, or any other exception subsequently recognized by the Court of Appeals, the Council is without authority to designate OAG as agency to prosecute this offense.

The penalties provision authorizes the reimbursement of expenses to the District and to the parent whose rights were violated. Subparagraph (i)(5) states "Any expenses incurred by the District in returning the child shall be reimbursed to the District by any person convicted of a violation of this section. Those expenses and costs reasonably incurred by the lawful custodian

[2] If this suggestion is adopted, the Commission may want to consider substituting the word "actor" for the word "person" in each instance where the use of that term refers to the person who is concealing the child.

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." As both the District and the lawful custodian of the child victim are entitled to reimbursement of expenses, it is unclear why the two sentences in the restitution provision are not drafted in parallel. In both cases the requesting party has to request reimbursement and the court has to order that reimbursement. In addition, as to the lawful custodian, it is unclear what the difference is between an "expense" and a "cost." The Commentary does not address these issues. For the foregoing reasons, and for clarity, OAG suggests that paragraph (i)(5) be redrafted to say "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."

MEMORANDUM



To:	Richard Schmechel, Executive Director D.C. Criminal Code Reform Commission
From:	Public Defender Service for the District of Columbia
Date:	January 24, 2020
Re:	Comments on First Draft of Report Nos. 42, 43, 44, 45, 46, 47, 48, and 49

The Public Defender Service makes the following comments on reports 42, 43, 44, 45, 46, 47, 48, and 49.

1) RCC § 22E-1802, electronic stalking, prohibits engaging in a particular course of conduct directed at a complaint with either the "intent to cause the complainant to fear for the complainant's safety or the safety of another person; or <u>negligently causing</u> the complainant to fear for the complainant's safety or the safety of another person; or suffer significant emotional distress." (emphasis added) 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. An actor who unintentionally caused distress should not be held responsible to the same degree as an actor who had the intent to harm.

   To appropriately differentiate between harm that is intentionally caused and harm that is negligently caused, PDS recommends creating two degrees of electronic stalking,

2) RCC § 22E-1802, RCC § 22E-1803, and RCC § 22E-1807 include the term "derivative image." While there are examples of derivative images given in the commentary and footnotes, PDS recommends incorporating a definition of derivative image into the statute. Whether an individual's conduct is criminalized will depend in some instances on whether an image or recording is "derivative." Since the term is central to culpability, in order to provide notice to individuals and clarity in the application of the law, the CCRC should define the term.

3) RCC § 22E-1804, unauthorized disclosure of sexual recordings, provides that it is an affirmative defense to a prosecution under this section that the defendant: "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation

of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS understands that the purpose of this defense is to exclude from liability individuals who, in good faith, disclose the image in order to prevent its further dissemination or to seek legal counsel on its legality. In order to properly limit liability consistent with this purpose, the defense should be applicable where an individual discloses the image to someone who he or she believes has a responsibility under District civil law for the person depicted in the image even if it turns out that no such legal responsibility exists. For instance, if an individual discloses an image to a child's grandparent as a result of a mistaken belief that the grandparent has assumed full custody of the child, the individual should not be barred from asserting this defense if it turns out that the grandparent's role is limited to driving the child to school.

PDS also recommends expanding the individuals to whom someone can disclose to include teachers and counselors since they may be a more direct point of contact for adults who interact with school systems.

PDS therefore recommends the following amendments:

> "(A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, teacher, or counselor, or a person who he or she reasonably believed had ~~with~~ a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation of the image; (B) with intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney."

PDS recommends that the language above also be amended in RCC § 22E-1807 and RCC § 22E-1808.

4) PDS recommends modifying RCC § 22E-1807, trafficking an obscene image of a minor. RCC § 22E-1807 provides five ways for an individual to commit the offense of trafficking an obscene image of a minor. The first way is when an individual knowingly "(A) creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image." This first category of action is dissimilar and typically less severe than the other actions encompassed by this offense which include giving consent for recording or photographing a minor over whom the individual has a responsibility under District civil law, displaying, distributing, or manufacturing with intent to distribute an image, making an image accessible to another user on an electronic platform, or selling or advertising the image. In each of these other instances, the minor complainant's privacy is further violated by the transfer of the image to others, the intent to transfer, or a violation of trust that may lead to the exposure of the image to the adult with a responsibility over the complainant as well as to the individual creating the image. In light of these differences, PDS recommends separating the conduct defined in (A) into a lesser included offense. The excised conduct would include creating an image or recording or directing another to create an image in instances where the defendant

directs the complainant to create the image and no other individuals are involved in the creation of the image.

