D.C. Criminal Code Reform Commission

441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov

To: Councilmember Charles Allen,
Chairperson, Committee on the Judiciary and Public Safety
From: Richard Schmechel,
Executive Director, D.C. Criminal Code Reform Commission (CCRC)
Date: July 11, 2018
Re: Testimony for the July 11, 2018 Hearing on the *Protection from Sexual Extortion Amendment Act of 2017*

I. Introduction.

Thank you for the opportunity to provide testimony to the Committee on the Judiciary and Public Safety for the record of the public hearing on the *Protection from Sexual Extortion Amendment Act of 2017* ("sextortion bill"), held on July 11, 2018. I am the Executive Director of the Criminal Code Reform Commission (CCRC).

The CCRC is a small, independent District agency that began operation October 1, 2016. The CCRC's mission is to prepare comprehensive recommendations for the Mayor and Council on reform of the District's criminal statutes. Specifically, the CCRC's work is focused on developing possible reforms to the District's "substantive" criminal statutes—i.e., laws that define crimes and punishments, such as extortion and sexual abuse.

To date, the CCRC has not submitted final recommendations to the Mayor or Council for offenses that may address or relate to the conduct that is the apparent aim of the sextortion bill. However, the agency has completed research on several current District criminal offenses that are implicated in the sextortion bill ("relevant, existing offenses").

Specifically, the CCRC has developed and received feedback from its statutory Advisory Group[1] on a first draft of revised language for the District's extortion offense. In the next three months the CCRC also expects to have submitted to its statutory Advisory Group first drafts of revised language for other relevant offenses, including the District's blackmail, sexual abuse, and

[1] The Criminal Code Revision Advisory Group (Advisory Group) is a statutorily-designated group of stakeholders who review and provide information and suggestions on proposals prepared by the Commission. The Advisory Group consists of 7 members. The Advisory Group consists of: two Council appointees; the Designee of the United States Attorney for the District of Columbia; the Designee of the Director of the Public Defender Service for the District of Columbia; the Designee of the Attorney General for the District of Columbia; the Designee of the Chairperson of the Committee on the Judiciary and Public Safety; and the Designee of the Deputy Mayor for Public Safety and Justice. The CCRC submitted its first draft of a revised extortion offense to the Advisory Group on August 11, 2017. None of the Advisory Group's comments, received on or by November 3, 2017, referenced sextortion conduct or necessary language changes.

stalking statutes. The CCRC also has begun research on other matters implicated by the sextortion bill, such as penalty proportionality in District offenses.

This testimony is based on the CCRC's research and distinct expertise evaluating ambiguities, overlap, gaps, and proportionality in the current D.C. Code.

II. Sextortion Bill Amendment and Purpose.

The sextortion bill would amend the District's current extortion statute, D.C. Code § 22-3251 to read as follows (additions in underline, deletions in strikethrough):

> (a) A person commits the offense of extortion if:
>
> (1) That person obtains or attempts to obtain the property of ~~another with~~ another, or causes or attempts to cause another to do or refrain from doing any act, with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of ~~economic injury; or~~ economic injury or injury to reputation; or
>
> (2) That person obtains or attempts to obtain property of ~~another with~~ another, causes or attempts to cause another to do or refrain from doing any act, with" the other's consent which was obtained under color or pretense of official right.
>
> (b) Any person convicted of extortion shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 10 years, or both.

The sextortion bill makes no other changes to District statutes.

The sextortion bill was introduced as a way to address "sextortion," which has been defined as "a new, computer-based type of sexual conduct that has arisen in the District."[2] While no specific facts were presented with the bill's introduction as to how sextortion has arisen in the District, it was generally stated that a person engages in sextortion-type conduct when that person:

> 1. Obtains possession of sexually explicit images (through hacking or other means); and
> 2. Demands that another person (the victim—presumably the subject of the images), provide images or in-person sex acts under threat of distributing the images.[3]

Regarding the current state of District law, the introduction stated that this conduct "may not fit within any existing sexual offenses" and that the District "does not already have laws that criminalize sexual exploitation."[4] Moreover, the bill's introduction stated that, "in an effort to ensure that the [revised] language covers the broad range of acts that might fall under sextortion, including the intangible items that often motivate a sextortion actor (e.g. relationships), the proposed amendment tracks the language of the District of Columbia's blackmail statute."[5]

---

[2] *Letter from Attorney General Karl Racine to Chairman Mendelson presenting the Protection from Sexual Extortion Amendment Act of 2017* (September 26, 2017) at 1.

