



First Draft of Report #54 – Prostitution and Related Statutes

SUBMITTED FOR ADVISORY GROUP REVIEW
May 18, 2020

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

This Draft Report has two parts: (1) draft statutory text for a new Title 22E of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision and considers whether existing District law would be changed by the provision (and if so, why this change is being recommended).

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

The deadline for the Advisory Group's written comments on this First Draft of Report #54 – Prostitution and Related Offenses is June 19, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22E-4401. Prostitution

- (a) *Offense.* An actor commits prostitution when that actor knowingly:
 - (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for any person receiving anything of value;
 - (2) Agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value; or
 - (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value.
- (b) *Immunity.*
 - (1) A person does not commit an offense under this section when that person is under 18 years of age.
 - (2) The Metropolitan Police Department shall refer any person under 18 years of age that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22E-1805.
- (c) *Suspension and dismissal of proceedings.*
 - (1) When a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him or her from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions or other similar provisions) or for any other purpose.
 - (2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or

information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.

- (3) A person who was discharged from probation and whose case was dismissed pursuant to paragraph (1) of this subsection shall be entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection but only to the extent that such record would have been available to the person before an order of expungement was entered pursuant to paragraph (2) of this subsection. A request for a copy of the nonpublic record may be made ex parte and under seal by the person or by an authorized representative of the person.
- (d) *Penalties.* Prostitution is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (e) *Definitions.* The term “knowingly” has the meaning specified in RCC § 22E-206; and the terms “actor,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701.

Commentary

Explanatory Note. The RCC prostitution offense prohibits engaging in, agreeing to, or soliciting for a commercial sex act in exchange for any person receiving anything of value. Along with the RCC patronizing prostitution offense,¹ the RCC prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution² and soliciting for prostitution.³

Subsection (a) specifies the prohibited conduct for the revised prostitution statute. Paragraph (a)(1) specifies one type of prohibited conduct—pursuant to a prior agreement, express or implicit, engaging in or submitting to a sexual act or sex contact in exchange for any person receiving anything of value. The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person actually receives anything of value or if anything of value was promised to any person.⁴ Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(1). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor, pursuant to a prior agreement,

¹ RCC § 22E-4402.

² D.C. Code § 22-2701.

³ D.C. Code § 22-2701.

⁴ If anything of value is promised to any person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, expressly or implicitly, to engage in or submit to sexual activity in exchange for any person receiving anything of value.

express or implicit, engages in or submits to a sexual act or sexual contact in exchange for any person receiving anything of value. The person receiving anything of value may be the actor or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(2) specifies the second type of prohibited conduct—agreeing, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person receives anything of value or if anything of value was promised to any person. Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(2). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. The person receiving anything of value may be the actor or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(3) prohibits the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. “Commands, requests, or tries to persuade” matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person receives anything of value or if anything of value was promised to any person. Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(3). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. The person receiving anything of value may be the actor or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) excludes from liability for the offense a person that is under the age of 18 years. Subsection (b) further requires that the Metropolitan Police Department refer a person under the age of 18 years that is suspected of violating subsection (a) of this section to an organization that provides treatment, housing, or services appropriate for victims of sex trafficking of children under § 22E-1805.

Subsection (c) specifies procedures by which a judge may dismiss or defer proceedings.

Paragraph (c)(1) provides that when “a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe.” Under paragraph (c)(1), if the person violates a condition of probation, the court “may enter an adjudication of guilt and proceed as otherwise provided.” If the person does not violate probation, paragraph (c)(1) provides for an early dismissal of the

proceedings, and once the period of probation expires, paragraph (c)(1) states that “the court shall discharge such person and dismiss the proceedings against him or her.” Paragraph (c)(1) provides that a “nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection.” Under paragraph (c)(1), such a dismissal “shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime,” including recidivist penalties such as in RCC § 22E-606.

Paragraph (c)(2) states that upon discharge of the proceedings under paragraph (c)(1), the person may apply to the court for an order to expunge “from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection.” If the court determines, after a hearing, that such person was dismissed and the proceedings against him or her discharged, paragraph (c)(2) provides that “it shall enter such order.” Further, under paragraph (c)(2), “No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.”

Under paragraph (c)(3), a person whose case was dismissed under paragraph (c)(1) “shall be entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection but only to the extent that such record would have been available to the person before an order of expungement was entered pursuant to paragraph (2) of this subsection.”

Subsection (d) specifies relevant penalties for the offense. [See Third Draft of Report #41.]

Subsection (e) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised prostitution statute changes current District law in eight main ways.*

First, the revised prostitution statute is limited to an individual that engages in sexual activity in exchange for receiving payment. The current D.C. Code prostitution offense⁵ and current D.C. Code soliciting for prostitution offense⁶ include, without

⁵ The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution” and defines “prostitution” as a “sexual act or contact with another person in return for *giving* or receiving anything of value.” D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of “prostitution” is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity “with another person in return for giving anything of value” and “with another person in return for receiving anything of value.”

⁶ The current D.C. Code prostitution or solicitation statute prohibits “solicit[ing] for prostitution.” D.C. Code § 22-2701(a). “Solicit for prostitution” is defined, in relevant part, as “to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution” and “prostitution” is defined as a “sexual act or contact with another person in return for *giving* or receiving anything of value.” D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of “solicit for prostitution” and “prostitution” are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or

distinction, a patron that pays for sexual activity, as well as an adult⁷ who receives payment for sexual activity. In contrast, the RCC prostitution statute is limited to an individual that engages in, agrees to engage in, or solicits for sexual activity, in exchange for any person receiving payment. The RCC patronizing prostitution statute (RCC § 22E-4402) separately criminalizes a patron that pays for, agrees to pay for, or solicits for sexual activity in exchange for giving payment. As part of this revision, the revised prostitution statute no longer uses the current D.C. Code definitions of “prostitution” (D.C. Code § 22-2701.01(3)) or “solicit for prostitution” (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.⁸ This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).⁹ For the first offense, the current D.C. Code prostitution or solicitation statute has a maximum term of imprisonment of 90 days.¹⁰ The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,¹¹ and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.¹² This special enhancement is highly unusual in current District law. In contrast, for the revised prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

Third, the revised prostitution statute limits soliciting for prostitution to conduct that “commands, requests, or tries to persuade” another person. The current D.C. Code definition of “solicit for prostitution” is “to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering,

soliciting to engage in sexual activity both “with another person in return for giving anything of value” and “with another person in return for receiving anything of value.”

⁷ Although the current D.C. Code prostitution offense includes both a prostitute and a patron, the “safe harbor” provision in subsection (d)(1) of the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) (“A child who engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.”).

⁸ D.C. Code § 22-2701 prohibits both “engag[ing] in prostitution” and “solicit[ing] for prostitution.”

⁹ D.C. Code § 22-2701 (“(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.”).

¹⁰ D.C. Code § 22-2701(b)(1)(A).

¹¹ D.C. Code § 22-2701(b)(1)(B).

¹² D.C. Code § 22-2701(b)(2).

persuading, or agreeing to engage in prostitution.”¹³ There is no DCCA case law interpreting this special definition of “solicit for prostitution.”¹⁴ However, an older version of the statute made it unlawful to “invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading”¹⁵ for the purpose of prostitution. The DCCA stated that the older statute used the term “address,” as opposed to “solicit” or “solicitation,”¹⁶ which “removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt,”¹⁷ and that “an enticement also does not require an active, initiatory effort but can occur in a responsive manner.”¹⁸ Under this case law, it is also irrelevant which party broaches the subject of payment: “[o]nce there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of the transaction.”¹⁹ In contrast, the revised prostitution statute limits soliciting for prostitution to conduct that “commands, requests, or tries to persuade” another person to engage in sexual activity in exchange for any person receiving anything of value. With this change, the revised prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—prostitution requires “knowingly” rather than “purposely.” To the extent that DCCA case law interpreting the older statute is still good law under the current D.C. Code, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—“commands, requests, or tries to persuade another person.” This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. The current D.C. Code definitions of

¹³ D.C. Code § 22-2701.01(7).

¹⁴ The current D.C. Code definition of “solicit for prostitution” was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

¹⁵ D.C. Code § 22-2701 (1973).

¹⁶ *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).

¹⁷ *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer’s questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“We hold that appellant’s attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.”).

¹⁸ *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer’s questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“We hold that appellant’s attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.”).

¹⁹ *Dinkins*, 374 A.2d at 295. The DCCA further stated that “[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent.” *Dinkins*, 374 A.2d at 296.

“prostitution” and “solicit for prostitution” use the terms “sexual act” and “sexual contact” as those terms are currently defined in D.C. Code § 22-3001²⁰ for the current D.C. Code sexual abuse statutes. In contrast, the revised prostitution statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of “sexual act” and “sexual contact” differ in multiple ways as compared to current law. As a result, the scope of the revised prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of “sexual act” and “sexual contact” extend to conduct done with “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,” but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually “abuse, humiliate, harass, degrade, arouse, or gratify” any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724²¹ provides that when there is probable cause that a vehicle “is being used in furtherance of a prostitution-related offense,” including prostitution or solicitation,²² and there is an arrest,²³ the vehicle “shall” be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.²⁴ There is no requirement that the owner be involved in

²⁰ D.C. Code §§ 22-2701.01(5), (6) (stating the terms “sexual act” and “sexual contact” in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph” and “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

²¹ In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which “shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense.” D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all “funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723” will be deposited in the fund. D.C. Code § 22-2725(a). The reference to “§ 22-2723” appears to be an error, however, and the text should instead refer to “§ 22-2724.” D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law “An act for the suppression of prostitution in the District of Columbia.” The text of Section 7 in the Omnibus Act, establishing § 22-2725, states “All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*.” The reference to section 5 appears to be an error. Section 5 of the 1935 “An act for the suppression of prostitution in the District of Columbia” is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to “section 6,” which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

²² D.C. Code § 22-2724(b). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

²³ D.C. Code § 22-2724(b).

²⁴ D.C. Code § 22-2724(b)(1), (b)(2).

the offense or know of the vehicle’s use in the offense. The owner is “entitled to a due process hearing regarding the seizure of the vehicle,”²⁵ but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed “at any time” by paying several different penalties, fees, and costs,²⁶ which are either not refundable,²⁷ or are refundable only in narrow circumstances.²⁸ Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner’s right to a due process hearing.²⁹ There is no DCCA case law interpreting the current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in

²⁵ D.C. Code § 22-2701(f) (“An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.”).

²⁶ D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.”).

²⁷ Subsection (d) requires paying “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing” and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6).”); § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

²⁸ D.C. Code § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

²⁹ Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner “shall be entitled to a due process hearing regarding the seizure of the vehicle,” D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must “convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing.” D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing.” D.C. Code § 22-2724(d) (emphasis added).

furtherance of the RCC prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under certain circumstances, however, as opposed to impoundment, because that statute targets “pimps” and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that are used, or intended to be used, “to transport, or in any manner to facilitate a violation of a prostitution-related offense,”³⁰ and all “money, coins, and currency” which are used, or intended to be used “in violation of a prostitution-related offense.”³¹ Prostitution forfeitures currently are subject to D.C. Law 20-278,³² which provides significant due process protections for the owner of property,³³ but still can result in a lengthy or permanent loss of an individual’s vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the solicitation for prostitution statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at \$15,500, would violate the Excessive Fines Clause of the U.S. Constitution.³⁴ The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be “grossly disproportionate to the gravity of the defendant’s offense.”³⁵ It was the defendant’s first conviction for solicitation and the DCCA stated

³⁰ D.C. Code § 22-2723(a)(1). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

³¹ D.C. Code § 22-2723(a)(2). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

³² D.C. Code § 22-2723(b).

³³ See D.C. Code §§ 41-301 through 41-315.

³⁴ *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 559, 560 (D.C. 1998).

³⁵ The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a “fine” within the meaning of the Excessive Fines Clause because “the limitation on excessive fines is meant to curb ‘the government’s power to extract payments, whether in cash or in kind, as *punishment* for some offense.’” *Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was “at least in part,” punishment for solicitation and that D.C. Code § 22-2723 “has distinct punitive aspects,” an “innocent owner” defense and a direct tie to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *Toyota Pick-Up Truck*, it retains an “innocent owner defense” and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

that solicitation for prostitution “particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant’s conduct.”³⁶ At the time, a first offense for solicitation for prostitution had a maximum criminal fine of \$300 and no incarceration and the defendant actually received a \$150 fine.³⁷ The court concluded that “forfeiting a vehicle valued at \$15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed.”³⁸ Finally, the DCCA stated that while the defendant “fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute.”³⁹

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.⁴⁰ A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets “pimps” and owners of prostitution businesses, as opposed to an individual engaged in consensual commercial sex work. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 (“current D.C. Code prostitution nuisance provisions”) and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 (“Title 42 nuisance provisions.”). The current D.C. Code prostitution nuisance provisions apply to “any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,”⁴¹ or a nuisance that is

³⁶ *Toyota Pick-Up Truck*, 718 A.2d at 565.

³⁷ *Toyota Pick-Up Truck*, 718 A.2d at 565-66.

³⁸ *Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are “comparable to the seventy-to-one figured considered grossly disproportionate” in the controlling Supreme Court case *United States v. Bajakajian*, 524 U.S. 321 (1998) and are “also consistent with excessiveness determinations in of other federal courts.” *Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

³⁹ *Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that “the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza's crime, one justification commonly advanced for the *in rem* action. . . . And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza's assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

⁴⁰ The forfeiture statute has been amended since the version at issue in the 1998 *Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA’s ruling in that case that forfeiture of a vehicle valued at \$15,500 was grossly disproportionate when the defendant received at \$150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

⁴¹ D.C. Code § 22-2713(a) (“Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or

established “in a criminal proceeding.”⁴² The scope of “in a criminal proceeding” is unclear under current District law.⁴³ Violating a court order under the current D.C. Code

exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.”).

⁴² D.C. Code § 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

⁴³ D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if “the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding.” A broad reading of “in a criminal proceeding” is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether “in a criminal proceeding” extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a “disorderly house” under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits “keeping a bawdy or disorderly house.” Under DCCA case law, a “bawdy house” used for prostitution is a type of “disorderly house,” but a “disorderly house” can extend beyond a “bawdy house” to encompass “activities on the premises that either disturb the public or constitute a nuisance per se.” *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a “disorderly house” that is used for “lewdness, assignation, or prostitution” as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of “lewdness, assignation, or prostitution,” and D.C. Code § 22-2717 refers to the existence of “*the* nuisance.” *Id.* at 971-72 (emphasis in original). The court concluded that “the” refers back to the requirements of “lewdness, assignation, or prostitution” in D.C. Code § 22-2713 and that D.C. Code § 22-2717 “concerns only those nuisances defined in” D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a “bawdy house” under D.C. Code § 22-2722 would “clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it.” *Id.* The court stated that “[b]ecause the Government failed to show that [the property] was ‘used for the purpose of lewdness, assignation, or prostitution,’ the [defendants’] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717].” *Id.*

prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.⁴⁴ The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.⁴⁵ The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,⁴⁶ and again in 2010 to include firearm-related nuisances.⁴⁷ It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law⁴⁸ or legislative history on this issue. In contrast, the revised prostitution statute

The court acknowledged that the DCCA in *Raleigh v. United States* had stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for “lewdness, assignation, or prostitution,” and, furthermore, that the DCCA “did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717].” *Id.* The court stated that “we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713].” *Id.*

⁴⁴ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

⁴⁵ “Drug-Related Nuisance Abatement Act of 1998,” 1998 District of Columbia Laws 12-194 (Act 12-470).