PDS also recommends expanding the affirmative defenses for RCC § 22E-1807. 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. The 25 year old would be criminally liable for trafficking in an obscene image of a minor 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. The 17 year old would have reached the age of consent, so there would be nothing illegal about the 25 year old having sex with the 17 year old. Instead, the criminal action would be the creation, with the 17 year old's consent, of for example, "a sexualized display of the breast below the top of the areola."

Since the current code[1] and the RCC[2] 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. 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.[3]

PDS also recommends expanding the affirmative defense in (d)(4). The affirmative defense currently includes a narrow list of civic institutions and commercial establishments that may come in contact with artistic images. PDS recommends the following addition:

> It is an affirmative defense to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E) of this section that the actor:
> (A) Is an employee of a school, museum, library, ~~or~~ movie theater, or other cultural institution;
> (B) Is acting within the reasonable scope of that role; and
> (C) Has no control over the creation or selection of the image.

5) PDS recommends that the CCRC make the two changes above to the affirmative defenses in RCC § 22E-1808, possession of an obscene image of a minor. Since RCC § 22E-1808 prohibits the mere possession of an obscene sexual image, without PDS's proposed changes, a 25 year old would be criminally liable for possessing a sexually explicit image of his17 year old girlfriend that she created in the context of their legal, consensual relationship. Criminal liability in this

[1] D.C. Code § 22-3001 defines child, for the purposes of the sexual abuse chapter, as an individual who has not yet reached the age of 16.

[2] See RCC § 22E-1301(e) sexual assault.

[3] PDS's proposed modification would be consistent with RCC § 22E-1302, third degree sexual abuse, which prohibits otherwise consensual sexual contact between a minor under the age of 18 and an adult who is in a position of trust or authority over the minor.

instance makes little sense and does nothing to protect the minor who has been deemed sufficiently mature to consent to the relationship.

6) RCC § 22E-1811 provides that a person under the age of 12 is not subject to prosecution for offenses in that subchapter. PDS recommends raising this exemption to age 14. By 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.[4]

7) PDS recommends that the age of prosecution for RCC § 22E-4206, indecent exposure, be raised to age 14. For the reasons listed above, children 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.

8) PDS recommends decriminalizing the crime of incest as proposed in RCC § 22E-1312. Consensual 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 RCC § 22E-1302, third degree sexual abuse of a minor. Incest criminalizes consensual sexual contact between adults. This sexual conduct may be viewed as socially or morally repugnant, but there is no clear justification for criminalizing consensual conduct between adults. For example, the crime of incest would criminalize a consensual sexual relationship between a similarly aged niece and an uncle by marriage. In such an instance, both actors would be subject to prosecution. While 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.

   As a result of large families, the passage of years between the birth of sibling, marriages between people with wide age differences, and varied decisions about when to have children, 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, an adopted teenage sibling may never share the same house as his or her brother or sister who left home at age 18. Rather than allowing prosecutions in myriad situations that should be outside the scope of the court system, the RCC should decriminalize this conduct.

   If the CCRC does not decriminalize incest, PDS urges the CCRC to drop the terms "legitimately or illegitimately" from the statute. The current statute prohibits knowingly engaging in a sexual act with a person who is "related, either legitimately or illegitimately." The state of being related to someone legitimately or illegitimately is not defined in the RCC. The terms are most closely associated with prejudice and racism that is deeply embedded in the American legal system as

---

[4] Samantha Schmidt, "*Middle Schools Enter a new era in sex ed — Teaching 13-year-olds About Consent*," Washington Post, January 14, 2020. Available at:

https://www.washingtonpost.com/local/social-issues/middle-schools-enter-a-new-era-in-sex-ed--teaching-13-year-olds-about-consent/2020/01/14/27c17c80-35ad-11ea-bf30-ad313e4ec754_story.html

seen in the prohibition of interracial marriage, gay marriage, and the adoption of children by gay or single parents. The terms also have been used to define and demean children who were born to parents who were not married, or to mothers who did not include an acknowledgement of paternity on a birth certificate. If the CCRC continues to criminalize incest, it should define the prohibited relationships without the use of racist and pejorative terms.