[3] *Id*. at 1. Other sources have defined "sextortion more broadly," but this testimony concerns only the two forms of conduct described in the bill's introduction—demands for sexually explicit images or in-person sex acts in return for not distributing sexually explicit images.

[4] *Id*. at 1-2.

[5] *Id*. at 2.

III. Analysis of the Legal Effect of the Sextortion Bill.

As described below, the District's current extortion statute generally does not appear to cover sextortion conduct. However, the sextortion bill's changes would not newly criminalize sextortion conduct because the D.C. Code already criminalizes sextortion conduct under the blackmail statute. The sextortion bill's changes also would not punish sextortion as a distinctly "sexual" offense because the bill modifies a property offense rather than a sexual offense, and does so in general terms that make no specific reference to sexual coercion. Rather, the sole apparent effect of the sextortion bill would be to double to 10 years the maximum imprisonment penalty available under the current blackmail statute for causing someone to perform an act or refrain from doing so by threatening to harm someone's reputation—which includes many types of wrongdoing besides sextortion. Whether such an increase in penalty is warranted may depend on the availability of other, relevant offenses (e.g. sexual abuse or stalking) that may be charged in a case of sextortion. The proportionality of the penalty increase proposed in the sextortion bill also may depend on evaluation of the penalties for other, unrelated District offenses.

The District's current extortion statute generally does not appear to cover sextortion conduct. The District's current extortion statute is focused on obtaining property rather than actions.[6] Consequently, the current extortion statute does not appear to cover sextortion that seeks to compel a person to perform in-person sexual acts.[7] The current extortion statute does define "property" to include intangible personal property, so digital images of the sort involved in sextortion conduct are likely included.[8] However, the current extortion statute requires not only that the actor seek to obtain property, but the means of doing so must be either "wrongful use of actual or threatened force or violence or by wrongful threat of economic injury" or "under color or pretense of official right." As presented in the sextortion bill, the coercive threat employed in sextortion is distribution of images involving reputational harm, not "force or violence" or "economic injury."[9] Consequently, the current District extortion statute generally does not appear to apply to sextortion conduct as described in the sextortion bill's introduction.

The sextortion bill's changes would not newly criminalize sextortion conduct because the D.C. Code already criminalizes sextortion conduct under the blackmail statute. As stated in the presentation of the sextortion bill, the proposed change to the D.C. Code's extortion statute "tracks

---

[6] See *Extension of Comments on Bill No. 4-193, District of Columbia Theft and White Collar Crime Act of 1982,* Committee on the Judiciary (July 20, 1982) at 68 ("The offense of extortion is divided into two different sections. The gravamen of both sections is the act of obtaining or attempting to obtain property of another.").

[7] It could be argued that sexual acts are a type of "service" that falls within the definition of "property," however, even were such an interpretation valid, sextortion involving sexual acts would not be covered under the current extortion statute for the reasons stated below regarding the means of coercing consent.

[8] "Property" is a defined term for both extortion and blackmail offenses. *See* D.C. Code § 22-3201(3) ("'Property' means anything of value. The term 'property' includes, but is not limited to: (A) Real property, including things growing on, affixed to, or found on land; (B) Tangible or intangible personal property; (C) Services; (D) Credit; (E) Debt; and (F) A government-issued license, permit, or benefit.").

[9] However, in some circumstances, it is possible that distribution of images in sextortion could constitute both a threat of reputational harm and economic injury—e.g. where the target's employment would likely be lost were the images already in possession of the actor publicly circulated.

the language of the District of Columbia's blackmail statute."[10] The District's current blackmail statute, D.C. Code § 22–3252, is as follows (emphasis added):

> (a) A person commits the offense of blackmail, if, *with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens*:
>
> (1) To accuse any person of a crime;
>
> (2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or
>
> (3) *To impair the reputation of any person*, including a deceased person.
>
> (b) Any person convicted of blackmail shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.