⁴⁶ “Nuisance Abatement Reform Amendment Act of 2006,” 2006 District of Columbia Laws 16-81 (Act 16-267).

⁴⁷ “Community Impact Statement Amendment Act of 2010,” 2010 District of Columbia Laws 18-259 (Act 18-446).

⁴⁸ Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington, D.C.*, 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 “authorizes a special summary action in equity to abate and enjoin” a nuisance, and that D.C. Code § 42-3102 “authorizes an action to abate, enjoin, and prevent” a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”).

It should be noted that the “special summary action in equity to abate and enjoin” a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 (“In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented.”). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 (“Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course.”). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions⁴⁹ do not apply to real property that is used for “lewdness” or “assignment” like the current D.C. Code prostitution nuisance provisions do.⁵⁰ To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.⁵¹ Second, the Title 42 nuisance provisions apply to any “real property”⁵² “used” or “intended to be used” for prostitution,⁵³ whereas current D.C. Code

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 (“(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.”).

⁴⁹ The Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C).

⁵⁰ The current D.C. Code prostitution nuisance provisions apply to any “building, erection, or place used for the purposes of lewdness, assignment, or prostitution.” D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of “debauchery” or “other immoral” purposes, which may overlap with “lewdness” or “assignment.” However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of “prostitution.”

⁵¹ “Lewdness” and “assignment” appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that “lewdness” “has been defined by the Supreme Court as ‘that form of immorality which has relation to sexual impurity.’” *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of “assignment,” but Black’s Law Dictionary defines it as “[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex.” *Assignment*, Black’s Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. *See Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

⁵² The Title 42 nuisance provisions define “property” as “tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse,

§ 22-2713 is limited to any “building, erection, or place used for the purpose of prostitution.”⁵⁴ Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a “criminal proceeding” as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months’ imprisonment as do the current D.C. Code prostitution nuisance provisions.⁵⁵ Fifth, while both sets of nuisance provisions provide for a preliminary injunction,⁵⁶ a permanent injunction and order of abatement,⁵⁷ and a procedure for vacating an order of abatement,⁵⁸ the

park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land.”

⁵³ The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

⁵⁴ D.C. Code § 22-2713.

⁵⁵ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”). A violation of a court order “issued under” the Title 42 nuisance provisions is “punishable as a contempt of court.” D.C. Code § 42-3112(a).

⁵⁶ D.C. Code §§ 22-2714 (“ . . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . .”); 42-3104(a) (“Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . .”).

⁵⁷ D.C. Code §§ 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”); 42-3110(a) (“If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.”).

⁵⁸ D.C. Code §§ 22-2719 (“If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1

procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,⁵⁹ as do the types of equitable relief.⁶⁰ This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised prostitution statute makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the “court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct.”⁶¹ The statute specifies examples of conditions that the court may impose on the defendant, such as “an order to stay away from the area

year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) (“Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.”).

⁵⁹ For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 (“The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111.”). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

⁶⁰ For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all “fixtures, furniture, musical instruments, or movable property used in conducting the nuisance.” D.C. Code § 22-2717 (“an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . .”). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) (“Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.”).

⁶¹ D.C. Code § 22-2703.

within which the offense or offenses occurred.”⁶² D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.⁶³ In contrast, the deferred disposition provision in the revised prostitution statute is consistent with the more recent D.C. Code⁶⁴ deferred disposition provision for possession of a controlled substance, and the RCC equivalent provision.⁶⁵ This revision results in several changes to law.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires “reasonable conditions”⁶⁶ and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: “The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.”⁶⁷ The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,⁶⁸ and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women’s Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a maximum of one year, instead of “for such period as the court may direct”⁶⁹ in current

⁶² D.C. Code § 22-2703.

⁶³ The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti-Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11-237).

⁶⁴ D.C. Code § 48-904.01(e). This statute was enacted in 1981.

⁶⁵ RCC § 48-904.01a(g).

⁶⁶ In addition to this requirement, the current D.C. Code and RCC prostitution offenses are subject to D.C. Code § 16-710, which authorizes the court to “suspend the imposition of sentence . . . for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby,” although the period of probation, “together with any extension thereof, shall not exceed 5 years.” D.C. Code § 16-710(a), (b). The DCCA in *Simmons v. United States* recognized that both D.C. Code § 22-2703 and D.C. Code § 16-710 apply to a deferred disposition for prostitution, and that is true under the RCC as well. *Simmons v. United States* 461 A.2d 463, 464 (D.C. 1983) (“Under D. C. Code § 22-2703 (1981), the court is authorized to ‘impose conditions upon any person found guilty under § 22-2701, and ... the imposition or execution of sentence may be suspended for such period as the court may direct.’ Similarly, under D. C. Code § 16-710 (1981), the court is authorized to suspend the imposition or execution of sentence “for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby.” Under either statute, the decision to grant or deny probation, as well as the term of probation ordered, is within the broad sentencing discretion of the trial court.”) (internal footnotes and citations omitted).

⁶⁷ D.C. Code § 22-2703.

⁶⁸ D.C. Code § 48-904.01(e).

⁶⁹ D.C. Code § 22-2703 (“The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed.”). Under the revised

D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction “for purposes of disqualifications or disabilities imposed by law,” including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code⁷⁰ and the RCC.⁷¹ Finally, the revised provision provides for the expungement of records, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code⁷² and the RCC.⁷³ These changes improve the clarity, consistency, and proportionality of the revised statutes.

Beyond these eight substantive changes to current District law, six other aspects of the revised prostitution statute may be viewed as substantive changes of law.

First, the revised prostitution statute clarifies that payment can be received by or promised to “any person.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution”⁷⁴ or “solicit[ing] for prostitution”⁷⁵ and defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in exchange for . . . receiving anything of value.”⁷⁶ It is unclear whether the recipient of payment must be the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute requires “in exchange for any person receiving anything of value.” This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in or soliciting for the sexual activity for payment or a third party, as long as the payment is “in exchange” for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise for payment of anything of value is sufficient for liability in the revised prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution”⁷⁷ or “solicit[ing] for prostitution” and defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in exchange for . . . receiving anything of value.”⁷⁸ It is unclear whether “receiving anything of value” requires that a person actually receive anything of value, or if a promise to receive anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution statute retains the language “receiving anything of value,” but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In

deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.

⁷⁰ D.C. Code § 48-904.01(e).

⁷¹ RCC § 48-904.01a(g).

⁷² D.C. Code § 48-904.01(e).

⁷³ RCC § 48-904.01a(g).

⁷⁴ D.C. Code § 22-2701(a).

⁷⁵ D.C. Code § 22-2701(a).

⁷⁶ D.C. Code § 22-2701.01(3).

⁷⁷ D.C. Code § 22-2701(a).

⁷⁸ D.C. Code § 22-2701.01(3).

paragraph (a)(1), the actor must engage in sexual activity in exchange for any person “receiving anything of value” pursuant to a prior agreement. In paragraph (a)(2), the actor must agree to engage in sexual activity in exchange for any person “receiving anything of value.” In the revised statute the phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if any person receives anything of value or if anything of value was promised to any person.⁷⁹ This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised prostitution statute requires that an individual engage in or submit to sexual activity in exchange for anything of value “pursuant to a prior agreement, express or implicit.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution”⁸⁰ and defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in exchange for . . . receiving anything of value.”⁸¹ It seems clear that the offense includes an individual and a patron reaching an agreement for payment “in exchange” for sexual activity, and then engaging in sexual activity. It is unclear, however, if the offense includes individuals engaging in sexual activity, and after the fact coming to an agreement about payment. Resolving this ambiguity, the revised prostitution statute includes receiving anything of value in exchange for past sexual activity only if it is “pursuant to a prior agreement, express or implicit.” Without requiring a prior agreement, receiving anything of value in exchange for past sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised prostitution statute requires a “knowingly” culpable mental state for the prohibited conduct—engages in, agrees to engage in, or solicits for sexual activity, in exchange for any person receiving anything of value. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.⁸² Resolving this ambiguity, the revised prostitution statute requires a “knowingly” culpable mental state for the prohibited conduct—engaging in, or agreeing or offering to engage in, a sexual act or sexual contact in exchange for anything of value to be received by any person. Requiring, at a minimum, a

⁷⁹ As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to any person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, expressly or implicitly, to engage in or submit to sexual activity in exchange for any person receiving anything of value.

⁸⁰ D.C. Code § 22-2701(a).

⁸¹ D.C. Code § 22-2701.01(3).

⁸² Due to the statutory definition of “sexual contact” (D.C. Code § 22-3001(9)), prostitution based on a “sexual contact” requires that the prostitute have an “intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” In the context of the District’s current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor “knowingly” touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant’s conviction for second degree child sexual abuse when the jury instructions required that the appellant “knowingly” touched the complainant and omitted the “intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person” requirement because “no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court’s jury instruction . . . without also finding the requisite intent.”).

knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.⁸³ This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute does not require that the sexual activity be “with another person.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”⁸⁴ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”⁸⁵ The current D.C. Code⁸⁶ and RCC⁸⁷ definitions of “sexual act” and “sexual contact” include masturbation. However, the current statute’s “with another person” requirement may narrow the offense to exclude a prostitute engaging in or soliciting to engage in masturbation because masturbation is not “with another person.” Alternatively, the current prostitution or solicitation offense could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation “with another person,” if the latter phrase is construed to mean “for another person to watch.” To resolve this ambiguity, the revised statute does not require that the sexual activity be “with another person.” Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statute.

Sixth, the revised prostitution statute expands the scope of the “safe harbor” provision in the current D.C. Code prostitution or solicitation statute to include solicitation. The “safe harbor” provision in the current prostitution or solicitation statute states that a person under the age of 18 years that “engages in or offers to engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.”⁸⁸ However, subsection (a) of the current statute prohibits conduct beyond engaging in or offering to engage in sexual activity. It also prohibits “solicit[ing] for prostitution,”⁸⁹ defined as “to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution.”⁹⁰ It is unclear if the current safe harbor provision is limited to engaging in or offering to engage in sexual activity, or if it extends to all solicitation of prostitution, as prohibited in

⁸³ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

⁸⁴ D.C. Code § 22-2701(a).

⁸⁵ D.C. Code § 22-2701.01(3).

⁸⁶ D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of “sexual act” in D.C. Code § 22-3001(8) and the definition of “sexual contact” in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.”); 22-3001(9) (defining “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

⁸⁷ RCC § 22E-701.

⁸⁸ D.C. Code § 22-2701(d)(1).

⁸⁹ D.C. Code § 22-2701(a).

⁹⁰ D.C. Code § 22-2701.01(7).

subsection (a). There is no DCCA case law interpreting the current “safe harbor” provision. Resolving this ambiguity, the safe harbor provision in the revised prostitution statute applies to all prohibited conduct in the revised statute—engages in, agrees to engage in, or solicits for sexual activity, in exchange for any person receiving payment. This change improves the clarity and may improve the proportionality of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised prostitution statute makes “agrees” to engage in or submit to sexual activity a discrete basis of liability in paragraph (a)(2), separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits “solicit[ing] for prostitution”⁹¹ and the current D.C. Code definition of “solicit for prostitution” is, in relevant part, “to invite, entice, offer, persuade, or agree to engage in prostitution.”⁹² Paragraph (a)(3) of the revised statute encompasses liability for “invite,” “entice,” “offer,” or “persuade” to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

Second, the revised prostitution statute specifies that an agreement can be either express or implicit. The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”⁹³ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”⁹⁴ The language “in return for” implies the requirement of an agreement, either express or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to “invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading”⁹⁵ for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an express or implicit agreement.⁹⁶ More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.⁹⁷ This change improves the clarity of the revised statute.

Third, the revised prostitution statute uses “in exchange” for anything of value instead of “in return” for anything of value. The current D.C. Code definition of “prostitution” is a “sexual act or contact with another person in return for giving or

⁹¹ D.C. Code § 22-2701(a).

⁹² D.C. Code § 22-2701.01(7).

⁹³ D.C. Code § 22-2701(a).

⁹⁴ D.C. Code § 22-2701.01(3).

⁹⁵ D.C. Code § 22-2701 (1973).

⁹⁶ *See, e.g., Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.”) (internal citations omitted).

⁹⁷ In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of “solicitation” was in effect and stated that “we do not require the government to prove any particular language” and “we look to appellant’s conduct or words in light of surrounding circumstances.” *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).

receiving anything of value.”⁹⁸ “In exchange” emphasizes the transactional nature of the sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised safe harbor provision language is changed in several minor ways to be more consistent and clear than the safe harbor provision in current D.C. Code § 22-2701(d). First, the revised prostitution statute replaces “shall be immune from prosecution” with “does not commit an offense under this section.” The revised language is consistent with other RCC offenses that contain an exclusion from liability and is not intended to change the scope of the provision. Second, the revised safe harbor provision no longer uses the term “child,” defined in the current safe harbor provision as a “person who has not attained the age of 18 years.”⁹⁹ The revised safe harbor provision instead refers to a person that is “under 18 years of age,” which is consistent with other RCC offenses. Third, the revised safe harbor provision replaces the reference to current D.C. Code § 22-1834, the sex trafficking of children offense, with RCC § 22E-1805, the equivalent RCC sex trafficking a minor offense. This change improves the clarity and consistency of the revised statutes.

Fifth, the revised prostitution statute includes an actor who “engages in or submits to” sexual activity (paragraph (a)(1)), agrees to “engage in or submit to” sexual activity, (paragraph (a)(2)), and solicits any person to “engage in or submit to” sexual activity (paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”¹⁰⁰ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”¹⁰¹ The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Sixth, the revised prostitution statute is no longer subject to the definition of “anything of value” in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that “anything of value” “shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value.”¹⁰² This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within “anything of value” in the revised offense is not intended to change current District law.

⁹⁸ D.C. Code § 22-2701.01(3).

⁹⁹ D.C. Code § 22-2701(d)(3).

¹⁰⁰ D.C. Code § 22-2701(a).

¹⁰¹ D.C. Code § 22-2701.01(3).

¹⁰² D.C. Code § 22-1802.

RCC § 22E-4402. Patronizing prostitution.

- (a) *Offense.* An actor commits patronizing prostitution when that actor knowingly:
- (1) Pursuant to a prior agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for giving any person anything of value;
 - (2) Agrees, expressly or implicitly, to give anything of value to any person in exchange for any person engaging in or submitting to a sexual act or sexual contact;
 - (3) Commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for giving any person anything of value.
- (b) *Suspension and dismissal of proceedings.*
- (1) When a person is found guilty of violation of RCC § 22E-4402 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge him or her from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against him or her. Discharge and dismissal under this subsection shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in subsequent proceedings, such person qualifies under this subsection. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime (including the penalties prescribed under RCC § 22E-606 for second or subsequent convictions or other similar provisions) or for any other purpose.
 - (2) Upon the dismissal of such person and discharge of the proceedings against him under paragraph (1) of this subsection, such person may apply to the court for an order to expunge from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection. If the court determines, after hearing, that such person was dismissed and the proceedings against him or her discharged, it shall enter such order. The effect of such order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason

of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.