In addition, PDS recommends using the terms "sibling," "half-sibling," and "step-sibling," rather than the binary gendered terms of "brother" and "sister." Similarly, in place of "aunt, uncle, nephew or niece," PDS recommends CCRC use "a parent's sibling or sibling's child."

9) With respect to RCC § 16-1022, parental kidnapping, PDS recommends clarifying the element "knowingly takes, conceals, or detains the child outside of the District" which appears in first, second, and third degree parental kidnapping. Taking the child out of the District should only increase the severity of the offense when the purpose of taking the child out of the District is to further the kidnapping by keeping the child hidden from view or evading detection in the District. As drafted, knowingly taking a child to Maryland for a trip to the grocery store and then returning to the District would increase the severity of the offense in the same manner as renting an apartment in Maryland in order to avoid authorities who are likely to check a District address. To address the harmful conduct rather than incidental contact with neighboring jurisdictions, PDS recommends the following language:

(a) *First Degree*. A person commits the offense of first degree parental kidnapping when that person:
  (1) Commits fourth degree parental kidnapping; and
  (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
  (3) The child is, in fact, outside the custody of the lawful custodian for more than 30 days.

(b) *Second Degree*. A person commits the offense of second degree parental kidnapping when that person:
  (1) Commits fourth degree parental kidnapping; and
  (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>; and
  (3) Fails to release the child without injury in a safe place prior to arrest.

(c) *Third Degree*. A person commits the offense of third degree parental kidnapping when that person:
  (1) Commits fourth degree parental kidnapping;
  (2) Knowingly takes, conceals, or detains the child outside of the District <u>with the purpose of avoiding detection</u>;

(d) *Fourth Degree*. A person commits the offense of fourth degree parental kidnapping when that person:
  (1) Knowingly takes, conceals, or detains a person who has another lawful custodian;

(2) With intent to prevent a lawful custodian from exercising rights to custody of the person;
(3) The complainant is, in fact, under the age of 16; and
(4) The actor is, in fact, a relative of the complainant, or a person acting pursuant to the direction of a relative of the complainant.

Memorandum

Jessie K. Liu
United States Attorney
District of Columbia

Subject: Comments to D.C. Criminal Code Reform Commission for First Draft of Reports #42–49	Date: January 24, 2020

To: Richard Schmechel, Executive Director, D.C. Criminal Code Reform Commission	From: U.S. Attorney's Office for the District of Columbia

The U.S. Attorney's Office for the District of Columbia (USAO) and other members of the Code Revision Advisory Group of the D.C. Criminal Code Reform Commission (CCRC) were asked to review the CCRC's First Draft of Reports #42–49. USAO reviewed these documents and makes the recommendations noted below.[1]

Comments on Draft Report #42—Obscenity, Privacy, and Related Offenses

A. RCC § 22E-701. Generally Applicable Definitions.

1. USAO recommends that the definition of "image" be modified to include other possible formats.

   With USAO's changes, the definition of "image" would provide:

   " 'Image' means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram, whether in print, electronic, magnetic, ~~or~~ digital, or other format."

   This would allow for the possibility of future technology to fall under this definition as well.

2. USAO recommends that the definitions of "live performance" and "live broadcast" clarify the definition of "audience."

USAO recommends that, within the definitions of "live performance" and "live broadcast," the RCC clarify that an "audience" can consist of one or more people, and that the defendant alone can qualify as an "audience." This is particularly relevant as applied to RCC § 22E-1809 and RCC § 22E-1810, to clarify that an audience of one person qualifies as an

[1] This review was conducted under the understanding that the structure of the code revision process allows the members of the Code Revision Advisory Group an opportunity to provide meaningful input without limiting the position that the members may take at any subsequent hearing that the Council may have on any legislation that may result from the Report.