The plain language of the current blackmail statute covers both conduct variants described in the sextortion bill introduction—a demand for images or in-person sex acts. As noted above, images appear to be "property" as defined for purposes of the extortion and blackmail statutes,[11] and in-person sexual acts are within the scope of "any act." Moreover, unlike extortion, the current blackmail statute specifically addresses a threat to harm someone's reputation, such as would result from the distribution of images in sextortion. Consequently, both ways of committing sextortion conduct—threatening to distribute images unless the target gives more images or an in-person sex act—are currently criminalized as blackmail.[12]

The sextortion bill's changes also would not punish sextortion as a distinctly "sexual" offense because the bill modifies a property offense rather than a sexual offense, and does so in general terms that make no specific reference to sexual coercion. Both extortion and blackmail are property offenses currently codified in Chapter 32 of Title 22 of the D.C. Code entitled "Theft; Fraud; Stolen Property; and Extortion." They are separate and distinct from most sexual crimes, which are codified in Chapter 30 of Title 22 of the D.C. Code entitled "Sexual Abuse." These different property and sex crime chapters each contain their own definitions,[13] their respective offenses are treated differently for purposes of the District's sex offender registry requirements,[14]

---

[10] Id. at 2.

[11] *See* D.C. Code § 22-3201(3).

[12] Arguably, the sextortion bill is less clear than the blackmail statute about the culpable mental state that must be proven with respect to a defendant's effort to obtain property—potentially broadening the scope of the conduct covered by the revised extortion offense. Whereas the blackmail statute clearly requires action "with intent to obtain property…", the sextortion bill revision to the extortion statute would merely says, "[t]hat person obtains…property…".

[13] For example, "consent" is a defined term for sexual abuse offenses, but is undefined for property offenses such as extortion. *See* D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[14] The District's current definition of a "registration offense" for the sex offender registry categorically includes any offense in Chapter 30 of the D.C. Code and specifically lists several sex crimes outside of Chapter 30. *See* D.C. Code § 22-4001(A)-(C). None of these statutory provisions specifically references extortion or blackmail, nor would the sextortion statute add such a reference. It is possible, however, that either the current blackmail statute or the extortion statute as revised by the sextortion bill could result in the offender's inclusion in the District sex offender registry. This depends on the facts of the case and court analysis on whether a categorical of fact-specific approach should be taken to analyzing an offense (to date there is no case law on point). *See* D.C. Code § 22-4001(8)(D) ("Any offense under the District of Columbia Official Code that involved *a sexual act or sexual contact without consent* or with a minor, assaulting or *threatening another with the intent to engage in a sexual act or sexual contact* or with the intent

and the District's Voluntary Sentencing Guidelines may apply differently too.[15] Absent any specific reference to the sexual or personal nature of the crime, the sextortion bill would not appear to change the fact that the sextortion is treated similar to a property offense—either blackmail or the proposed extortion offense.

The sole apparent effect of the sextortion bill would be to double to 10 years the maximum imprisonment penalty available under the current blackmail statute for causing someone to perform an act or refrain from doing so by threatening to harm someone's reputation—which includes many types of wrongdoing besides sextortion. Blackmail, in current law, is subject to a 5 year statutory maximum while extortion, both under current law and the sextortion bill, is subject to a 10 year statutory maximum sentence. Broadening the District's extortion statute to encompass conduct now criminalized by the blackmail statute would thus double the maximum imprisonment penalty for sextortion conduct. However, because the sextortion bill does not limit its expansion of the extortion statute to threats to obtain images or in-person sex, the sextortion bill also would double the imprisonment penalty for any other conduct that causes or attempts to cause someone to perform an act by threatening to harm someone's reputation. Examples of non-sextortion conduct that would also be subject to the doubled penalty under the sextortion bill include any kind of threat to injure someone's reputation unless they do something or give over property.[16]

Whether such an increase in penalty is warranted may depend on the availability of other, relevant offenses (e.g. sexual abuse or stalking) that may be charged in a case of sextortion. Depending on the facts of a given case, sextortion conduct may be subject to prosecution under an array of existing, relevant offenses in the D.C. Code, either as an alternative to, or in combination with, blackmail or the sextortion bill's revised extortion offense. Other, relevant offenses include:

- *Sexual abuse*.[17] The District's sexual abuse offenses already criminalize coercing someone into a sexual act or sexual contact by a threat of any sort, including reputational harm.. A demand for in-person sex acts in exchange for not distributing sexually explicit images likely would constitute second degree, fourth degree, or misdemeanor sexual abuse if consummated, or attempted second degree, fourth degree, or misdemeanor sexual abuse if unconsummated.[18] Maximum imprisonment penalties for these charges range from 180

---

to commit rape, or causing the death of another in the course of, before, or after engaging or attempting to engage in a sexual act or sexual contact or rape." Per this provision, any offense penalizing sextortion conduct where there is a threat to disclose revealing images unless the target engages in a sexual act or contact with the actor, or coercing the target to engage in a coerced (non-consensual) sexual act or contact in producing revealing images may fall within the scope of the District's sex offender registration requirements.

[15] District of Columbia Voluntary Sentencing Guidelines §§ 6.1 and 6.2 (regarding consecutive and concurrent sentences for crimes of violence as compared to non-violent crimes). While coerced sexual acts are defined as "crimes of violence," blackmail and extortion are defined as "crimes of violence" only "when accompanied by threats of violence." D.C. Code § 23-1331(4).

[16] For example, threatening to reveal a person's infidelity on a prominent website unless the target agrees to endorse the website in public interviews.

[17] D.C. Code § 22-3003; D.C. Code § 22-3005; D.C. Code § 22-3006.

[18] While the sexual abuse statutes apply most straightforwardly to threats to provide in-person sex, they may also apply to threats to provide additional sexually-explicit images where capturing those images involves sexual abuse. For example, if the actor coerces the target into creating a recording of the target engaging in a sexual contact or sexual act that the target does not want to engage in, that sexual act or sexual contact was non-consensual and may expose the actor to liability even though the actor did not themselves touch or penetrate the target.

days to 20 or more years per occurrence, with even higher penalties[19] if the target is someone like a minor or elderly person.

- *Voyeurism*.[20] The District's voyeurism statute criminalizes any non-consensual electronic recording of a person engaging in sexual activity or undressed, or capture images of a person's private areas, with additional penalties for distribution of such images. This offense may apply to both the actor's initial taking of sexually explicit images and to the coerced taking of subsequent images for the actor to avoid public distribution of the sexually explicit images. Maximum imprisonment penalties for voyeurism are 1 year per occurrence, with a 5 year maximum if the images are distributed.

- *Stalking*.[21] The District's stalking statute prohibits engaging in a course of conduct, satisfied by two or more contacts that the actor knew or should have known would cause the target to feel seriously disturbed or suffer emotional distress. Any repetition of demands for in-person sex or sexually-explicit images likely would constitute stalking. Maximum imprisonment penalties for stalking range from 1 to 10 or more years per course of conduct, the higher penalties reserved for when the target is a minor, the actor has prior convictions or is under a court order, or causes more than $2,500 in financial injury.

- *Distribution of non-consensual pornography*.[22] The District's unlawful disclosure and unlawful publication statutes prohibit the non-consensual transfer of sexually explicit images under various conditions. The unlawful disclosure and publication crimes apply straightforwardly to a possessor's distribution of a sexual image of someone to a third person (or persons) when the person in the image did not consent to the transfer. However, the offense also may apply to both the actor's initial taking of sexually explicit images from the complainant's computer and to the coerced transfer of subsequent images to the actor to avoid public distribution of the sexually explicit images.[23] Maximum imprisonment penalties are 180 days per occurrence, with a 3 year maximum if the images are shown to six or more persons or made available for viewing on the internet.