- (3) A person who was discharged from probation and whose case was dismissed pursuant to paragraph (1) of this subsection shall be entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection but only to the extent that such record would have been available to the person before an order of expungement was entered pursuant to paragraph (2) of this subsection. A request for a copy of the nonpublic record may be made ex parte and under seal by the person or by an authorized representative of the person.

(c) *Penalties.*

- (1) Patronizing prostitution is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

- (2) *Enhanced penalties.* In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by one class when the actor is reckless as to the fact that the person patronized is under 18 years of age.

- (d) *Definitions.* The terms “knowingly” and “reckless” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the terms “actor,” “sexual act,” and “sexual contact” have the meanings specified in RCC § 22E-701.

Commentary

Explanatory Note. *The RCC patronizing prostitution offense prohibits engaging in a commercial sex act in exchange for giving any person anything of value and soliciting for this purpose, as well as agreeing to give anything of value to any person in exchange for a commercial sex act. The offense is graded based on the age of the person trafficked. Along with the RCC prostitution offense,¹⁰³ the revised patronizing prostitution offense replaces two distinct offenses in the current D.C. Code: prostitution¹⁰⁴ and soliciting for prostitution.¹⁰⁵*

Subsection (a) specifies the prohibited conduct for the revised patronizing prostitution statute. Paragraph (a)(1) specifies one type of prohibited conduct—pursuant to a prior agreement, express or implicit, engaging in or submitting to a sexual act or sex contact in exchange for giving any person anything of value. The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to any person.¹⁰⁶ Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(1). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor, pursuant to a prior

¹⁰³ RCC § 22E-4401.

¹⁰⁴ D.C. Code § 22-2701.

¹⁰⁵ D.C. Code § 22-2701.

¹⁰⁶ If anything of value is promised to any person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, expressly or implicitly, to give anything of value in exchange for any person engaging in or submitting to sexual activity.

agreement, express or implicit, engages in or submits to a sexual act or sexual contact in exchange for giving any person anything of value. The recipient or promised recipient of payment may be the person engaging in sexual activity for payment or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(2) specifies the second type of prohibited conduct—agreeing, expressly or implicitly, to give anything of value to any person in exchange for any person engaging in or submitting to a sexual act or sexual contact. The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to any person. Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(2). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor agrees, expressly or implicitly, to engage in or submit to a sexual act or sexual contact in exchange for giving any person anything of value. The recipient or promised recipient of payment may be the person agreeing to sexual activity for payment or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Paragraph (a)(3) prohibits the final type of prohibited conduct—commanding, requesting, or trying to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for any person receiving anything of value. “Commands, requests, or tries to persuade” matches the language in the RCC solicitation statute (RCC § 22E-302). The phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value or promises to give anything of value to any person. Subsection (a) specifies a culpable mental state of “knowingly” and per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state applies to all the elements in paragraph (a)(3). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor commands, requests, or tries to persuade any person to engage in or submit to a sexual act or sexual contact in exchange for giving any person anything of value. The recipient or promised recipient of payment may be the person soliciting for sexual activity for payment or a third party. “Sexual act” and “sexual contact” are defined terms in RCC § 22E-701 that prohibit specific types of sexual penetration or sexual touching.

Subsection (b) specifies procedures by which a judge may dismiss or defer proceedings. Paragraph (b)(1) provides that when “a person is found guilty of violation of RCC § 22E-4401 the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place him or her on probation upon such reasonable conditions as it may require and for such period, not to exceed one year, as the court may prescribe.” Under paragraph (b)(1), if the person violates a condition of probation, the court “may enter an adjudication of guilt and proceed as otherwise provided.” If the person does not violate probation, paragraph (b)(1) provides for an early dismissal of the proceedings, and once the period of probation expires, paragraph (b)(1) states that “the court shall discharge such person and dismiss the proceedings against him or her.” Paragraph (b)(1) provides that a “nonpublic record thereof shall be retained solely for the purpose of use by the courts in determining whether or not, in

subsequent proceedings, such person qualifies under this subsection.” Under paragraph (b)(1), such a dismissal “shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime,” including recidivist penalties such as in RCC § 22E-606.

Paragraph (b)(2) states that upon discharge of the proceedings under paragraph (b)(1), the person may apply to the court for an order to expunge “from all official records (other than the nonpublic records to be retained under paragraph (1) of this subsection) all recordation relating to his or her arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this subsection.” If the court determines, after a hearing, that such person was dismissed and the proceedings against him or her discharged, paragraph (b)(2) provides that “it shall enter such order.” Further, under paragraph (b)(2), “No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest, or indictment, or trial in response to any inquiry made of him or her for any purpose.”

Under paragraph (b)(3), a person whose case was dismissed under paragraph (b)(1) “shall be entitled to a copy of the nonpublic record retained under paragraph (1) of this subsection but only to the extent that such record would have been available to the person before an order of expungement was entered pursuant to paragraph (2) of this subsection.”

Paragraph (c)(1) specifies relevant penalties for the offense. [See Third Draft of Report #41.] Paragraph (c)(2) codifies a penalty enhancement for the patronizing prostitution offense and specifies that the penalty enhancement is in addition to the general penalty enhancements under title 22E. If the penalty enhancement in paragraph (c)(2) is proven, the penalty classification for the offense is increased by one class. The penalty enhancement requires that the actor is reckless as to the fact that the person patronized is under 18 years of age. “Reckless” is a defined term in RCC § 22E-206 that here means that the actor is aware of a substantial risk that the person patronized is under 18 years of age.

Subsection (d) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised patronizing prostitution statute changes current District law in nine main ways.*

First, the revised patronizing prostitution statute is limited to an individual that engages in sexual activity in exchange for paying any person. The current D.C. Code prostitution offense¹⁰⁷ and current D.C. Code soliciting for prostitution offense¹⁰⁸ include

¹⁰⁷ The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution” and defines “prostitution” as a “sexual act or contact with another person in return for *giving* or receiving anything of value.” D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definition of “prostitution” is inserted into the current prostitution or solicitation statute, the statute prohibits both engaging in sexual activity “with another person in return for giving anything of value” and “with another person in return for receiving anything of value.”

Although the current D.C. Code prostitution or solicitation offense includes both a prostitute and a patron, the “safe harbor” provision in the current statute is limited to the individual that engages in sexual activity for payment, and excludes patrons. D.C. Code § 22-2701(d)(1) (“A child who engages in or offers to

within their scope an individual that pays for sexual activity, as well as the individual that receives payment for sexual activity. In contrast, the RCC patronizing prostitution statute is limited to the individual that engages in or solicits for sexual activity in exchange for giving any person anything of value, or agrees to give any person anything of value in exchange for sexual activity. The RCC prostitution statute (RCC § 22E-4401) separately criminalizes an individual that pays for, agrees to pay for, or solicits for sexual activity in exchange for receiving payment. As part of this revision, the revised patronizing prostitution statute no longer uses the current D.C. Code definitions of “prostitution” (D.C. Code § 22-2701.01(3)) or “solicit for prostitution” (D.C. Code § 22-2701.01(7)), and there is no longer a separate soliciting for prostitution form of the offense.¹⁰⁹ This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the revised patronizing prostitution statute deletes the special recidivist penalty for engaging in or soliciting for prostitution set forth in current D.C. Code § 22-2701(b).¹¹⁰ For the first offense, the current D.C. Code prostitution or solicitation statute has a maximum term of imprisonment of 90 days.¹¹¹ The special recidivist penalty provides that for the second offense, the maximum term of imprisonment is 180 days,¹¹² and for a third or subsequent offense, the conviction is a felony with a maximum term of imprisonment of two years.¹¹³ This special enhancement is highly unusual in current District law. In contrast, for the revised patronizing prostitution statute, only the general recidivism enhancement in section RCC § 22E-606 may provide enhanced punishment for recidivist patronizing prostitution, consistent with other misdemeanor offenses. There is no clear basis for singling out recidivist prostitution or solicitation offenses as compared to other offenses of similar seriousness. This change improves the consistency and proportionality of the revised statutes.

engage in a sexual act or sexual contact in return for receiving anything of value shall be immune from prosecution for a violation of subsection (a) of this section.”).

¹⁰⁸ The current D.C. Code prostitution or solicitation statute prohibits “solicit[ing] for prostitution.” D.C. Code § 22-2701(a). “Solicit for prostitution” is defined, in relevant part, as “to invite, entice, offer, persuade, or agree to engage in prostitution, or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution” and “prostitution” is defined as a “sexual act or contact with another person in return for *giving* or receiving anything of value.” D.C. Code §§ 22-2701(a); 22-2701.01(3) (emphasis added). When the definitions of “solicit for prostitution” and “prostitution” are inserted into the current prostitution or solicitation statute, the statute prohibits offering, agreeing, or soliciting to engage in sexual activity both “with another person in return for giving anything of value” and “with another person in return for receiving anything of value.”

¹⁰⁹ D.C. Code § 22-2701 prohibits both “engag[ing] in prostitution” and “solicit[ing] for prostitution.”

¹¹⁰ D.C. Code § 22-2701 (“(b)(1) Except as provided in paragraph (2) of this subsection, a person convicted of prostitution or soliciting for prostitution shall be: (A) Fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 90 days, or both, for the first offense; and (B) Fined not more than the amount set forth in § 22-3571.01, imprisoned not more than 180 days, or both, for the second offense. (2) A person convicted of prostitution or soliciting for prostitution who has 2 or more prior convictions for prostitution or soliciting for prostitution, not committed on the same occasion, shall be fined not more than the amount set forth in § 22-3571.01, imprisoned for not more than 2 years, or both. (c) For the purposes of this section, a person shall be considered as having 2 or more prior convictions for prostitution or soliciting for prostitution if he or she has been convicted on at least 2 occasions of violations of: (1) This section; (2) A statute in one or more other jurisdictions prohibiting prostitution or soliciting for prostitution; or (3) Conduct that would constitute a violation of this section if committed in the District of Columbia.”).

¹¹¹ D.C. Code § 22-2701(b)(1)(A).

¹¹² D.C. Code § 22-2701(b)(1)(B).

¹¹³ D.C. Code § 22-2701(b)(2).

Third, the revised patronizing prostitution statute limits soliciting to conduct that “commands, requests, or tries to persuade” any person. The current D.C. Code definition of “solicit for prostitution” is “to invite, entice, offer, persuade, or agree to engage in prostitution or address for the purpose of inviting, enticing, offering, persuading, or agreeing to engage in prostitution.”¹¹⁴ There is no DCCA case law interpreting this special definition of “solicit for prostitution.”¹¹⁵ However, an older version of the statute made it unlawful to “invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading”¹¹⁶ for the purpose of prostitution. The DCCA stated that the older statute used the term “address,” as opposed to “solicit” or “solicitation,”¹¹⁷ which “removes the suggestion that an initial, active effort to engage someone in a conversation or transaction involving prostitution is a prerequisite to guilt,”¹¹⁸ and that “an enticement also does not require an active, initiatory effort but can occur in a responsive manner.”¹¹⁹ Under this case law, it is also irrelevant which party broaches the subject of payment: “[o]nce there is an enticement or an address for the purpose of enticement, it becomes unimportant who broaches the commercial nature of the transaction.”¹²⁰ In contrast, the revised patronizing prostitution statute limits soliciting to conduct that “commands, requests, or tries to persuade” another person to engage in sexual activity in exchange for giving any person anything of value. With this change, the revised patronizing prostitution statute uses language identical to the general RCC solicitation statute (RCC § 22E-302), and the RCC patronizing prostitution statute differs from the general RCC solicitation statute primarily in the required culpable mental state—patronizing prostitution requires “knowingly” rather than “purposely.” To the extent that DCCA case law interpreting the older statute is still good law, the revised statute preserves case law establishing that it is irrelevant which party initiates the encounter or brings up the subject of payment. However, unlike current case law, liability under paragraph (a)(3) of the revised statute does require active efforts to solicit another person—“commands,

¹¹⁴ D.C. Code § 22-2701.01(7). As is discussed elsewhere in this commentary, the current D.C. Code definition of “prostitution” includes both a patron and the individual engaging in prostitution for payment.

¹¹⁵ The current D.C. Code definition of “solicit for prostitution” was enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

¹¹⁶ D.C. Code § 22-2701 (1973).

¹¹⁷ *Dinkins v. United States*, 374 A.2d 292, 294 (D.C. 1977).

¹¹⁸ *Dinkins v. United States*, 374 A.2d 292, 295 (D.C. 1977). The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer’s questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“We hold that appellant’s attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.”).

¹¹⁹ *Dinkins*, 374 A.2d at 295. The DCCA in *Dinkins* affirmed a conviction under this older statute when the defendant did not initiate the encounter, merely responded to an undercover officer’s questions, and the officer brought up the subject of payment. *Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“We hold that appellant’s attire, her prolonged presence on the street corner, her approach to a complete stranger, her extremely suggestive verbal responses to the officer, her prompt discussion of financial terms, and her ready arrangement for a room are legally sufficient, when taken together, for a fact finder to conclude guilt beyond a reasonable doubt.”).

¹²⁰ *Dinkins*, 374 A.2d at 295. The DCCA further stated that “[i]t is sufficient that an understanding emerges that a commercial venture was contemplated when the sexual availability was made apparent.” *Dinkins*, 374 A.2d at 296.

requests, or tries to persuade another person.” This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised statutes.

Fourth, the revised patronizing prostitution statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. The current D.C. Code definitions of “prostitution” and “solicit for prostitution” use the terms “sexual act” and “sexual contact” as those terms are currently defined in D.C. Code § 22-3001¹²¹ for the current D.C. Code sexual abuse statutes. In contrast, the revised patronizing prostitution statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of “sexual act” and “sexual contact” differ in multiple ways as compared to current law. As a result, the scope of the revised patronizing prostitution statute will differ as compared to the current D.C. Code prostitution or solicitation statute. For example, the current D.C. Code definitions of “sexual act” and “sexual contact” extend to conduct done with “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,” but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually “abuse, humiliate, harass, degrade, arouse, or gratify” any person. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Current D.C. Code § 22-2724¹²² provides that when there is probable cause that a vehicle “is being used in furtherance of a prostitution-related offense,” including prostitution or solicitation,¹²³ and there is an arrest,¹²⁴ the

¹²¹ D.C. Code §§ 22-2701.01(5), (6) (stating the terms “sexual act” and “sexual contact” in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph” and “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

¹²² In addition to D.C. Code § 22-2724, D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which “shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense.” D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all “funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723” will be deposited in the fund. D.C. Code § 22-2725(a). The reference to “§ 22-2723” appears to be an error, however, and the text should instead refer to “§ 22-2724.” D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law “An act for the suppression of prostitution in the District of Columbia.” The text of Section 7 in the Omnibus Act, establishing § 22-2725, states “All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees *pursuant to section 5*.” The reference to section 5 appears to be an error. Section 5 of the 1935 “An act for the suppression of prostitution in the District of Columbia” is specific to forfeiture, not impoundment. The text in the Omnibus Act should instead refer to “section 6,” which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

¹²³ D.C. Code § 22-2724(b). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-

vehicle “shall” be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.¹²⁵ There is no requirement that the owner be involved in the offense or know of the vehicle’s use in the offense. The owner is “entitled to a due process hearing regarding the seizure of the vehicle,”¹²⁶ but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed “at any time” by paying several different penalties, fees, and costs,¹²⁷ which are either not refundable,¹²⁸ or are refundable only in narrow circumstances.¹²⁹ Finally, it is unclear whether paying for the immediate release of a vehicle waives the owner’s right to a due process hearing.¹³⁰ There is no DCCA case law interpreting the

2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”).