"audience," and to eliminate any potential confusion as to whether there must be multiple people present to constitute an "audience."

3. USAO recommends that the definition of "obscene" be modified to remove the words "in sex."

   With USAO's changes, subsection (A) of the definition of "obscene" would provide:

   "(A) Appealing to a prurient interest ~~in sex~~ . . ."

"Prurient interest" is defined in the Commentary (at 5 n.33) as "a morbid, degrading, or unhealthy interest in sex." Thus, it is redundant to state "a prurient interest in sex." This is not a substantive change.

4. Consistent with USAO's previous comments, USAO recommends that the definitions of "sexual act" and "sexual contact" be modified to remove the additional requirement that the intent be "sexual" in nature.

   With USAO's changes, subsection (C) of the definition of "sexual act" would provide:

   "(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire;"

   With USAO's changes, subsection (B)(ii) of the definition of "sexual contact" would provide:

   "(ii) With the desire to ~~sexually~~ abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire."

In its July 8, 2019 comments on Report #36 (at 13), USAO provided an example of a case in which a defendant grabbed the buttocks of a stranger, causing the victim to feel sexually violated. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure, however, the government may not be able to prove that the defendant's actions were sexually motivated. The government would be able to prove at a minimum, however, that the defendant intended to humiliate or harass the victim. The Commentary (at 10 n.80) states that hitting someone on their buttocks while commenting on their sexual attractiveness would constitute a sexual assault. But if the defendant made no such statement to the complainant about the complainant's sexual attractiveness, then the fact that a defendant hit a complainant on their buttocks may not as easily satisfy the sexual motivation requirement.

Moreover, the Commentary (at 10 n.80) states that "there can be virtually no penetration or oral contact that satisfied the definition of 'sexual act' that is not sexual in nature." That is not necessarily the case, however, where there is penetration with an object. For example, if, at a fraternity hazing, a defendant anally penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse,

humiliate, harass, or degrade the complainant. This would and should constitute a sexual offense. Likewise, when committing a sexual offense, including a rape, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused.

B. RCC § 22E-1802. Electronic Stalking.[2]

1. USAO recommends, to eliminate confusion, defining "course of conduct" as "2 or more occasions."

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely[3]~~, on 2 or more separate occasions,~~ engages in a course of conduct directed at a complainant that consists of:"

   A new subsection (f)(3) would provide:

   "(3) In this section, the term 'course of conduct' means actions taken on 2 or more occasions."

As subsection (a)(1) is currently drafted, it could be interpreted that a defendant must engage in a course of conduct on 2 or more occasions—that is, that the full course of conduct must take place on 2 or more occasions. Rather, the opposite is true—that is, a course of conduct *consists of* actions on 2 or more occasions. Under current law, a "course of conduct" is defined in relevant part to include actions taken "on 2 or more occasions." D.C. Code § 22-3132(8). USAO recommends this change to eliminate potential confusion on this point.

2. USAO requests that the RCC clarify the exclusion in subsection (b)(2)(A).

Subsection (b)(2)(A) provides that a person is not subject to prosecution under subsection (a)(1)(A) if that person is "a party to the communication." It is unclear what this exclusion would cover. For example, 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.

3. USAO recommends that the Commentary be rephrased for clarification.

   With USAO's changes, the Commentary on page 19 would provide:

   "Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to ~~cause~~ engage in a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must

[2] USAO recommends consistent changes to Stalking, RCC § 22E-1206, as appropriate.

[3] In its July 8, 2019 comments on Report #36 (at 39), USAO recommended changing the culpability standard in this provision from "purposely" to "knowingly." USAO reiterates that comment here.

share a~~n uninterrupted~~ purpose and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public."

The requirements of this offense are more appropriately characterized as "engaging" in a pattern of misconduct than "causing" a pattern of misconduct. Moreover, there should not be a requirement that the purpose be "uninterrupted." Stalking behavior may be interrupted, as a defendant engaging in stalking will engage in activities other than stalking during the course of the stalking.

4. USAO reiterates several of its July 8, 2019 comments on Report #36 (at 40-41) that related to Stalking, RCC § 22E-1206.