---

[19] Second degree sexual abuse is subject to the general penalty enhancements that apply when the victim of specified crimes is a minor or a senior citizen,. D.C. Code §§ 22-3601; 22-3611. Fourth degree sexual abuse and misdemeanor sexual abuse are not subject to these general enhancements. D.C. Code §§ 22-3601; 22-3611. However, all the sexual abuse statutes, including second degree, fourth degree, and misdemeanor sexual abuse, are subject to specific aggravators for the sexual abuse statutes, including an aggravator for when the victim is under the age of 12 at the time of the offense. D.C. Code § 22-3020(a)(1). In addition to these enhancements and aggravators, first degree child sexual abuse and second degree child sexual abuse prohibit any sexual act or sexual contact with a person under the age of 16 when the actor is at least four years older. D.C. Code § 22-3008; D.C. Code § 22-3009. First degree sexual abuse of a child has a possible maximum sentence of life imprisonment without possibility of release if any of the sexual abuse aggravators apply, and second degree child sexual abuse has a maximum possible sentence of 10 years. D.C. Code §§ 22-3020; 22-3008; 22-3009.

[20] D.C. Code § 22-3531.

[21] D.C. Code § 22-3134.

[22] D.C. Code §§ 22-3052 - 22-3054.

[23] In the former case, the actor is transferring images to himself; in the latter case the actor is causing an innocent intermediary (the complainant) to transfer images to the actor. Notwithstanding the connotation that a "disclosure" is normally to a third person, rather than oneself, as used in D.C. Code §§ 22-3052 - 22-3054 "disclosure" is a statutorily defined term in the statute that specifically means "to transfer or exhibit to 5 or fewer persons."

- *Sexual performance using minors.*[24] The District's sexual performance using minors statute prohibits, in relevant part, inducing a minor to engage in sexual conduct in an image or video, or to transmit or possess such an image or video. The offense may apply to both the initial transfer of sexually explicit images by the actor and the coerced creation and/or transfer of images to the actor to avoid public distribution of sexually explicit images already possessed. Maximum imprisonment penalties are 10 years for a first offense, with a 20 year maximum for subsequent offenses.

- *Obscene activities.*[25] The District's obscenity statute prohibits distribution, participation in, or possession with intent to distribute "any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation."[26] The offense may apply to both the initial transfer of sexually explicit images by the actor and the coerced creation and/or transfer of images to the actor to avoid public distribution of sexually explicit images already possessed. Maximum imprisonment penalties are 180 days for a first occurrence, with a 3 year maximum for subsequent convictions.

Because sextortion prosecution may involve multiple charges[27] depending on the facts of a given case and prosecutorial discretion, a criminal defendant may face statutory imprisonment penalties far greater or less than the ten year penalty for a single charge under the current or proposed extortion statute. Consideration of the full range of charges that may be brought for sextortion conduct may affect the decision whether doubling the penalty for what currently constitutes blackmail is warranted.

The proportionality of the penalty increase proposed in the sextortion bill also may depend on evaluation of the penalties authorized for other, unrelated District offenses.[28] Beyond the penalties for other, relevant offenses discussed above,[29] some other common District crimes carrying 5 and 10 year statutory maximum sentences include:

---

[24] D.C. Code § 22-3102.

[25] D.C. Code § 22-2201. Although in many respects antiquated and not reflective of current, the District's obscene activities statute remains valid law that may be prosecuted.

[26] D.C. Code § 22-2201.

[27] The above list highlights offenses that will commonly overlap with a charge under the extortion offense proposed in the sextortion bill, but it is necessarily incomplete. An offender may commit any number of offenses in conjunction with the sextortion conduct. It should also be noted that while the sextortion bill may amend the existing extortion statute to cover conduct now in the blackmail statute, the sextortion bill does not propose to eliminate the relevant portion of the blackmail statute. Instead, under the sextortion bill, prosecutions may proceed under either the blackmail statute or the new extortion statute or both.

[28] Determining what imprisonment penalty is appropriate for any crime is more difficult the greater the range of conduct the crime seeks to redress. Criminal punishment ideally would provide for neither too severe or too lenient an imprisonment term for the prohibited conduct, but when the conduct at issue is highly varied, a proportionate penalty that works for all or most permutations of the crime may be elusive. As noted above, the current blackmail statute covers a wide array of actions beyond sextortion, making it difficult to find a one-size fits all penalty that is appropriate for the statute or the sextortion bill proposal. Nonetheless, comparison to other offenses is possible using the most typical "heartland" fact patterns for an offense and extreme (high and low severity) fact patterns.