The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

¹²⁴ D.C. Code § 22-2724(b).

¹²⁵ D.C. Code § 22-2724(b)(1), (b)(2).

¹²⁶ D.C. Code § 22-2701(f) (“An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.”).

¹²⁷ D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.”).

¹²⁸ Subsection (d) requires paying “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing” and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6).”); § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

¹²⁹ D.C. Code § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

¹³⁰ Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner “shall be entitled to a due process hearing regarding the seizure of the vehicle,” D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must “convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing.” D.C. Code § 22-

current D.C. Code prostitution impoundment provision. In contrast, a vehicle used in furtherance of the RCC patronizing prostitution offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what otherwise is a minor misdemeanor offense or comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. A vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under certain circumstances, however, as opposed to impoundment, because that statute targets “pimps” and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to civil asset forfeiture. Current D.C. Code § 22-2723 makes subject to forfeiture all conveyances that are used, or intended to be used, “to transport, or in any manner to facilitate a violation of a prostitution-related offense,”¹³¹ and all “money, coins, and currency” which are used, or intended to be used “in violation of a prostitution-related offense.”¹³² Prostitution forfeitures are subject to D.C. Law 20-278,¹³³ which provides significant due process protections for the owner of property,¹³⁴ but still can result in a lengthy or permanent loss of an individual’s vehicle or money. There is no DCCA case law interpreting the current D.C. Code § 22-2723. However, under an earlier version of the statute, the DCCA held in *One Toyota Pick-Up Truck v. District of Columbia* that forfeiture of the truck the defendant used to solicit for prostitution, valued at \$15,500, would violate the Excessive Fines Clause of the U.S. Constitution.¹³⁵ The DCCA determined that, under controlling Supreme Court case law, the forfeiture would be “grossly disproportionate to the gravity of the defendant’s offense.”¹³⁶ It was the defendant’s first conviction for solicitation and

2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing.” D.C. Code § 22-2724(d) (emphasis added).

¹³¹ D.C. Code § 22-2723(a)(1). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

¹³² D.C. Code § 22-2723(a)(2). The current D.C. Code definition of “prostitution-related offenses” includes both engaging in “prostitution” and “solicit[ing] for prostitution” in D.C. Code § 22-2701. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

¹³³ D.C. Code § 22-2723(b).

¹³⁴ See D.C. Code §§ 41-301 through 41-315.

¹³⁵ *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558, 559, 560 (D.C. 1998).

¹³⁶ The DCCA applied the test established in *United States v. Bajakajian*, 524 U.S. 321 (1998), which states that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.” *Toyota Pick-Up Truck*, 718 A.2d at 564-65 (quoting *United States v. Bajakajian*, 524 U.S. 321 (1998)). Prior to engaging in the proportionality analysis, the DCCA first had to establish whether the forfeiture provision in D.C. Code § 22-2723 was a “fine” within the meaning of the Excessive Fines Clause because “the limitation on excessive fines is meant to curb ‘the government’s power to extract payments, whether in cash or in kind, as *punishment* for some offense.’” *Toyota Pick-Up Truck*, 718 A.2d at 560 (internal quotations and citations omitted) (emphasis in the original). The DCCA concluded that forfeiture of the truck pursuant to D.C. Code § 22-2723 was “at least in part,” punishment for solicitation and that D.C. Code § 22-2723 “has distinct punitive aspects,” an “innocent owner” defense and a direct tie

the DCCA stated that solicitation for prostitution “particularly for a first conviction, has historically been treated as a minor crime in the District, and was certainly so treated at the time of the defendant’s conduct.”¹³⁷ At the time, a first offense for solicitation for prostitution had a maximum criminal fine of \$300 and no incarceration and the defendant actually received a \$150 fine.¹³⁸ The court concluded that “forfeiting a vehicle valued at \$15,500 inflicts a penalty . . . on the order of fifty times the fine authorized . . . and one hundred times the fine actually imposed.”¹³⁹ Finally, the DCCA stated that while the defendant “fit[] within the class of persons for whom the statute was principally designed, he can not [sic] be made to bear grossly disproportionate responsibility for the problem of prostitution in the District or for the attendant consequences . . . he is, at bottom, one individual who on one occasion attempted to retain a prostitute.”¹⁴⁰

In contrast, a conveyance or money used or intended to be used in furtherance of the RCC patronizing prostitution offense is no longer subject to forfeiture. Forfeiture of a vehicle or money is a disproportionate penalty under the RCC patronizing prostitution statute and may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the statute.¹⁴¹ A vehicle or money used, or intended to be used, to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) is subject to forfeiture under RCC § 22E-4404 because that statute targets “pimps” and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Seventh, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 (“current D.C. Code prostitution nuisance provisions”) and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 (“Title 42 nuisance provisions.”). The current D.C. Code prostitution nuisance provisions apply to “any building, erection,

to a violation of law. *Id.* at 562, 563. Although D.C. Code § 22-2723 has been amended since the version at issue in *Toyota Pick-Up Truck*, it retains an “innocent owner defense” and directly ties the forfeiture to a violation of the prostitution laws, making it likely that the DCCA would reach the same conclusion—that D.C. Code § 22-2723 is subject to the Excessive Fines Clause.

¹³⁷ *Toyota Pick-Up Truck*, 718 A.2d at 565.

¹³⁸ *Toyota Pick-Up Truck*, 718 A.2d at 565-66.

¹³⁹ *Toyota Pick-Up Truck*, 718 A.2d at 566. The court stated that these ratios are “comparable to the seventy-to-one figured considered grossly disproportionate” in the controlling Supreme Court case *United States v. Bajakajian*, 524 U.S. 321 (1998) and are “also consistent with excessiveness determinations in of other federal courts.” *Toyota Pick-Up Truck*, 718 A.2d at 566 (internal citations omitted).

¹⁴⁰ *Toyota Pick-Up Truck*, 718 A.2d at 566. The DCCA further noted that “the forfeiture of the pick-up truck cannot fairly be said to compensate the District for any loss associated with Esparza’s crime, one justification commonly advanced for the *in rem* action. . . . And although no findings have been made on the impact on Esparza and his family of the forfeiture of the truck, the government does not dispute Esparza’s assertions that the vehicle played a significant role in the maintenance of his livelihood. *Id.* (internal citations omitted).

¹⁴¹ The forfeiture statute has been amended since the version at issue in the 1998 *Toyota Pick-Up Truck* case, but the amendments do not address the basis for the DCCA’s ruling in that case that forfeiture of a vehicle valued at \$15,500 was grossly disproportionate when the defendant received at \$150 fine for a first conviction of solicitation for prostitution. The penalties for soliciting for prostitution have increased since the 1998 *Toyota Pick-Up Truck* case, but it is unclear whether they would be significant enough for forfeiture of a vehicle to survive a constitutional challenge. The DCCA has not interpreted the current forfeiture statute under the increased prostitution or solicitation penalties.

or place used for the purpose of lewdness, assignation, or prostitution,”¹⁴² or a nuisance that is established “in a criminal proceeding.”¹⁴³ The scope of “in a criminal proceeding” is unclear under current District law.¹⁴⁴ Violating a court order under the

¹⁴² D.C. Code § 22-2713(a) (“Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.”).

¹⁴³ D.C. Code § 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

¹⁴⁴ D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if “the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding.” A broad reading of “in a criminal proceeding” is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether “in a criminal proceeding” extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a “disorderly house” under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits “keeping a bawdy or disorderly house.” Under DCCA case law, a “bawdy house” used for prostitution is a type of “disorderly house,” but a “disorderly house” can extend beyond a “bawdy house” to encompass “activities on the premises that either disturb the public or constitute a nuisance per se.” *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a “disorderly house” that is used for “lewdness, assignation, or prostitution” as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of “lewdness, assignation, or prostitution,” and D.C. Code § 22-2717 refers to the existence of “the nuisance.” *Id.* at 971-72 (emphasis in original). The court concluded that “the” refers back to the requirements of “lewdness, assignation, or prostitution” in D.C. Code § 22-2713 and that D.C. Code § 22-2717 “concerns only those nuisances defined in” D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a “bawdy house” under D.C. Code § 22-2722 would “clearly entail the type of nuisance described in [D.C.

current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.¹⁴⁵ The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.¹⁴⁶ The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,¹⁴⁷ and again in 2010 to include firearm-related nuisances.¹⁴⁸ It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law¹⁴⁹ or legislative history on this issue. In

Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it.” *Id.* The court stated that “[b]ecause the Government failed to show that [the property] was ‘used for the purpose of lewdness, assignation, or prostitution,’ the [defendants’] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717].” *Id.* The court acknowledged that the DCCA in *Raleigh v. United States* had stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Id.* at 973 (quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for “lewdness, assignation, or prostitution,” and, furthermore, that the DCCA “did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717].” *Id.* The court stated that “we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713].” *Id.*

¹⁴⁵ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

¹⁴⁶ “Drug-Related Nuisance Abatement Act of 1998,” 1998 District of Columbia Laws 12-194 (Act 12-470).

¹⁴⁷ “Nuisance Abatement Reform Amendment Act of 2006,” 2006 District of Columbia Laws 16-81 (Act 16-267).

¹⁴⁸ “Community Impact Statement Amendment Act of 2010,” 2010 District of Columbia Laws 18-259 (Act 18-446).

¹⁴⁹ Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington, D.C.*, 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 “authorizes a special summary action in equity to abate and enjoin” a nuisance, and that D.C. Code § 42-3102 “authorizes an action to abate, enjoin, and prevent” a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”).

It should be noted that the “special summary action in equity to abate and enjoin” a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 (“In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented.”). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in

contrast, the revised patronizing prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2713 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions¹⁵⁰ do not apply to real property that is used for “lewdness” or “assignation” like the current D.C. Code prostitution nuisance provisions do.¹⁵¹ To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.¹⁵² Second, the Title 42 nuisance provisions apply to any

that sense, may be considered a special summary action. D.C. Code § 22-2714 (“Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course.”). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 (“(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.”).

¹⁵⁰ The Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C).

¹⁵¹ The current D.C. Code prostitution nuisance provisions apply to any “building, erection, or place used for the purposes of lewdness, assignation, or prostitution.” D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of “debauchery” or “other immoral” purposes, which may overlap with “lewdness” or “assignation.” However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of “prostitution.”

¹⁵² “Lewdness” and “assignation” appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that “lewdness” “has been defined by the Supreme Court as ‘that form of immorality which has relation to sexual impurity.’” *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of “assignation,” but Black’s Law Dictionary defines it as “[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex.” *Assignation*, Black’s Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

“real property”¹⁵³ “used” or “intended to be used” for prostitution,¹⁵⁴ whereas current D.C. Code § 22-2713 is limited to any “building, erection, or place used for the purpose of prostitution.”¹⁵⁵ Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a “criminal proceeding” as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months’ imprisonment as do the current D.C. Code prostitution nuisance provisions.¹⁵⁶ Fifth, while both sets of nuisance provisions provide for a preliminary injunction,¹⁵⁷ a permanent injunction and order of abatement,¹⁵⁸ and a procedure for vacating an order of

¹⁵³ The Title 42 nuisance provisions define “property” as “tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land.”

¹⁵⁴ The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

¹⁵⁵ D.C. Code § 22-2713.

¹⁵⁶ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”). A violation of a court order “issued under” the Title 42 nuisance provisions is “punishable as a contempt of court.” D.C. Code § 42-3112(a).

¹⁵⁷ D.C. Code §§ 22-2714 (“ . . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course”); 42-3104(a) (“Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .”).

¹⁵⁸ D.C. Code §§ 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”); 42-3110(a) (“If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.”).

abatement,¹⁵⁹ the procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,¹⁶⁰ as do the types of equitable relief.¹⁶¹ This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised patronizing prostitution statute makes several changes to the deferred disposition provision for prostitution or solicitation in current D.C. Code § 22-2703. Current D.C. Code § 22-2703 states that the “court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be

¹⁵⁹ D.C. Code §§ 22-2719 (“If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) (“Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.”).

¹⁶⁰ For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 (“The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111.”). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

¹⁶¹ For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all “fixtures, furniture, musical instruments, or movable property used in conducting the nuisance.” D.C. Code § 22-2717 (“an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . .”). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) (“Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.”).

suspended for such period as the court may direct.”¹⁶² The statute specifies examples of conditions that the court may impose on the defendant, such as “an order to stay away from the area within which the offense or offenses occurred.”¹⁶³ D.C. Code § 22-2703 was enacted in 1914. Despite substantive revisions to the current D.C. Code prostitution or solicitation statute (D.C. Code § 22-2701) in 2007, 2009, and 2015, D.C. Code § 22-2703 has not been substantively amended since 1996.¹⁶⁴ In contrast, the deferred disposition provision in the revised patronizing prostitution statute is consistent with the more recent D.C. Code¹⁶⁵ deferred disposition provision for possession of a controlled substance, and the RCC equivalent provision.¹⁶⁶ This revision results in several changes to law.

First, the revised deferred disposition provision no longer codifies examples of conditions that the court may impose on the defendant. This language is unnecessary because the revised provision requires “reasonable conditions”¹⁶⁷ and does not restrict the conditions the court may impose. Second, the revised provision deletes this language from D.C. Code § 22-2703: “The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant.”¹⁶⁸ The current D.C. Code deferred disposition provision for possession of a controlled substance does not have such a provision,¹⁶⁹ and the statutory grant of authority to probation officers appears unnecessary. Similarly, it is unclear whether the Department of Human Services of the District of Columbia needs such a statutory grant of authority, and the Women’s Bureau of the Police Department no longer exists. Third, the revised provision requires the consent of the defendant and limits the probation period to a

¹⁶² D.C. Code § 22-2703.

¹⁶³ D.C. Code § 22-2703.

¹⁶⁴ The second sentence of D.C. Code § 22-2703, specifying examples of conditions that the court may impose on the defendant, was added in 1996. Safe Streets Anti-Prostitution Amendment Act of 1996, 1996 District of Columbia Laws 11-130 (Act 11-237).

¹⁶⁵ D.C. Code § 48-904.01(e). This statute was enacted in 1981.

¹⁶⁶ RCC § 48-904.01a(g).

¹⁶⁷ In addition to this requirement, the current D.C. Code and RCC prostitution offenses are subject to D.C. Code § 16-710, which authorizes the court to “suspend the imposition of sentence . . . for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby,” although the period of probation, “together with any extension thereof, shall not exceed 5 years.” D.C. Code § 16-710(a), (b). The DCCA in *Simmons v. United States* recognized that both D.C. Code § 22-2703 and D.C. Code § 16-710 apply to a deferred disposition for prostitution, and that is true under the RCC as well. *Simmons v. United States* 461 A.2d 463, 464 (D.C. 1983) (“Under D. C. Code § 22-2703 (1981), the court is authorized to ‘impose conditions upon any person found guilty under § 22-2701, and ... the imposition or execution of sentence may be suspended for such period as the court may direct.’ Similarly, under D. C. Code § 16-710 (1981), the court is authorized to suspend the imposition or execution of sentence “for such time and upon such terms as it deems best, if it appears to the satisfaction of the court that the ends of justice and the best interest of the public and of the defendant would be served thereby.” Under either statute, the decision to grant or deny probation, as well as the term of probation ordered, is within the broad sentencing discretion of the trial court.”) (internal footnotes and citations omitted).