Specifically, USAO reiterates its comment #5 regarding jury trials; comment #6 regarding violation of a court order prohibiting stalking, harassing, assaulting, or threatening the complainant; comment #7 regarding an enhancement for one "or more" previous convictions for stalking; and comment #8 regarding the defendant's reckless disregard for the complainant's age.

5. USAO recommends that the jurisdictional limitations of this offense be clarified.

The Commentary discusses the jurisdictional limitations of this offense. (Commentary at 28-29.) Although, under the RCC's proposal, there would not be jurisdiction based *solely* on the victim's residence in the District, the RCC should clarify 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.

C. RCC § 22E-1803. Voyeurism.

1. USAO recommends, in subsections (a)(1)(A) and (b)(1)(A) removing the word "developed" from the words "developed female breast," requiring only a "female breast."

The RCC acknowledges that this is a change from current law, *see* D.C. Code § 22-3531(a)(1), which includes the words "female breast." Adding the word "developed" limits this definition too far. If a girl is going through puberty, and is in the process of developing, she may not have "developed." 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." Therefore, USAO believes that, consistent with current law, it is appropriate to require only a "female breast," not a "developed female breast."

2. USAO opposes removal of observing someone using a restroom or bathroom as a basis for voyeurism liability.

Under current law, a person is liable for voyeurism if they observe or record another person "using a bathroom or rest room." D.C. Code § 22-3531(b)(1), (c)(1)(A). The Commentary provides that capturing an image of a person urinating or defecating that does not show that

person's private areas could constitute attempted voyeurism. (Commentary at 43 n. 266.) But liability for only attempted voyeurism understates the privacy interests that individuals hold in using the bathroom, as it is a very intimate and private experience. In eliminating this as a basis for liability, the RCC Commentary is concerned that it may inadvertently criminalize, for example, a bathroom selfie showing a stranger in the background applying makeup. (Commentary at 42 n.265.) To alleviate these concerns, and to protect the privacy interests of individuals using a toilet or urinal, USAO proposes that liability attach for voyeurism if a defendant either observes or creates an image or audio recording of a person "using a toilet or a urinal."

3. USAO recommends that liability attach for a defendant observing or creating an image of another person engaging in or submitting to a sexual contact.

   With USAO's changes, subsections (a)(1)(B) and (b)(1)(B) would provide:

   " . . . the complainant engaging in or submitting to a sexual act, sexual contact, or masturbation."

Under current law, a person is liable for voyeurism if they observe or record another person "engaged in sexual activity." D.C. Code § 22-3531(b)(3), (c)(1)(C). The Commentary is concerned that the term "sexual activity" could be too broadly construed. (Commentary at 43.) The RCC therefore only includes "sexual act or masturbation" as a basis for liability in subsections (a)(1)(B) and (b)(1)(B). USAO proposes that liability also attach where the defendant observes or creates an image of the complainant engaging in or submitting to a sexual contact. A sexual contact can be a private and intimate experience, even where the parties remain clothed. For example, if a person is touching another person's genitalia underneath the clothing, even though they may be clothed, that is a private experience in which they have an expectation of privacy. It would create a strange dichotomy if voyeurism liability attached for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attached for a defendant creating an image of someone else touching that person's genitalia (sexual contact). A defendant should be liable for voyeurism for observing or creating an image of that intimacy.

4. USAO recommends that the *mens rea* required under subsection (c)(3) be modified from requiring that the actor "knew" the complainant was under 18 years of age to requiring that the actor "recklessly disregarded" that the complainant was under 18 years of age.

Throughout the RCC, this enhancement applies when the actor recklessly disregarded that the complainant was under 18 years of age. It is unclear why the enhancement for voyeurism would require knowledge. USAO recommends that this *mens rea* be modified to be consistent with the same enhancement throughout the RCC.

5. USAO recommends that the RCC clarify that "upskirting" is expressly criminalized under the voyeurism statute.

The Commentary is unclear as to whether "upskirting" would be criminalized under the voyeurism statute. The Commentary notes that, "[f]or example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed." (Commentary at 36 n.223.) The Commentary then goes on to say that "the revised statute criminalizes all upskirting behavior that violated a reasonable expectation of privacy, even if the accused does not produce a recorded image." (Commentary at 37-38.) USAO recommends that the RCC clarify these provisions, and expressly codify upskirting as a basis for voyeurism liability.