[29] In particular, recall that fourth degree sexual abuse (causing a person to engage in or submit to a sexual contact by a threat other than a threat of death, bodily injury, or kidnapping) carries a maximum imprisonment penalty of 5 years under current law. Third degree sexual abuse (causing a person to engage in or submit to a sexual contact by force or a threat of death, bodily injury, or kidnapping) carries a 10 year maximum imprisonment penalty.

- 4.5 years—felony assault[30] of a minor[31] (causing significant bodily injury to a person under 18 years of age that requires professional medical attention but is not life threatening or involve extreme pain or disfigurement);

- 10 years—aggravated assault[32] (causing serious bodily injury to an adult that is life threatening or involves extreme pain or disfigurement);

- 10 years—first degree theft[33] (stealing any amount over $1,000); and

- 5 years—first degree unauthorized use of a motor vehicle[34] (non-permanent use of a car without permission).

Of course, statutory penalties for District offenses that are used for comparison with sextortion may themselves be disproportionate because they themselves were set without a review of other crimes' penalties or reflect outdated views of offense severity. This limits the utility of relying solely on a review of comparable statutory penalties in the D.C. Code. More contemporary measures of penalty proportionality among offenses include public opinion polls, data on punishments imposed by District judges for various offenses, and recommended sentencing guidelines by expert bodies.[35] However, while such measures may all be useful reference points for established offenses, sentencing decisions are also subject to policy considerations such enforcement costs.

IV. Evaluating the Sextortion Bill in Light of the District's Comprehensive Criminal Code Reform Efforts.

Since being codified by Congress in 1901, the D.C. Code's criminal statutes have never undergone a comprehensive review or reform. Many of the most serious, common offenses in the District—e.g., murder, manslaughter, and assault—are virtually unchanged since that date. In the early 1980s there was reform legislation that reformed most property offenses,[36] and in the 1990s many of the District's sex offenses[37] were reworked. However, apart from these two stand-out efforts which greatly improved the clarity, consistency, and proportionality of those criminal statutes, the norm for decades has been to engage in piecemeal legislative efforts as circumstances or advocacy brings a particular issue to attention.

[30] D.C. Code § 22-404(a)(2).
[31] D.C. Code § 22-3611 (enhancing certain crimes' authorized imprisonment penalties by 1.5 times when the harm is to a minor).
[32] D.C. Code § 22-404.01.
[33] D.C. Code § 22-3211.
[34] D.C. Code § 22-3215.
[35] On request, the CCRC would be happy to provide the Committee with its general research in these areas, although its work on a comprehensive review of the District offenses' penalty proportionality is still undergoing research.
[36] *District of Columbia Theft and White Collar Crime Act of 1982.*
[37] *Anti-Sexual Abuse Act of 1994.*

This approach to reform of criminal laws is understandable given the often-controversial nature of changes to criminal laws and simple resource constraints.[38] But, it is an approach that over time has led to a criminal code that contains many overlapping offenses, misaligned penalties, and inconsistent terminology. Core offenses often have gone unviewed while crimes addressing specialized forms of these core offenses have proliferated. A better approach, which most states in the country have taken, is to undertake comprehensive reviews of their criminal codes to ensure they reflect current local norms, use clear and consistent language, eliminate gaps and overlap in offenses that complicate charging decisions, and check the basic proportionality and fairness of the laws. Thanks to the investment of resources by this Committee, the Council and Mayor, the CCRC is for the first time undertaking such a comprehensive review of District criminal statutes.

However, while a comprehensive review is underway, interim changes may be necessary for a variety of reasons. Emergency situations may arise for which the District's existing criminal sanctions are insufficient. Or, on the contrary, continuing existing criminal sanctions for certain behaviors may simply become intolerable.

When changes to criminal statutes cannot wait, the same standards—set by statute—that guide the CCRC's comprehensive review of District criminal statutes also may be considered when evaluating interim reforms.