¹⁶⁸ D.C. Code § 22-2703.

¹⁶⁹ D.C. Code § 48-904.01(e).

maximum of one year, instead of “for such period as the court may direct”¹⁷⁰ in current D.C. Code § 22-2703. Fourth, the revised provision establishes that discharge or dismissal of the charge is not a conviction “for purposes of disqualifications or disabilities imposed by law,” including the imposition of recidivist penalties for prior misdemeanor convictions under RCC § 22E-606 or other similar provisions, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code¹⁷¹ and the RCC.¹⁷² Finally, the revised provision provides for the expungement of records, consistent with the deferred disposition for possession of a controlled substance in the current D.C. Code¹⁷³ and the RCC.¹⁷⁴ These changes improve the clarity, consistency, and proportionality of the revised statutes.

Ninth, the patronizing prostitution statute authorizes enhanced penalties if the accused is reckless as to the fact that the person patronized is under 18 years of age. The current D.C. prostitution or solicitation statute does not enhance penalties based on the age of the complainant.¹⁷⁵ However, the current D.C. Code pandering statute¹⁷⁶ and the current D.C. Code procuring for prostitution statute¹⁷⁷ have enhanced penalties when the trafficked person is under the age of 18 years. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. In contrast, the RCC patronizing prostitution statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the complainant is under 18 years of age. This culpable mental state requirement is consistent with other age-based penalty enhancements in the RCC, such as in the human trafficking offenses in RCC Chapter 16. This change improves the consistency and proportionality of the revised statute.

Beyond these nine substantive changes to current District law, four other aspects of the revised patronizing prostitution statute may be viewed as substantive changes of law.

First, the revised patronizing prostitution statute clarifies that payment can be given to or promised to “any person.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution”¹⁷⁸ or “solicit[ing] for prostitution”¹⁷⁹ and

¹⁷⁰ D.C. Code § 22-2703 (“The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed.”). Under the revised deferred disposition provision, the court must have the consent of the defendant to defer imposition or execution of sentence, and the period of probation is limited to one year.

¹⁷¹ D.C. Code § 48-904.01(e).

¹⁷² RCC § 48-904.01a(g).

¹⁷³ D.C. Code § 48-904.01(e).

¹⁷⁴ RCC § 48-904.01a(g).

¹⁷⁵ D.C. Code § 22-2701(b).

¹⁷⁶ D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).

¹⁷⁷ D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).

¹⁷⁸ D.C. Code § 22-2701(a).

¹⁷⁹ D.C. Code § 22-2701(a).

defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in exchange for giving . . . anything of value.”¹⁸⁰ It is unclear whether the payment must be given to the person engaging in or soliciting for sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute specifies “any person.” This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in, agreeing to, or soliciting for the sexual activity for payment or a third party, as long as the payment is “in exchange” for the sexual activity. This change improves the clarity and consistency of the revised statute and removes a possible gap in liability.

Second, a promise to give anything of value is sufficient for liability in the revised patronizing prostitution statute. The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution”¹⁸¹ or “solicit[ing] for prostitution”¹⁸² and defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in exchange for giving . . . anything of value.”¹⁸³ It is unclear whether “giving anything of value” requires that a person actually give anything of value, or if a promise to give anything of value in the future is sufficient. There is no DCCA case law on this issue. Resolving this ambiguity, the revised patronizing prostitution statute retains the language “giving . . . anything of value,” but requires an agreement to engage in sexual activity in paragraphs (a)(1) and (a)(2), and, per the explanatory note to the commentary above, it is sufficient if anything of value is promised as part of this agreement. In paragraph (a)(1), the actor must engage in sexual activity in exchange for “giving” any person anything of value pursuant to a prior agreement. In paragraph (a)(2), the actor must agree to give any person anything of value “in exchange” for sexual activity. In the revised statute the phrase “in exchange for” specifies the transactional nature of the sexual act or sexual contact and is satisfied if the actor gives anything of value to any person or if anything of value was promised to any person.¹⁸⁴ This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Third, the revised patronizing prostitution statute requires a “knowingly” culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in exchange for giving any person anything of value, or agrees to give anything of value in exchange for sexual activity. The current D.C. Code prostitution or solicitation statute does not specify any culpable mental states, and there is no DCCA case law on this issue.¹⁸⁵ Resolving this ambiguity, the revised patronizing prostitution statute requires a

¹⁸⁰ D.C. Code § 22-2701.01(3).

¹⁸¹ D.C. Code § 22-2701(a).

¹⁸² D.C. Code § 22-2701(a).

¹⁸³ D.C. Code § 22-2701.01(3).

¹⁸⁴ As is noted in the explanatory note, there is overlap between paragraph (a)(1) and paragraph (a)(2). In paragraph (a)(1), if anything of value is promised to any person as part of a prior agreement, this conduct also falls under paragraph (a)(2)—agreeing, expressly or implicitly, to give anything of value to any person in exchange for any person engaging in or submitting to sexual activity.

¹⁸⁵ Due to the statutory definition of “sexual contact” (D.C. Code § 22-3001(9)), prostitution based on a “sexual contact” requires that the prostitute have an “intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” In the context of the District’s current D.C. Code sexual abuse statutes, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor “knowingly” touched the complainant and erroneously omitted the additional intent requirement. *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming

“knowingly” culpable mental state for the prohibited conduct—engages in or solicits for sexual activity, in exchange for giving any person anything of value, or agrees to give anything of value in exchange for sexual activity. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.¹⁸⁶ This change improves the clarity and consistency of the revised statute.

Fifth, the revised patronizing prostitution statute does not require that the sexual activity be “with another person.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”¹⁸⁷ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”¹⁸⁸ The current D.C. Code¹⁸⁹ and RCC¹⁹⁰ definitions of “sexual act” and “sexual contact” include masturbation. However, the current statute’s “with another person” requirement may narrow the offense to exclude a patron engaging in or soliciting to engage in masturbation because masturbation is not “with another person.” Alternatively, the current prostitution or solicitation offense could be interpreted to include a patron engaging in or soliciting to engage in masturbation “with another person,” if the latter phrase is construed to mean “for another person to watch.” To resolve this ambiguity, the revised statute does not require that the sexual activity be “with another person.” Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statute.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

First, the revised patronizing prostitution statute makes “agrees” to give anything of value in exchange for sexual activity a discrete basis of liability in paragraph (a)(2), separate from soliciting for prostitution in paragraph (a)(3). The current D.C. Code prostitution or solicitation statute prohibits “solicit[ing] for prostitution”¹⁹¹ and the

appellant’s conviction for second degree child sexual abuse when the jury instructions required that the appellant “knowingly” touched the complainant and omitted the “intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person” requirement because “no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court’s jury instruction . . . without also finding the requisite intent.”)

¹⁸⁶ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

¹⁸⁷ D.C. Code § 22-2701(a).

¹⁸⁸ D.C. Code § 22-2701.01(3).

¹⁸⁹ D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of “sexual act” in D.C. Code § 22-3001(8) and the definition of “sexual contact” in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.”); 22-3001(9) (defining “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

¹⁹⁰ RCC § 22E-701.

¹⁹¹ D.C. Code § 22-2701(a).

current D.C. Code definition of “solicit for prostitution” is, in relevant part, “to invite, entice, offer, persuade, or agree to engage in prostitution.”¹⁹² Paragraph (a)(3) of the revised statute encompasses liability for “invite,” “entice,” “offer,” or “persuade” to engage in prostitution using language consistent with the general RCC solicitation statute (RCC § 22E-302). Paragraph (a)(2) separately and clearly addresses an agreement to engage in prostitution. This change clarifies the revised statute.

Second, the revised patronizing prostitution statute specifies that an agreement can be either express or implicit. The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”¹⁹³ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”¹⁹⁴ The language “in return for” implies the requirement of an agreement, either express or implicit, but there is no DCCA case law interpreting this requirement. An older version of the statute made it unlawful to “invite, entice, persuade, or to address for the purpose of inviting, enticing, or persuading”¹⁹⁵ for the purpose of prostitution and DCCA case law interpreting this older statute appears to have extended to both an express or implicit agreement.¹⁹⁶ More recent case law has also looked beyond spoken words to the surrounding circumstances to assess whether there is an agreement to prostitution.¹⁹⁷ This change improves the clarity of the revised statute.

Third, the revised patronizing prostitution statute uses “in exchange” for anything of value instead of “in return” for anything of value. The current D.C. Code definition of “prostitution” is a “sexual act or contact with another person in return for giving or receiving anything of value.”¹⁹⁸ “In exchange” emphasizes the transactional nature of the sexual act or sexual contact, regardless of when the sexual activity occurs, and is not intended to substantively change current District law.

Fourth, the revised patronizing prostitution statute includes an actor who “engages in or submits to” sexual activity (paragraph (a)(1)), agrees to give anything of value in exchange for a person “engaging in or submitting to” sexual activity, (paragraph (a)(2)), and solicits any person to “engage in or submit to” sexual activity (paragraph (a)(3)). The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution or . . . solicit[ing] for prostitution”¹⁹⁹ and defines “prostitution” as a “sexual act or contact with another person in return for giving or receiving anything of value.”²⁰⁰

¹⁹² D.C. Code § 22-2701.01(7).

¹⁹³ D.C. Code § 22-2701(a).

¹⁹⁴ D.C. Code § 22-2701.01(3).

¹⁹⁵ D.C. Code § 22-2701 (1973).

¹⁹⁶ *See, e.g., Dinkins v. United States*, 374 A.2d 292, 296 (D.C. 1977) (“In the final analysis, it is a question of fact whether the acts and words of the defendant in general, viewed in the light of surrounding circumstances, constitute the enticing or addressing prohibited by the statute. Were specific language or conduct determinative, as urged by appellant, every prostitute could know how to avoid arrest.”) (internal citations omitted).

¹⁹⁷ In 2013, the DCCA affirmed a conviction for soliciting for prostitution under D.C. Code § 22-2701 when the current definition of “solicitation” was in effect and stated that “we do not require the government to prove any particular language” and “we look to appellant’s conduct or words in light of surrounding circumstances.” *Moten v. United States*, 81 A.3d 1274, 1280, 1281 (D.C. 2013) (internal citations omitted).

¹⁹⁸ D.C. Code § 22-2701.01(3).

¹⁹⁹ D.C. Code § 22-2701(a).

²⁰⁰ D.C. Code § 22-2701.01(3).

The revised language is consistent with the revised sex offenses in RCC Chapter 13 and is not intended to substantively change current District law.

Fifth, the revised patronizing prostitution statute clarifies that an individual that engages in or submits to sexual activity in exchange for giving anything of value must do so “pursuant to a prior agreement, express or implicit.” The current D.C. Code prostitution or solicitation statute prohibits “engag[ing] in prostitution,”²⁰¹ and defines “prostitution,” in relevant part, as “a sexual act or sexual contact with another person in return for giving . . . anything of value.”²⁰² The language “in return for” implies that there was a prior agreement, but there is no DCCA case law interpreting this language. The revised patronizing prostitution statute includes giving anything of value in exchange for past sexual activity only if it is “pursuant to a prior agreement, express or implicit.” Without requiring a prior agreement, giving anything of value in exchange for sexual activity could criminalize consensual romantic conduct with subsequent gifts. This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the revised patronizing prostitution statute is no longer subject to the definition of “anything of value” in D.C. Code § 22-1802 that applies to the current D.C. Code prostitution or solicitation statute. Current D.C. Code § 22-1802 states that “anything of value” “shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value.”²⁰³ This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within “anything of value” in the revised offense is not intended to change current District law.

²⁰¹ D.C. Code § 22-2701(a).

²⁰² D.C. Code § 22-2701.01(3).

²⁰³ D.C. Code § 22-1802.

RCC § 22E-4403. Trafficking in Commercial Sex.

- (a) *Offense.* An actor commits trafficking in commercial sex when that actor:
- (1) With intent to receive anything of value as a result, purposely:
 - (A) Causes, procures, provides, recruits, or entices a person to engage in or submit to a commercial sex act with or for another person; or
 - (B) Provides or maintains a location for a person to engage in or submit to a commercial sex act with or for another person;
 - (2) Knowingly receives anything of value as a result of:
 - (A) Causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a commercial sex act with or for another person; or
 - (B) Providing or maintaining a location for a person to engage in or submit to a commercial sex act with or for another person; or
 - (3) Obtains anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act, either without consideration or when the consideration is providing or maintaining a location for a commercial sex act.
- (b) *Penalties.*
- (1) Trafficking in commercial sex is a Class [X] crime, subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) *Enhanced penalties.* In addition to the general penalty enhancements under this title, the penalty classification of this offense is increased by one class when the actor is reckless as to the fact that the person trafficked is under 18 years of age.
- (c) *Definitions.* The terms “knowingly,” “purposely,” “intent,” and “reckless” have the meanings specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-701; and the terms “actor” and “commercial sex act” have the meanings specified in RCC § 22E-701.

Commentary

Explanatory Note. The RCC trafficking in commercial sex statute prohibits causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a commercial sex act or providing a location for this purpose, as well as obtaining anything of value from the earnings of an individual that has engaged in or submitted to a commercial sex act. The offense provides enhanced penalties based on the age of the person trafficked. The RCC trafficking in commercial sex statute replaces the operating a house of prostitution statute,²⁰⁴ portions of the keeping a disorderly or bawdy house statute,²⁰⁵ portions of the pandering statute,²⁰⁶ the procuring for prostitution statute,²⁰⁷

²⁰⁴ D.C. Code § 22-2712.

²⁰⁵ D.C. Code § 22-2722.

²⁰⁶ D.C. Code § 22-2705(a)(1), (a)(2),

²⁰⁷ D.C. Code § 22-2707.

the procuring for a house of prostitution statute,²⁰⁸ and the procuring for a third person statute.²⁰⁹

Subsection (a) specifies the prohibited conduct for the RCC trafficking in commercial sex statute. Paragraph (a)(1) specifies one basis of liability for the offense. Per paragraph (a)(1), the actor must act with “intent to receive anything of value as a result.” “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the actor would receive anything of value as a result. Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the actor’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the actor actually received anything of value as a result, just that the actor believed to a practical certainty that the actor would receive anything of value as a result.

Under subparagraph (a)(1)(A) and subparagraph (a)(1)(B), the actor must either cause, procure, provide, recruit, or entice a person to engage in or submit to a “commercial sex act” with or for another person, or provide or maintain a location for a person to engage in or submit to a “commercial sex act” with or for another person. “Commercial sex act” is defined in RCC § 22E-701 as “any sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” The requirement “with or for another person” may be satisfied if the actor causes the complainant to engage in a commercial sex act with a third party, or if the actor causes the complainant to engage in masturbatory conduct.²¹⁰ An actor who causes, procures, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or provides or maintains a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC patronizing prostitution statute (RCC § 22E-4402).²¹¹

Paragraph (a)(1) also specifies a culpable mental state of “purposely.” Per the rule of construction in RCC § 22E-207, the “purposely” culpable mental state in paragraph (a)(1) applies to the elements in subparagraph (a)(1)(A) and subparagraph (a)(1)(B). “Purposely” is a defined term in RCC § 22E-206 that here means the actor must “consciously desire” that the actor causes, procures, etc., a person to engage in or submit to a commercial sex act with or for another person, or provides or maintains a location for a person to engage in or submit to a commercial sex act with or for another person.