The Commentary also seems to suggest that the onus is on a complainant to ensure that they are properly covered at all times to ensure they are not "upskirted," stating that "[t]he more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose." (Commentary at 36 n.223.) But this ignores the frequent reality of upskirting, and the often stealthy nature of upskirting actions. Upskirting can take place when a woman is sitting on the steps of the Lincoln Memorial, but if she does not see a nearby camera, she would not expect to be photographed. Rather, a zoom lens could be used to stealthily photograph up her skirt from far away. Likewise, if a woman is sitting in a seat on the metro with her legs slightly ajar (a frequent posture), she should not have to be conscientious about ensuring that someone is not using a cell phone camera across from her to take photos up her skirt. Finally, if a woman is on an escalator, she should not have to be conscientious of a person standing just below her with a stealthy cell phone camera to take photos up her skirt. USAO recommends that the RCC expressly clarify that "upskirting" activity (where the complainant has not provided effective consent) constitutes voyeurism.

Finally, the Commentary states that "[c]hasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202." (Commentary at 38 n.236.) However, because the RCC definition of "assault" requires bodily injury to the complainant, it is unclear how this could constitute an assault.

D. <u>RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.</u>

1. <u>USAO recommends changing the name of this offense from "Unauthorized Disclosure of Sexual Recordings" to "Unauthorized Disclosure of a Sexual Recording."</u>

USAO recommends that the title of this offense be modified to clarify that an actor must only disclose one sexual recording to be liable for this offense, and that there is no requirement that an actor disclose multiple sexual recordings to be liable for this offense. This is not a substantive change, and aligns the title of the offense with the elements.

2. <u>USAO recommends, in subsection (a)(1), adding the words "or causes to be distributed or displayed to a person other than the complainant" and "causes to be made accessible."</u>

With USAO's changes, subsection (a)(1) would provide:

"(1) Knowingly distributes or displays, or causes to be distributed or displayed, to a person other than the complainant, or makes accessible, or causes to be made accessible, on an electronic platform to a user other than the complainant or actor:"

The RCC proposed eliminating language currently codified in D.C. Code § 22-3531(f)(2) that provides liability for distributing images "directly or indirectly, by any means," on the ground that the language is surplusage. (Commentary at 56 & n.334.) USAO does not believe that this language is necessarily surplusage, but believes that it can be rephrased to clarify its applicability. If a defendant asks another person to distribute a sexual recording—that is, distributes an image indirectly—the statute should clarify that the defendant should be liable for this offense on the basis that the defendant caused the recording to be distributed.

3. USAO recommends, in subsection (a)(1)(A)(ii), removing the word "developed" from the words "developed female breast," requiring only a "female breast."

USAO relies on the same rationale as set forth above for the Voyeurism statute. USAO also recommends that this statute contain a footnote similar to footnote 216 in the Voyeurism statute (Commentary at 35 n.216) clarifying that a "female breast" means the breast of both a cisgender and a transfeminine woman.

4. USAO recommends, in subsection (a)(1)(B), including a "sexual contact."

With USAO's changes, subsection (a)(1)(B) would provide:

"(B) An image or an audio recording of the complainant engaging in or submitting to a sexual act, a sexual contact, masturbation, or sadomasochistic abuse;"

As discussed above with respect to the Voyeurism statute, a sexual contact can be an intimate, private experience that a complainant has an interest in keeping private. This could be true even if nude genitalia are not visible. USAO recommends that, to protect this privacy interest, "sexual contact" be added to this subsection.

5. USAO recommends that, in subsection (a)(4)(A), the statute clarify that an agreement or understanding can be either explicit or implicit.

With USAO's changes, subsection (a)(4)(A) would provide:

"(A) After reaching an agreement or understanding, whether explicit or implicit, with the complainant that the image or audio recording will not be distributed or displayed, . . ."

This is alluded to in the Commentary (at 47 n.280), but USAO recommends that it be codified in the plain language of the statute to eliminate any potential confusion. Most agreements and understandings are implicit. 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.