Specifically, all interim reforms to criminal statutes should be reviewed to see if they:

(1) Use clear and plain language;
(2) Apply consistent, clearly articulated definitions;
(3) Describe all elements, including mental states, that must be proven;
(4) Reduce unnecessary overlap and gaps between criminal offenses;
(5) Eliminate archaic and unused offenses;
(6) Adjust penalties, fines, and the gradation of offenses to provide for proportionate penalties; [or]
(7) Organize existing criminal statutes in a logical order[.] [39]

Absent a comprehensive set of reforms, it is not possible to fully meet or conduct an evaluation under some of these standards.[40] However, it is reasonable to expect that any new legislation give attention to these considerations.

[38] A comprehensive review of criminal statutes involves considerable complexity, not only in harmonizing the drafting of statutes and penalties, but doing so in a manner that is cognizant of existing case law and best practices in other jurisdictions. The analysis in this testimony pertains to only a few aspects of the District's extortion statute. It does not address how District case law might be changed by or change the expected effect of the new extortion statute, shortcomings in the existing and proposed extortion statute's description of elements, or how the proposed extortion changes line up with other states. The CCRC routinely evaluates these and other matters when developing its reform recommendations, but it is a time-intensive process.
[39] D.C. Code § 3-151 *et seq*.
[40] For example, utilizing consistent definitions and improving penalty proportionality requires changes across many offenses.

On several of these measures, the sextortion bill does not fare well, chiefly because it relies upon the existing extortion statute. Insofar as the narrow target of the legislation is sextortion, the bill's reliance on the general language of "injury to reputation" is imprecise.[41] The terms "force or violence" are not defined for the current or proposed extortion statute. No culpable mental states are specified or defined for the current or proposed extortion statute, leaving determination of these essential elements up to courts to infer.[42] The sextortion bill's failure to repeal the blackmail language it duplicates means that the bill creates new overlap between the blackmail and extortion offenses. Such overlap, in turn, requires prosecutors to exercise discretion as to which statute (and corresponding penalty, five years or ten years) to charge a particular defendant.[43] Lastly, while arguments could be made that either a five or ten year maximum imprisonment penalty is appropriate, any recommendation without a full consideration of related offenses may result in a punishment not reflective of the offense's seriousness.

V. Alternative Ways to Address Sextortion in the D.C. Code.

Conduct that constitutes sextortion, as described in the sextortion bill's introduction, would clearly constitute a significant criminal harm and the District's laws should clearly prohibit and adequately punish such conduct. As described above, sextortion already is clearly prohibited under the District's blackmail statute and, depending on the facts of a particular case, many other relevant offenses can be charged for sextortion conduct too. However, sextortion conduct is primarily criminalized in both current law and the sextortion bill primarily as a property offense (as blackmail or extortion), and the primary charge of blackmail in current law holds a 5 year maximum imprisonment penalty (putting aside the possibility of other relevant charges being brought).

What reform alternatives might address sextortion?

Should the Council wish to criminalize sextortion conduct primarily as a sexual offense (as opposed to extortion, which is treated as a property offense in the D.C. Code), there are two main options consistent with comprehensive criminal code reform. First, the blackmail statute could be revised, relabeled, and reorganized so that it is a general "criminal coercion" offense alongside other offenses against persons—this is a reform the CCRC is preparing to circulate shortly to its statutory Advisory Group. Coercing a person into an act or omission by threat of a reputational or other harm compromises a person's personal autonomy and best conceived as an offense against persons. A new "criminal coercion" offense could also update the way in which coercion is

[41] While it would ordinarily seem that disclosure of sexually explicit images would constitute harm to a person's reputation, this may not always be the case. For example, if an actor in a sextortion scheme posts online sexually explicit photos that are not identifiable to the complainant, it may be difficult to prove that a complainant's reputation was harmed even though the posting still would cause emotional distress to the victim who would know people were viewing his or her body.

[42] The lack of statutorily prescribed culpable mental states may lead to unnecessary litigation. In 2017, an *en banc* decision of the D.C. Court of Appeals held that something more than negligence, but less than purpose, must be proven for the District's criminal threat offense. *Carrell v. United States*, 165 A.3d 314, 324-25 (D.C. 2017). However, it remains unclear whether and how such a holding may apply to threats that are elements of other offenses such as extortion.