Paragraph (a)(2) specifies a second basis of liability for the offense. For this basis of liability, the actor must receive anything of value as a result of causing, procuring, providing, recruiting, or enticing a person to engage in or submit to a “commercial sex act” with or for another person (subparagraph (a)(2)(A)), or providing or maintaining a location for a person to engage in or submit to a “commercial sex act” with or for another

²⁰⁸ D.C. Code § 22-2710.

²⁰⁹ D.C. Code § 22-2711.

²¹⁰ Masturbation is not explicitly included in the definition of “commercial sex act.” However, the term “commercial sex act” is defined to include any “sexual act” or “sexual contact” performed in exchange for anything of value. To the extent that conduct commonly understood as masturbation meets the definition of “sexual act” or “sexual contact,” if it performed in exchange for anything of value, it constitutes a “commercial sex act.”

²¹¹ If the commercial sex act is not consensual, or if the person whom the actor solicits or patronizes is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

person (subparagraph (a)(2)(B)). “Commercial sex act” is defined in RCC § 22E-701 as “any sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” Paragraph (a)(2) specifies a culpable mental state of “knowingly.” Per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(2), subparagraph (a)(2)(A), and subparagraph (a)(2)(B). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person, or providing or maintaining a location for a person to engage in or submit to a commercial sex act with or for another person. An actor who receives anything of value as a result of causing, procuring, etc., a person to engage in or submit to a consensual commercial sex act with the actor, or providing or maintaining a location for a person to engage in or submit to a consensual commercial sex act with the actor, may be subject to liability under the RCC prostitution statute (RCC § 22E-4401).²¹²

Paragraph (a)(3) specifies the final possible basis of liability for the offense. The actor must receive anything of value from the proceedings or earnings of a person who has engaged in or submitted to a “commercial sex act” without consideration or when the consideration is providing or maintaining a location for a “commercial sex act.” “Commercial sex act” is defined in RCC § 22E-701 as “any sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” Per the rule of construction in RCC § 22E-207, the “knowingly” culpable mental state in paragraph (a)(2) applies to the elements in paragraph (a)(3). “Knowingly” is a defined term in RCC § 22E-206 that here means the actor must be “practically certain” that the actor receives anything of value from the proceedings or earnings of a person who has engaged in or submitted to a “commercial sex act” without consideration or when the consideration is providing or maintaining a location for a “commercial sex act.” Unlike the other bases of liability, paragraph (a)(3) does not require that the “commercial sex act” be “with or for another person.” An actor that engages in a “commercial sex act” with a person, and then receives anything of value from any earnings of that person, has liability under paragraph (a)(3) if the other requirements of the provision are met. Similarly, if the only consideration is providing or maintaining a location for a “commercial sex act” with the actor, the actor has liability under paragraph (a)(3) if the other requirements of the provision are met.

Paragraph (b)(1) specifies relevant penalties for the offense. [See Third Draft of Report #41.]

Paragraph (b)(2) codifies a penalty enhancement for the trafficking in commercial sex statute and specifies that the penalty enhancement is in addition to the general penalty enhancements under title 22E. If the penalty enhancement in paragraph (b)(2) is proven, the penalty classification for the offense is increased by one class. The penalty enhancement requires that the actor is reckless as to the fact that the person trafficked is under 18 years of age. “Reckless” is a defined term in RCC § 22E-206 that here means

²¹² If the commercial sex act is not consensual, or if the person whom the actor solicits or with whom the actor engages in sexual activity is under the age of 18 years, there may be liability under the RCC sex assault offenses in Chapter 13.

that the actor is aware of a substantial risk that the person trafficked is under 18 years of age.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised trafficking in commercial sex statute changes current District law in eleven main ways.*

First, the RCC trafficking in commercial sex statute no longer prohibits abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage. Several of the current D.C. Code prostitution statutes prohibit abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, with maximum penalties that range from five years to 20 years.²¹³ In addition to these statutes, current

²¹³ D.C. Code § 22-2704 prohibits abducting, secreting, or harboring a person under the age of 18 years for purposes of prostitution and has a maximum penalty of 20 years. D.C. Code § 22-2704 (“(a) It is unlawful for any person, for purposes of prostitution, to: (1) Persuade, entice, or forcibly abduct a child under 18 years of age from his or her home or usual abode, or from the custody and control of the child’s parents or guardian; or (2) Secrete or harbor any child so persuaded, enticed, or abducted from his or her home or usual abode, or from the custody and control of the child’s parents or guardian. (b) A person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both.”).

D.C. Code § 22-2705(a)(3) prohibits taking or detaining an individual to force them to marry another person, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(a)(3), (c)(1), (c)(2) (“(a) It is unlawful for any person, within the District of Columbia to: (3) Take or detain an individual against the individual’s will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.

D.C. Code § 22-2705(b) prohibits a parent, guardian, or other legal custodian from consenting to an individual being taken or detained for purposes of prostitution or sexual activity, with a maximum penalty of 5 years, unless the individual is under the age of 18 years, in which case the maximum penalty is 20 years. D.C. Code §§ 22-2705(b), (c)(1), (c)(2) (“(b) It is unlawful for any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual’s being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact. . . . (c)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) or (b) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years, or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) or (b) of this section when the individual so placed, caused, compelled, induced, enticed, procured, taken, detained, or used or attempted to be so placed, caused, compelled, induced, enticed, procured, taken, detained, or used is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.”).

D.C. Code § 22-2706 prohibits, by threats or duress, detaining an individual or compelling an individual to reside with any person for the purposes of prostitution or sexual activity and has a maximum penalty of 15 years, unless the complainant is under the age of 18, in which case the maximum penalty is 20 years. D.C. Code § 22-2706 (“(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to

D.C. Code § 22-2708 prohibits “plac[ing] or leav[ing]” a spouse or domestic partner “in a house of prostitution, or to lead a life of prostitution” by “force, fraud, intimidation, or threats.”²¹⁴ These statutes overlap with the current D.C. Code kidnapping statute (RCC § 22-2001), which has a higher maximum penalty (30 years),²¹⁵ as well as other current D.C. Code statutes, such as human trafficking. In contrast, the RCC kidnapping (RCC § 22E-1401) and RCC criminal restraint (RCC § 22E-1402) statutes criminalize abducting or detaining an individual for the purposes of prostitution, sexual activity, or marriage, as well as placing or leaving a spouse or domestic partner “in a house of prostitution, or to lead a life of prostitution” by “force, fraud, intimidation, or threats.” There may also be liability under the RCC human trafficking statutes in RCC Chapter 16 or other RCC offenses against persons, such as sexual assault. There is no reason why forcing a person into prostitution should be penalized differently or less severely than other forms of sexual assault, kidnapping, criminal coercion, and human trafficking. This change reduces unnecessary overlap between offenses and improves the clarity, consistency, and proportionality of the revised statute.

Second, the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts that are not caused by the prohibited means in the RCC human trafficking statutes, such as physical force or a coercive threat. Two of the current D.C. Code prostitution statutes require the use of force, threats, etc.,²¹⁶ but most of the current

detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact. (b)(1) Except as provided in paragraph (2) of this subsection, a person who violates subsection (a) of this section shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 15 years or by a fine of not more than the amount set forth in § 22-3571.01, or both. (2) A person who violates subsection (a) of the section when the individual so detained or compelled is under the age of 18 years shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 20 years or by a fine of not more than the amount set forth in § 22-3571.01, or both.”).

D.C. Code § 22-2709 prohibits attempting to detain an individual in a disorderly house or house of prostitution because of debt accrued while living in that house and has a five year maximum penalty. D.C. Code § 22-2709 (“Any person or persons who attempt to detain any individual in a disorderly house or house of prostitution because of any debt or debts such individual has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than one year nor more than 5 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.”). This statute will also overlap with attempted kidnapping and attempted criminal restraint under the RCC general attempt provision (RCC § 22E-301).

²¹⁴ D.C. Code § 22-2708 (“Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.”).

²¹⁵ D.C. Code § 22-2001.

²¹⁶ D.C. Code § 22-2706 (“(a) It is unlawful for any person, within the District of Columbia, by threats or duress, to detain any individual against such individual's will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual's will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.”); 22-2708 (“Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than one

D.C. Code prostitution statutes do not specify whether force, threats, etc., are required. As a result, most of the current D.C. Code prostitution statutes appear to extend liability equally to both coerced and consensual commercial sexual conduct, particularly the statutes that require “causing”²¹⁷ or “compelling”²¹⁸ an individual to engage in prostitution. There is no DCCA case law discussing the scope of “causing” or “compelling” in these statutes. However, under earlier versions of the D.C. Code pandering²¹⁹ and procuring for prostitution²²⁰ statutes, the DCCA upheld the trial court admitting evidence of the appellant’s assault on a prostitute because the “evidence was relevant to the issue of appellant’s intent to coerce complainant to engage in prostitution.”²²¹ To the extent that the current D.C. Code prostitution statutes extend to forced or coerced commercial sexual conduct, they overlap with the current D.C. Code human trafficking statutes, which generally have significantly higher maximum penalties for the same conduct.²²² In contrast, the RCC trafficking in commercial sex statute is limited to consensual commercial sex acts, with lower maximum penalties, and the RCC human trafficking statutes in Chapter 16 require forced or coerced commercial sex acts, and have higher maximum penalties. The seriousness of forced or coerced commercial sex acts is far greater than consensual acts. This change improves the clarity and the proportionality of the revised assault statute.

year nor more than 10 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.”).

²¹⁷ D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, “[c]ause . . . any individual” to “engage in prostitution.”); 22-2707(a) (procuring statute prohibiting, in part, receiving anything of value “for or on account of . . . causing any individual to engage in prostitution or a sexual act or contact.”).

²¹⁸ D.C. Code §§ 22-2705(a)(2)(C) (pandering statute prohibiting, in part, “[c]ause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual” to “engage in prostitution.”).

²¹⁹ D.C. Code § 22-2705.

²²⁰ D.C. Code § 22-2707.

²²¹ *Godfrey v. United States*, 454 A.2d, 293, 295, 295 & n. 1 (D.C. 1982).

²²² The relevant D.C. Code human trafficking statutes have a maximum term of imprisonment of 20 years. *See* D.C. Code §§ 22-1833; 22-1834; 22-1837(a)(1), (c) (statutes prohibiting trafficking in labor or commercial sex acts and sex trafficking of children with maximum terms of imprisonment of 20 years, and statute prohibiting benefitting financially from human trafficking with the same maximum penalty as the underlying trafficking offense, which, in the case of trafficking in commercial sex acts and sex trafficking of children, is 20 years).

In contrast, the current D.C. Code prostitution statutes that prohibit causing individuals to engage in prostitution and procuring individuals for prostitution, have a maximum penalty of five years unless the complainant is under the age of 18 years, in which case the maximum penalty is 20 years. *See* D.C. Code §§ 22-2705(a)(2)(C), (c)(1), (c)(2) (pandering statute prohibiting causing, compelling, inducing, enticing, or procuring any individual to engage in prostitution with a maximum term of imprisonment of 5 years unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2707 (procuring statute prohibiting receiving anything of value for arranging for or causing an individual to engage in prostitution with a maximum term of imprisonment of five years, unless the complainant is under the age of 18 years, in which case the maximum term of imprisonment is 20 years); 22-2710 (procuring statute prohibiting paying or receiving anything of value for procuring for or placing an individual in a house of prostitution with a maximum term of imprisonment of five years); 22-2711 (procuring statute prohibiting receiving anything of value for procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum term of imprisonment of five years); 22-2712 (statute prohibiting operating a house of prostitution with a maximum term of imprisonment of five years); 22-2722 (statute prohibiting keeping a bawdy house or disorderly house with a maximum term of imprisonment of five years).

Third, the RCC trafficking in commercial sex statute requires a “purposely” culpable mental state for the prohibited conduct in subparagraph (a)(1)(A) and that the conduct be “with intent to receive anything of value as a result.” The current D.C. Code pandering statute prohibits, in part, conduct to “[c]ause, compel, induce, entice, or procure” any individual “to engage in prostitution.”²²³ There is no requirement that the defendant receive anything of value as a result. The statute does not specify any culpable mental states and there is no District case law on this issue. However, in the context of denying a claim for merger of a pandering conviction and a procuring conviction, the DCCA has stated that “[t]o convict appellant of pandering, the government had to prove that he induced or coerced complainant to engage in prostitution, not merely that he facilitated or arranged for an act that she, herself, elected to do.”²²⁴ In contrast, the RCC trafficking in commercial sex statute requires a “purposely” culpable mental state for the pandering conduct under paragraph subparagraph (a)(1)(A)—cause, procure, provide, recruit, or entice a person to engage in or submit to a commercial sex act—and that the defendant act “with intent to receive anything of value as a result.” In the RCC statute, the “purposely” culpable mental state excludes many well-intentioned individuals who might otherwise be captured by a lower culpable mental state.²²⁵ In addition, the RCC trafficking in commercial sex offense requires that an individual must have “intent to receive anything of value as a result”—i.e., the individual must be practically certain that he or she will receive anything of value as a result of his or her actions. This requirement limits the RCC offense to traditional “pimping” behavior and would also excluded well-intentioned individuals that facilitate but do not desire to profit from the consensual commercial sex work of another. If an individual actually receives anything of value as a result of causing, procuring, etc., an individual to engage in a commercial sex act, that would satisfy the “with intent” requirement. This change is consistent with DCCA case law and improves the clarity, consistency, and proportionality of the revised statute.

Fourth, the RCC trafficking in commercial sex statute punishes an attempted offense the same as most other criminal attempts. The current D.C. Code pandering statute includes an “attempt” to cause any individual to engage in prostitution,²²⁶ and the current D.C. Code procuring for prostitution statute includes “any act . . . to attempt to

²²³ D.C. Code § 22-2705(a)(2)(C).

²²⁴ *Godfrey v. United States*, 454 A.2d 295 n.1 (D.C. 1982). Although *Godfrey* was decided in 1982, D.C. Code § 22-2705 has not been substantively amended since.

²²⁵ The RCC generally uses a lower culpable mental state of knowledge for prohibited conduct, which here would require that the defendant be “practically certain” that he or she causes, procures, etc., an individual to engage in or submit to a commercial sex act. However, a knowledge culpable mental state, particularly without any additional requirement that the defendant receive or intend to receive anything of value as a result, would criminalize well-intentioned individuals such as friends, family, other individuals engaged in commercial sex work, and medical professionals, that facilitate consensual commercial sex work that a person chooses to do. For example, a friend or family member that drives an individual to a location for commercial sex work that the individual wants to do or needs to do for financial reasons is arguably “knowingly” causing that individual to engage in commercial sex work. The friend or family member is “practically certain,” as required by the definition of “knowingly” in RCC § 22E-206, that his or her conduct is causing that individual to engage in commercial sex work.