6. USAO recommends that, in subsection (a)(4)(A)(i), the word "sexually" be removed.

With USAO's changes, subsection (a)(4)(A)(i) would provide:

"(i) Alarm or ~~sexually~~ abuse, humiliate, harass, or degrade the complainant;"

At the time that the defendant is distributing these photos, the defendant's intent is often not sexual. Rather, their intent is frequently to harass or humiliate the complainant, or to seek revenge. They often do not obtain sexual gratification from disclosure of the image. Although the underlying material is sexual, there should be no requirement that the defendant have a sexual intent when the defendant discloses the material.

7. USAO recommends that subsections (c)(1)(A) and (c)(2)(B) be joined by the word "and."

This is not a substantive change, and clarifies that a defendant must meet the elements in both subsections to claim this defense.

8. USAO recommends that the jurisdictional limitations of this offense be clarified.

USAO relies on the same rationale set forth above with respect to the offense of Electronic Stalking.

E. RCC § 22E-1807. Trafficking an Obscene Image of a Minor.

1. USAO recommends renaming this offense.

The title of this offense is "trafficking," but not all conduct that falls within the offense constitutes "trafficking." "Trafficking" implies some level of distribution. For example, for liability to attach under subsection (a)(1)(A), a person must create an image of a minor engaging in certain activity. There is no requirement under that subsection that the defendant distribute the image or "traffic" it in any way. Thus, to eliminate potential future confusion that all subsections of the offense may require "trafficking" of some sort, USAO recommends renaming this offense.

2. USAO recommends restructuring the gradations of this offense.

USAO recommends that there be gradations of this offense 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, then for possessing an image. This is consistent with the gradations for child pornography under federal law pursuant to 18 U.S.C. §§ 2251 and 2252. A defendant should be penalized more severely for creating an image than for distributing an image.

USAO does not oppose also creating gradations of this offense based on the type of sexual conduct depicted in the image (that is, images of the complainant engaging in or submitting to a sexual act versus sexual contact, etc.).

3. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1807 and § 22E-1808, and removing the affirmative defense in subsection (d)(1)

"Obscene" can be a vague standard, and is famously described as, "I know it when I see it." It is unclear whether certain images that would constitute child pornography would qualify as "obscene." USAO recommends that, instead of using the word "obscene," the RCC use the words "sexually explicit." Federal child pornography law uses the words "sexually explicit," rather than "obscene." *See* 18 U.S.C. § 2251. In addition to creating an analogue with federal law for criminalization of child pornography, this offense could draw on the case law regarding the definition of "sexually explicit" that would help guide interpretations of this statute.

Likewise, USAO recommends removing the affirmative defense in subsection (d)(1). That definition 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.

4. USAO recommends that the RCC codify a definition of "derivative image."

Although the words "derivative image" are used throughout these provisions, and are referenced in the Commentary to the definition of "image," USAO believes that it would be helpful to have a separate definition of "derivative image" to limit potential future confusion.

5. In subsections (a)(1)(C) and (b)(1)(C), USAO recommends changing the word "manufactures" to "produces."

It is unclear what the difference is between "manufacturing" and "producing," and both terms are used in this statute. Federal law, by contrast, uses the word "producing." 18 U.S.C. § 2251. This 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 this statute.

6. In subsections (a)(1)(E) and (b)(1)(E), USAO recommends changing "Sells or advertises an image" to "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."

This wording is consistent with federal child pornography law. *See* 18 U.S.C. § 2251(d)(1). As described above, it is useful to track federal statutory language in this respect.

7. USAO recommends that the affirmative defense in subsection (d)(3) contain a limit on the number of images that would qualify for this defense.

Under current law, there is a limit of 6 still photographs or 1 motion picture that allow a defendant to invoke this defense. D.C. Code § 22-3104(c). USAO suggests that there be some limit on the amount of images that a person may have to invoke this defense.

F. RCC § 22E-1808. Possession of an Obscene Image of a Minor.

1. USAO recommends changes consistent with the changes suggested for RCC § 22E-1807, Trafficking of an Obscene Image of a Minor.

G. RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

1. USAO recommends that subsections (a)(1)(A) and (b)(1)(A) apply to a "live broadcast" in addition to a "live performance."

"Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience."[4] "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience." It is equally culpable for a person to arrange a live performance as to arrange a live broadcast. If, for example, 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 other individuals in the chatroom who watch the video would be held liable for attending or viewing a live sexual performance of a minor.

2. USAO recommends changing the word "obscene" to "sexually explicit" in both § 22E-1809 and § 22E-1810, and removing the affirmative defense in subsection (d)(1)

USAO relies on the same rationale as set forth above.

H. RCC § 22E-4206. Indecent Exposure.

1. USAO recommends, in subsection (a)(2)(C), removing the word "sexually."

With USAO's changes, subsection (a)(2)(C) would provide:

"(C) Is with the purpose of alarming or ~~sexually~~ abusing, humiliating, harassing or degrading the complainant."

This is consistent with USAO's recommendations above regarding the definition of "sexual act" and "sexual contact."

2. USAO recommends removing subsection (b)(3).

Liability for indecent exposure should not turn on what the complainant actually observed, or how the defendant's actions affected the complainant. It should turn on what actions the defendant engaged in. This is true for both theoretical and practical reasons. As a theoretical

[4] USAO suggested above clarifications to the definition of "audience."

matter, it is the defendant's actions, rather than the impact of the defendant's actions, that should create liability for this offense. As a practical matter, it 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. For example, if a defendant exposed his genitalia in the middle of a metro car to multiple people, multiple people could have been alarmed or humiliated. But if this incident happened during rush hour when people were rushing to work, 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. In that case, law enforcement will have no complainant to speak with about whether they actually observed this behavior or how it made them feel. Rather, surveillance video from the metro could show the defendant's actions. As currently drafted, with only this surveillance video clearly showing the defendant exposing his genitals in a public conveyance, the government would be unable to prove that the defendant engaged in an indecent exposure. USAO therefore recommends removing this provision from the statute.

Comments on Draft Report #43—Blackmail

1. USAO recommends that, consistent with current law, liability attach if a person purposely causes *or intends to cause* another person to do or refrain from doing any act.

   With USAO's changes, subsection (a)(1) would provide:

   "(1) Purposely causes or intends to cause another person to do or refrain from doing any act."

Under current law, a defendant is liable for blackmail if the defendant makes a specified threat, intending to cause another to do or refrain from doing any act. D.C Code § 22-3252. The RCC's rationale for a change from current law is that it improves the proportionality of the RCC and is consistent with the RCC extortion offense. (Commentary at 6.) The RCC provides that attempt liability "may apply depending on the specific facts of the case" if "the accused fails to compel the other person to act or refrain from acting." (Commentary at 6 n.34.) The focus, however, should be on the defendant's intent and actions, rather than what those actions actually cause a complainant to do. Take, for example, a case in which a defendant threatens a complainant not to call the police following the defendant assaulting the complainant, threatening that the defendant will distribute photos of the complainant engaged in an affair. If, following the threat, the complainant were to refrain entirely from calling the police, then that would clearly constitute blackmail under the RCC proposal. But what if the complainant were to hesitate for just a moment as a result of the defendant's threat, and then call police, or if the complainant were to wait an hour or a day to call police as a result of the defendant's actions. Those would all constitute the defendant causing the complainant to "refrain" from doing an act due to a threat. It would not be proportionate for blackmail liability to attach if the defendant's threat caused the complainant to hesitate for a moment before calling police, and for only attempted blackmail liability to attach if the defendant's threat did not cause the complainant to hesitate before calling police. Rather, the defendant's intent in making the threat should be the guiding factor in whether blackmail liability attaches.

2. USAO recommends that subsection (a)(2)(E) be modified to include non-deceased persons.

With USAO's changes, subsection (a)(2)(E) would provide:

"Impair the reputation of another person, including a deceased person;"

Under current law, a person is liable for blackmail if, among other things, they threaten to "[i]mpair the reputation of another person, including a deceased person." D.C. Code § 22-3252(a)(3). It is unclear why this change was made, and USAO believes that it is appropriate for liability to attach when a person threatens to impair the reputation of any other person, whether alive or deceased.