[43] The possibility of inconsistent charging decisions between two offenses that differ only in their penalty could lead to disparate outcomes for similarly situated defendants, or the appearance of such disparate treatment.

defined, for example to include threats regarding a person's immigration status, the subject of another bill recently introduced to the Council.[44] If desired, sextortion conduct then could be specified as a distinct gradation of the general criminal coercion crime. However, a second reform option is a joint review and consolidation of several current District crimes referenced above—*voyeurism*,[45] *distribution of non-consensual pornography*,[46] *sexual performance using minors*,[47] and *obscene activities*[48]—such that the consolidated offense clearly criminalizes and punishes sextortion. Sextortion and the conduct in each of these offenses share a common concern with an unauthorized transfer of sexually explicit materials, and developing a consistent, proportionate approach to these harms would improve all these statutes.

Both the abovementioned ways of criminalizing sextortion are concerned with using coercive threats to get a person to provide sexually explicit images. New legislation targeting sextortion involving an in-person sexual act would be inconsistent with the current D.C. Code (and the CCRC's developing revision recommendations). As noted above, the District's current sexual abuse statutes prohibit any coerced, non-consensual sexual act or sexual contact, including by threats of reputational harm. Sextortion involving coerced sexual acts or sexual contacts are arguably the most severe types of sextortion and treating such conduct through the general sexual abuse statutes has the twin merits of providing more severe penalties and maintaining consistency across sex prosecutions. Treating sextortion involving coerced sexual acts or contacts through the District's general sexual abuse statutes also has the benefit of allowing any new amendments to focus on conduct involving provision of additional sexually explicit images.

Should the Council wish to penalize sextortion conduct more severely, both the abovementioned ways of criminalizing sextortion provide a more tailored approach than the sextortion bill. As noted above, the sextortion bill would not only double the penalty for sextortion-type conduct under the blackmail statute but also would double the penalty for any use of a coercive threat to injure someone's reputation in order to get someone to engage in a given act or give up property. If, as suggested above, a distinct gradation of a "criminal coercion" offense is created to address sextortion, or a consolidated offense is crafted to address unauthorized distribution of sexually explicit images, a higher penalty could be assigned where the distribution of images was coerced by threat of some reputation or other harm. This would avoid inadvertently doubling the penalty on other conduct now criminalized as blackmail generally.

Lastly, if the Council does not believe immediate action is necessary on the sextortion bill, I would suggest waiting to see how sextortion conduct may fit in with the comprehensive criminal code reform recommendations being developed by the CCRC. In the coming months, the CCRC

---

[44] *Protecting Immigrants from Extortion Amendment Act of 2018*, Bill No. 22-0877 (June 26, 2018). That bill would clarify that the extortion offense includes threats to notify law enforcement officials about a person's immigration status unless that person gives over property. Rather than conduct separate hearings on bills addressing particular issues with the extortion statute, a more efficient and fruitful approach would be to examine the clarity and scope of the extortion statute in conjunction with other offenses. Notably, the CCRC's first draft of a reformed extortion statute, developed last fall, specifically includes threats to "Notify a law enforcement official about a person's undocumented or illegal immigration status." This provision is comparable to language in Bill No. 22-0877.

[45] D.C. Code § 22-3531.

[46] D.C. Code §§ 22-3052 - 22-3054.

[47] D.C. Code § 22-3102.

[48] D.C. Code § 22-2201.

will issue first draft recommendations to its statutory Advisory Group regarding revision of the elements of the District's sexual abuse, stalking, and blackmail offenses. Within a year, the agency plans to have prepared a near-final or final set of recommendations for the elements of these and many other core offenses in the D.C. Code, as well as recommendations for their statutory penalties. These recommendations will be accompanied by a detailed commentary explaining how recommended changes affect current statutory and case law, and reviews how such changes compare to other jurisdictions that have undergone comprehensive reform. Other relevant offenses and penalties (e.g. voyeurism) may also be addressed in the coming year, time permitting.

There are many ways sextortion is already covered by District law and many ways it can be addressed as part of comprehensive reform. Addressing sextortion as part of comprehensive criminal code reform makes it possible to better align the description and punishment of sextortion with other types of coercive and sexual threats.

Thank you for your consideration of this testimony. For questions about the testimony or the CCRC's work more generally, please do not hesitate to contact our office or visit the agency website at www.ccrc.dc.gov.

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