²²⁶ D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting “Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . to engage in prostitution.”).

procure or otherwise arrange for the purpose of prostitution.”²²⁷ There is no District case law construing this “attempt” language. The current D.C. Code pandering and procuring for prostitution statutes penalize an attempted offense the same as a completed offense. In contrast, under the RCC trafficking in commercial sex statute, the general attempt provision in RCC § 22E-301 will establish liability and penalties for attempted trafficking in commercial sex consistent with other RCC offenses. Under RCC § 22E-301, the penalty for an attempted offense is one-half the maximum penalty of the completed offense, consistent with several of the more recently revised D.C. Code offenses.²²⁸ There is no clear rationale for attempts to be treated differently in trafficking in commercial sex as compared to other offenses, or for penalizing attempted trafficking in commercial sex the same as the completed offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability a parent or guardian of an individual consenting to that individual being used in prostitution. The current D.C. Code pandering statute prohibits, in part, “any parent, guardian, or other person having legal custody of the person of an individual [consenting] to the individual's being . . . used by any person, for the purpose of prostitution or a sexual act or sexual contact.”²²⁹ The current D.C. Code pandering statute has a maximum penalty of five years unless the complainant is under the age of 18 years, in which case the maximum penalty is 20 years.²³⁰ In contrast, the RCC arranging for sexual conduct with a minor statute (RCC § 22E-1306) criminalizes a person with a responsibility under civil law for the health, welfare, or supervision of a complainant that is under the age of 18 years giving effective consent for that complainant to engage in or submit to a sexual act or sexual contact. If the sexual act or sexual contact occurs, there also may be liability under the RCC sexual assault offenses in Chapter 13 or RCC human trafficking statutes in Chapter 16. This change reduces unnecessary overlap and improves the clarity, consistency, and proportionality of the revised prostitution statutes.

Sixth, to the extent that keeping a “disorderly house” does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC.²³¹ Current D.C. Code § 22-2722 prohibits “keeping a bawdy or disorderly house” with a five year maximum penalty.²³² The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common

²²⁷ This language appears in the current D.C. Code definition of “arranging for prostitution.” D.C. Code § 22-2701.01(1) (defining “arranging for prostitution” as “any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received.”). The definition is incorporated into the current D.C. Code procuring for prostitution statute, which prohibits receiving anything of value “for or on account of arranging for . . . any individual to engage in prostitution.”). D.C. Code § 22-2707.

²²⁸ See, e.g., D.C. Code § 22-3018, Attempts to commit sexual offenses.

²²⁹ D.C. Code § 22-2705(b).

²³⁰ D.C. Code § 22-2705(c)(1), (c)(2).

²³¹ But see RCC § 48-904.12 prohibits knowingly maintaining or opening any location with the intent that the location will be used to manufacture methamphetamine. While it seems likely that such a location would be considered a “disorderly house” under current District law, there is no DCCA case law on point.

²³² D.C. Code § 22-2722 (“Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.”).

law definition of a “disorderly house”²³³ and establishes that keeping a “disorderly house” requires that “acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them.”²³⁴ A “bawdy house” for prostitution is a type of “disorderly house,” but a “disorderly house” can extend to other conduct.²³⁵ In contrast, the RCC trafficking in commercial sex statute, and the RCC generally, do not specifically criminalize keeping a “disorderly house.” If an individual commits a crime at or in relation to the property, such as a drug-related or prostitution-related crime, that individual will have liability for that offense. If an individual does not commit a crime at or in relation to the property, but merely “knows or should know” of the activity at the property, it is disproportionate to impose criminal liability. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 et. seq. address the harm of such a property, and are discussed elsewhere in this commentary. Where, however, a person purposely maintains a “disorderly house” to facilitate trafficking in commercial sex, there may be liability as a principal or accomplice to RCC trafficking in commercial sex statute to the extent the statutory requirements are met. This change improves the clarity, consistency, and proportionality of the revised statutes.

Seventh, to the extent that keeping a “bawdy house” does not otherwise satisfy the RCC trafficking in commercial sex statute (including accomplice liability for trafficking in commercial sex), this conduct is no longer criminalized in the RCC. Current D.C.

²³³ See, e.g., *Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) (“Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.”).

²³⁴ *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1974). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be “subversive of the public morals,” but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 (“We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals.”). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this “departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se.” *Harris*, 315 A.2d at 573.

²³⁵ The majority of District case law on disorderly houses is limited to prostitution, but the United States District Court for the District of Columbia noted that a “crack house” would likely be a nuisance per se and would be a disorderly house, even if it did not disturb the public peace. *United States v. Wade*, 992 F. Supp. 6, 15 & n.5 (D.D.C. 1997) (ordered vacated on other grounds by *United States v. Wade*, 152 F.3d 969 (D.C. Cir. 1998) (“A reasonable argument could be made that a crack house fits under this definition [nuisance per se]; the inherent potential for breaches of the peace when a crack house is present is beyond question. However, this court does not at this time conclude that § 22-2722 is applicable whenever police seize a crack house, and therefore limits its reach to situations in which the government has proven that there exists an actual, demonstrative public disturbance.”). The United States District Court for the District of Columbia’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. See, e.g., *Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”).

The District case law on a “disorderly house” is fairly limited in scope, but the United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

Code § 22-2722 prohibits “keeping a bawdy or disorderly house” with a five year maximum penalty.²³⁶ The statute does not codify the elements of the offense; they are established entirely by District case law. DCCA case law refers to the common law definition of a “disorderly house”²³⁷ and establishes that keeping a “disorderly house” requires that “acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them.”²³⁸ The DCCA has stated that “the government does not have to prove ownership or legal control of the premises”²³⁹ and that it is sufficient that the defendant “in fact controlled or managed the premises.”²⁴⁰ A “bawdy house” is a type of “disorderly house,” but DCCA case law does not clearly state the elements of a “bawdy house” specifically. In dicta, the DCCA referred to a “bawdy house” as “a place for the convenience of people of both sexes in resorting to lewdness.”²⁴¹

In contrast, keeping or maintaining a “bawdy house,” alone, is not sufficient for liability under the RCC trafficking in commercial sex statute. Keeping or maintaining a “bawdy house” must otherwise satisfy the requirements of the RCC offense. Three provisions in particular apply to keeping or maintaining a “bawdy house,” although the other provisions of the RCC offense may also apply: 1) purposely providing or maintaining a location for a commercial sex act with or for another person with intent to receive anything of value as a result (subparagraph (a)(1)(B)); 2) knowingly receiving anything of value as a result of providing or maintaining a location for a commercial sex act with or for another person; (subparagraph (a)(2)(B)); or 3) receiving anything of value from the proceeds or earnings of a person who has engaged in or submitted to a commercial sex act and providing or maintaining a location for a commercial sex act as the only consideration (paragraph (a)(3)). Unlike current law, a person that merely “knows or should know” that prostitution occurs at the property and does nothing to prevent it is not criminally liable. It is disproportionate to impose criminal liability in such a situation. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101

²³⁶ D.C. Code § 22-2722 (“Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 5 years, or both.”).

²³⁷ See, e.g., *Harris v. United States*, 315 A.2d 569, 572 (D.C. 1974) (“Since Congress in enacting our disorderly house statute made no attempt to define what conduct it was seeking to proscribe we necessarily must resort to the common-law definition of the crime.”).

²³⁸ *Harris v. United States*, 315 A.2d 569, 575 (D.C. 1974). Earlier DCCA case law (*Payne v. United States*, 171 A.2d 509, 511 (D.C. 1961)) required that the acts be “subversive of the public morals,” but *Harris* specifically overruled this requirement. *Harris*, 315 A.2d at 573 (“We conclude . . . that subversion of the public morals is not an element of [keeping a disorderly house]. . . . *Payne* was incorrect in requiring proof by the government that the defendant subverted public morals.”). *Payne* had upheld a disorderly house conviction when the defendant regularly purchased stolen property at her home and the court in *Harris* noted that this “departed from the mainstream of the common law that for a disorderly house to exist there must be a public disturbance or a nuisance per se.” *Harris*, 315 A.2d at 573.

²³⁹ *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

²⁴⁰ *Thomas v. United States*, 588 A.2d 272, 275 (D.C. 1991).

²⁴¹ *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972) (“A bawdy house has been defined as a place for the convenience of people of both sexes in resorting to lewdness. It is a place many people may frequent for immoral purposes or a house where one may go for immoral purposes without invitation.”) (citing *Trent v. Commonwealth*, 181 Va. 338 (1943)).

address the harm of such a property, and are discussed elsewhere in this commentary. Although the scope of the RCC offense may be narrower than the current D.C. Code “bawdy house” offense, it is also broader in the sense that a single commercial sex act, or no commercial sex act, can be sufficient for liability, as opposed to the requirement of “regularly” sexual activity occurring under current law. This change improves the clarity, consistency, and proportionality of the revised statutes.

Eighth, the revised trafficking in commercial sex statute authorizes enhanced penalties if the accused is reckless as to the fact that the complainant is under 18 years of age. The current D.C. Code pandering statute²⁴² and the current D.C. Code procuring for prostitution statute²⁴³ have enhanced penalties when the trafficked person is under the age of 18 years, but the current D.C. Code procuring for a house of prostitution,²⁴⁴ procuring for a third person,²⁴⁵ operating a house of prostitution,²⁴⁶ and keeping a “bawdy house”²⁴⁷ statutes do not. In the pandering and procuring statutes that do have an enhanced penalty, the penalty quadruples, increasing from a five year maximum penalty to a 20 year maximum penalty. The penalty enhancements do not specify any culpable mental states for the age of the complainant and there is no DCCA case law on this issue. It is unclear whether a reasonable mistake of fact as to the complainant’s age would be a defense. In contrast, the RCC trafficking in commercial sex statute authorizes a penalty increase of one class, consistent with other enhanced penalties in the RCC, if the accused is reckless as to the fact that the complainant is under 18 years of age. This culpable mental state requirement is consistent with other age-based penalty enhancements in the RCC, such as in the human trafficking offenses in RCC Chapter 16. Imposing additional liability in circumstances in which a person was not subjectively aware of a risk that the complainant is underage or even had a reasonable belief that the complainant was 18 years or over has no deterrence effect and would punish less culpable conduct the same as those who recklessly, knowingly, or purposely engage in trafficking of underage complainants. This change improves the consistency and proportionality of the revised statutes.

Ninth, through the RCC definition of “commercial sex act,” the RCC trafficking in commercial sex statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. The current D.C. Code definition of “prostitution”²⁴⁸ uses

²⁴² D.C. Code § 22-2705(c)(1), (c)(2) (pandering statute authorizing a maximum penalty of five years imprisonment, unless the person trafficked is under the age of 18 years, in which case the maximum penalty is 20 years).

²⁴³ D.C. Code § 22-2707(b)(1), (c)(2) (procuring statute prohibiting receiving anything of value for or on account of arranging for prostitution and authorizing a maximum penalty of five years imprisonment, unless the person procured is under the age of 18 years, in which case the maximum penalty is 20 years).

²⁴⁴ D.C. Code § 22-2710 (procuring statute prohibiting paying or receiving anything of value for or an account of procuring an individual for or placing an individual in a house of prostitution, with a maximum penalty of five years).

²⁴⁵ D.C. Code § 22-2711 (procuring statute prohibiting procuring and placing an individual in the custody of a third person for purposes of prostitution with a maximum penalty of five years).

²⁴⁶ D.C. Code § 22-2712 (statute prohibiting operating a house of prostitution with a five year maximum penalty).

²⁴⁷ D.C. Code § 22-2722 (statute prohibiting keeping or maintaining a “bawdy house” with a maximum penalty of five years).

²⁴⁸ D.C. Code § 22-2701.01(3) (defining “prostitution” as “a sexual act or contact with another person in return for giving or receiving anything of value.”). Several of the current D.C. Code prostitution statutes that the RCC trafficking in commercial sex statute replaces use the term “prostitution.” *See* D.C. Code §§ 22-2705; 22-2707; 22-2710; 22-2711; 22-2712.

the terms “sexual act” and “sexual contact” as those terms are currently defined in D.C. Code § 22-3001²⁴⁹ for the current D.C. Code sexual abuse statutes. In contrast, through the RCC definition of “commercial sex act,” the RCC trafficking in commercial sex statute uses the revised definitions of “sexual act” and “sexual contact” in RCC § 22E-701. As the commentary to RCC § 22E-701 explains, the revised definitions of “sexual act” and “sexual contact” differ in multiple ways as compared to current law. As a result, the scope of the trafficking in commercial sex statute will differ as compared to the current D.C. Code pandering,²⁵⁰ procuring,²⁵¹ and house of prostitution²⁵² statutes. For example, the current D.C. Code definitions of “sexual act” and “sexual contact” extend to conduct done with “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,” but the RCC definitions are limited to conduct that is sexual in nature—with the desire to sexually “abuse, humiliate, harass, degrade, arouse, or gratify” any person. This change improves the clarity, consistency, and proportionality of the revised statutes.

Tenth, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Current D.C. Code §§ 22-2724²⁵³

²⁴⁹ D.C. Code §§ 22-2701.01(5), (6) (stating the terms “sexual act” and “sexual contact” in the prostitution and solicitation statute have the same meaning as in D.C. Code § 22-3001); 22-3001(8), (9) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph” and “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

²⁵⁰ D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to “engage in prostitution.”).

²⁵¹ D.C. Code §§ 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”); 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution”).

²⁵² D.C. Code § 22-2712 (“Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.”).

²⁵³ D.C. Code § 22-2725 establishes the Anti-Prostitution Vehicle Impoundment Proceeds Fund, which “shall be used solely to fund expenses directly related to the booting, towing, and impoundment of vehicles used in furtherance of prostitution-related activities, in violation of a prostitution-related offense.” D.C. Code § 22-2725(b).

D.C. Code § 22-2725 states that all “funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to § 22-2723” will be deposited in the fund. D.C. Code § 22-2725(a). The reference to “§ 22-2723” appears to be an error, however, and the text should instead refer to “§ 22-2724.” D.C. Law 16-306, the Omnibus Public Safety Amendment Act of 2006 (Omnibus Act), added D.C. Code §§ 22-2724 and 22-2725 as section 6 and section 7 to a 1935 law “An act for the suppression of prostitution in the District of Columbia.” The text of Section 7 in the Omnibus Act,

provides that when there is probable cause that a vehicle “is being used in furtherance of a prostitution-related offense”²⁵⁴ and there is an arrest,²⁵⁵ the vehicle “shall” be towed or immobilized and notice provided to the owner and to the person in control of the vehicle.²⁵⁶ There is no requirement that the owner be involved in the offense or know of the vehicle’s use in the offense. The owner is “entitled to a due process hearing regarding the seizure of the vehicle,”²⁵⁷ but the statute does not specify the timing or the requirements of the hearing. Independent of such a hearing, the vehicle can be repossessed “at any time” by paying several different penalties, fees, and costs,²⁵⁸ which are either not refundable,²⁵⁹ or are refundable only in narrow circumstances.²⁶⁰ Finally, it

establishing § 22-2725, states “All funds collected from the assessment of civil penalties, booting, towing, impoundment, and storage fees pursuant to section 5.” The reference to section 5 appears to be an error. Section 5 of the 1935 “An act for the suppression of prostitution in the District of Columbia” is specific to forfeiture, not impoundment.

The text in the Omnibus Act should instead refer to “section 6,” which would be D.C. Code § 22-2724, and establishes the impoundment provision and the civil penalties, fees and costs for impoundment.

²⁵⁴ D.C. Code § 22-2724(b). The current D.C. Code definition of “prostitution-related offenses” includes the current D.C. Code prostitution offenses that the RCC trafficking in commercial sex statute replaces. D.C. Code § 22-2701(4) (defining “prostitution-related offenses as “those crimes and offenses defined in this subchapter.”). The RCC prostitution statutes no longer use the term “prostitution-related offenses.”

²⁵⁵ D.C. Code § 22-2724(b).

²⁵⁶ D.C. Code § 22-2724(b)(1), (b)(2).

²⁵⁷ D.C. Code § 22-2701(f) (“An owner, or person duly authorized by an owner, shall be entitled to a due process hearing regarding the seizure of the vehicle.”).

²⁵⁸ D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying to the District government, as directed by the Department of Public Works, an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6). Payment of such fees shall not be admissible as evidence of guilt in any criminal proceeding.”).

²⁵⁹ Subsection (d) requires paying “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing” and there is no provision for a refund of this money in subsection (e). In addition, the refund of towing and storage costs required in subsection (d) is capped at two days unless a police report indicates that the vehicle was stolen at the time it was seized. D.C. Code § 22-2724(d) (“An owner, or a person duly authorized by an owner, shall, upon proof of same, be permitted to repossess or secure the release of the immobilized or impounded vehicle at any time (subject to administrative availability) by paying . . . an administrative civil penalty of \$150, a booting fee, if applicable, all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained after hearing, and all applicable towing and storage costs for impounded vehicles as provided by § 50-2421.09(a)(6).”); § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

²⁶⁰ D.C. Code § 22-2724(e) (“An owner, or person duly authorized by an owner, shall be entitled to refund of the administrative civil penalty, booting fee, and 2 days' towing and storage costs by showing that the prosecutor dropped the underlying criminal charges (except for instances of *nolle prosequi* or because the defendant completed a diversion program), that the Superior Court of the District of Columbia dismissed the case after consideration of the merits, or that the case resulted in a finding of not guilty on all

is unclear whether paying for the immediate release of a vehicle waives the owner’s right to a due process hearing.²⁶¹ There is no DCCA case law interpreting the current prostitution impoundment provisions. In contrast, a vehicle used in furtherance of the RCC trafficking in commercial sex offense is no longer subject to vehicle impoundment. Mandatory impoundment is a disproportionate penalty for what is comparatively low-level felony offense, particularly given the penalties, fees, and costs that must be paid for the immediate release of the vehicle with limited or no refund. However, a vehicle used, or intended to be used, to violate the RCC trafficking in commercial sex statute is subject to forfeiture under the RCC prostitution forfeiture provision (RCC § 22E-4404). RCC § 22E-4404, like the current prostitution forfeiture statute,²⁶² requires that the seizures and forfeitures of property “be pursuant to the standards and procedures set forth in D.C. Law 20-278.” D.C. Law 20-278 provides significant due process protections that are lacking in the current prostitution impoundment provisions, such as strict deadlines for filings,²⁶³ and requires the owner’s knowledge and consent to the use of the property, or willful blindness.²⁶⁴ This change improves the consistency and proportionality of the revised statutes.

Eleventh, the revised trafficking in commercial sex statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 (“current D.C. Code prostitution nuisance provisions”) and instead relies on the existing nuisance provisions in D.C. Code §§ 42-3101 through 42-3114 (“Title 42 nuisance provisions.”). The current D.C. Code prostitution nuisance provisions apply to “any building, erection, or place used for the purpose of lewdness, assignation, or prostitution,”²⁶⁵ or a nuisance

prostitution-related charges, or by providing a police report demonstrating that the vehicle was stolen at the time that it was subject to seizure and impoundment. If the vehicle had been stolen at the time of seizure and impoundment, a refund of all towing and storage costs shall be made.”).

²⁶¹ Subsection (f) of current D.C. Code § 22-2724 states unequivocally that an owner “shall be entitled to a due process hearing regarding the seizure of the vehicle,” D.C. Code § 22-2724(f), but other provisions in the statute suggest that paying for the immediate release of the vehicle waives the hearing. First, the written notice of the seizure of the vehicle must “convey[] . . . the right to obtain immediate return of the vehicle pursuant to subsection (d) of this section, *in lieu* of requesting a hearing.” D.C. Code § 22-2724(b)(2) (emphasis added). The plain language of this provision suggests that an owner can either pay for immediate release or request a hearing, but cannot pay and then have a hearing. In addition, subsection (d) requires that, for the immediate release of the vehicle, the owner pay “all outstanding fines and penalties for infractions for which liability has been admitted, deemed admitted, or sustained *after* hearing.” D.C. Code § 22-2724(d) (emphasis added).

²⁶² D.C. Code § 22-2723.

²⁶³ D.C. Code §§ 41-301 through 41-315.

²⁶⁴ D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”). The District has the burden of proof to prove the owner’s knowledge or willful blindness by a preponderance of the evidence or, if the property is a motor vehicle or real property, by clear and convincing evidence. D.C. Code § 41-308(d)(1)(A) – (C).

²⁶⁵ D.C. Code § 22-2713(a) (“Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided.”).

that is established “in a criminal proceeding.”²⁶⁶ The scope of “in a criminal proceeding” is unclear under current District law,²⁶⁷ but the DCCA has stated that “when

²⁶⁶ D.C. Code § 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

²⁶⁷ D.C. Code § 22-2717 requires that an abatement order be entered as part of the judgment if “the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding.” A broad reading of “in a criminal proceeding” is that an order of abatement is required whenever a nuisance is established as part of any criminal proceeding. The DCCA has stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of [D.C. Code § 22-2722], the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976). However, the DCCA has not addressed whether “in a criminal proceeding” extends to *any* criminal proceeding, or is limited to D.C. Code § 22-2722, or more generally to property used for prostitution.

In *United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998), the United States Court of Appeals for the District of Columbia rejected a broad interpretation of D.C. Code § 22-2717. The D.C. Circuit’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”). In *United States v. Wade*, the United States Court of Appeals for the District of Columbia vacated an order of abatement entered pursuant to D.C. Code § 22-2717 for a conviction of keeping a “disorderly house” under D.C. Code § 22-2722. *United States v. Wade*, 152 F.3d 969, 970, 973 (D.C. Cir. 1998). D.C. Code § 22-2722 prohibits “keeping a bawdy or disorderly house.” Under DCCA case law, a “bawdy house” used for prostitution is a type of “disorderly house,” but a “disorderly house” can extend beyond a “bawdy house” to encompass “activities on the premises that either disturb the public or constitute a nuisance per se.” *Harris v. United States*, 315 A.2d 569, 573 (D.C. 1974) (footnote omitted). The property in *Wade* was used for selling drugs. *Wade*, 152 F.3d at 970.

On appeal, the defendants argued that D.C. Code § 22-2717 only applies to a “disorderly house” that is used for “lewdness, assignation, or prostitution” as required by the nuisance provision in D.C. Code § 22-2713. *Wade*, 152 F.3d at 971. The government argued that a conviction for keeping any disorderly house under D.C. Code § 22-2722, or a conviction of any crime where there is proof that the defendant engaged in conduct constituting a nuisance per se, requires an order of abatement under D.C. Code § 22-2717. *Id.* at 971, 972.

The D.C. Circuit reviewed the enactment history of the prostitution nuisance provisions in D.C. Code §§ 22-2713 through 22-2717 and the disorderly house statute in 22-2722, noting that they were enacted by Congress at different times in different bills. *Wade*, 152 F.3d at 971, 971-972. The court noted that D.C. Code § 22-2713 requires that the property be used for the purpose of “lewdness, assignation, or prostitution,” and D.C. Code § 22-2717 refers to the existence of “the nuisance.” *Id.* at 971-72 (emphasis in original). The court concluded that “the” refers back to the requirements of “lewdness, assignation, or prostitution” in D.C. Code § 22-2713 and that D.C. Code § 22-2717 “concerns only those nuisances defined in” D.C. Code § 22-2713. *Id.* at 972. The court noted that while a conviction for keeping a “bawdy house” under D.C. Code § 22-2722 would “clearly entail the type of nuisance described in [D.C. Code § 22-2713], the keeping of a disorderly house might or might not, depending on the nature of the activity conducted in it.” *Id.* The court stated that “[b]ecause the Government failed to show that [the property] was ‘used for the purpose of lewdness, assignation, or prostitution,’ the [defendants’] plea of guilty to keeping a disorderly house is insufficient to permit the application of [D.C. Code § 22-2717].” *Id.* The court acknowledged that the DCCA in *Raleigh v. United States* had stated that “when a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.” *Id.* at 973

a defendant has been found guilty of maintaining a bawdy or disorderly house in violation of 22-2722, the house in question must be deemed to be a nuisance per se which the trial court is compelled to abate.”²⁶⁸ Violating a court order under the current D.C. Code prostitution nuisance provisions is punishable by no less than three months and no more than six months imprisonment.²⁶⁹ The current D.C. Code prostitution nuisance provisions have not been substantively amended since they were enacted in 1914, whereas the Title 42 nuisance provisions were enacted in 1999.²⁷⁰ The Title 42 nuisance provisions were originally limited to drug-related nuisances, but were amended in 2006 to include prostitution-related nuisances,²⁷¹ and again in 2010 to include firearm-related nuisances.²⁷² It is unclear how the two sets of nuisance provisions relate, and there is no DCCA case law²⁷³ or legislative history on this issue. In contrast, the revised trafficking

(quoting *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)). However, the court noted that the property at issue in *Raleigh* was used for “lewdness, assignation, or prostitution,” and, furthermore, that the DCCA “did not have before it the question of whether a disorderly house not used for such purposes is the kind of nuisance referred to in [D.C. Code § 22-2717].” *Id.* The court stated that “we conclude that, if confronted with this question, the [DCCA] would hold that conviction for keeping a disorderly house under [D.C. Code § 22-2722] will require an abatement order pursuant to [D.C. Code § 22-2717] only if that house was used, at least in part, for the purposes described in [D.C. Code § 22-2713].” *Id.*

²⁶⁸ *Raleigh v. United States*, 351 A.2d 510, 514 (D.C. 1976)).

²⁶⁹ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”).

²⁷⁰ “Drug-Related Nuisance Abatement Act of 1998,” 1998 District of Columbia Laws 12-194 (Act 12-470).

²⁷¹ “Nuisance Abatement Reform Amendment Act of 2006,” 2006 District of Columbia Laws 16-81 (Act 16-267).

²⁷² “Community Impact Statement Amendment Act of 2010,” 2010 District of Columbia Laws 18-259 (Act 18-446).

²⁷³ Both the current D.C. Code prostitution nuisance provisions and the current Title 42 nuisance provisions were used in a relatively recent United States District Court for the District of Columbia case. The government sought equitable relief under D.C. Code §§ 22-2713 through 22-2720 and D.C. Code §§ 42-3101 et seq. *United States v. Prop. Identified as 1923 Rhode Island Ave. Ne., Washington, D.C.*, 522 F. Supp. 2d 204, 205 (D.D.C. 2007). The court did not discuss the apparent overlap between the two sets of nuisance provisions. The court noted that D.C. Code § 22-2714 “authorizes a special summary action in equity to abate and enjoin” a nuisance, and that D.C. Code § 42-3102 “authorizes an action to abate, enjoin, and prevent” a prostitution-related nuisance. *1923 Rhode Island Ave. Ne.*, 522 F. Supp. 2d at 208. The U.S. District Court for the District of Columbia’s interpretation of a D.C. Code statute is not binding on the DCCA, but may be persuasive authority for the DCCA. *See, e.g., Tyler v. United States*, 705 A.2d 270, 277 n.14 (D.C. 1997) (“even though we may find persuasive a federal court’s interpretation of District of Columbia or of similar federal law . . .”).

It should be noted that the “special summary action in equity to abate and enjoin” a nuisance in D.C. Code § 22-2714 is limited to a preliminary injunction. D.C. Code § 22-2714 (“In such action [to perpetually enjoin a nuisance under D.C. Code § 22-2713], the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented.”). The preliminary injunction is automatically granted if the defendant moves to continue the hearing, and, in that sense, may be considered a special summary action. D.C. Code § 22-2714 (“Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance

in commercial sex prostitution statute deletes the prostitution nuisance provisions in current D.C. Code §§ 22-2723 through 22-2720 and instead relies on the Title 42 nuisance provisions. To the extent that the current D.C. Code prostitution nuisance provisions are used instead of the Title 42 nuisance provisions, this revision results in several changes to current District law.

First, the Title 42 nuisance provisions²⁷⁴ do not apply to real property that is used for “lewdness” or “assignation” like the current D.C. Code prostitution nuisance provisions do.²⁷⁵ To the extent that the current D.C. Code prostitution nuisance provisions apply to private, consensual sexual conduct that is not prostitution, they may infringe on constitutional rights.²⁷⁶ Second, the Title 42 nuisance provisions apply to any

the writ as prayed shall be granted as a matter of course.”). D.C. Code § 22-2715 requires a trial for a permanent injunction and order of abatement under D.C. Code § 22-2717.

D.C. Code § 42-3104 allows for a temporary injunction against a prostitution-related nuisance, but does not appear to allow a temporary injunction to be entered summarily if the defendant moves for a continuance. D.C. Code § 42-3104 (“(a) Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. A plaintiff need not prove irreparable harm to obtain a preliminary injunction. Where appropriate, the court may order a trial of the action on the merits to be advanced and consolidated with the hearing on the motion for preliminary injunction. (b) This section shall not be construed to prohibit the application for or the granting of a temporary restraining order, or other equitable relief otherwise provided by law.”).

²⁷⁴ The Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C).

²⁷⁵ The current D.C. Code prostitution nuisance provisions apply to any “building, erection, or place used for the purposes of lewdness, assignation, or prostitution.” D.C. Code § 22-2713. In contrast, the Title 42 nuisance provisions apply to any “real property, in whole or part, used, or intended to be used, to facilitate prostitution . . . that has an adverse impact on the community,” and any “real property, in whole or in part, used or intended to be used to facilitate any violation of §§ 22-2701, 22-2703, and 22-2723, § 22-2701.01, § 22-2704, §§ 22-2705 to 22-2712, and § 22-2722.” D.C. Code § 42-3101(5)(B), (5)(C). D.C. Code § 22-2710 and D.C. Code § 22-2711 prohibit procuring an individual for the purposes of “debauchery” or “other immoral” purposes, which may overlap with “lewdness” or “assignation.” However, as is discussed elsewhere in this commentary, the revised version of these offenses in the RCC trafficking in commercial sex statute (RCC § 22E-4403) are limited to procuring for purposes of “prostitution.”

²⁷⁶ “Lewdness” and “assignation” appear to extend the current D.C. Code prostitution nuisance provisions to property that is used for private, consensual sexual conduct that is not prostitution. Although the terms are not statutorily defined, the DCCA has stated that “lewdness” “has been defined by the Supreme Court as ‘that form of immorality which has relation to sexual impurity.’” *Riley v. United States*, 298 A.2d 228, 230 (D.C. 1972). There is no DCCA case law explaining the meaning of “assignation,” but Black’s Law Dictionary defines it as “[a]n appointment of a time and place to meet secretly, esp. for engaging in illicit sex.” *Assignation*, Black’s Law Dictionary (11th ed. 2019). The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

“real property”²⁷⁷ “used” or “intended to be used” for prostitution,²⁷⁸ whereas current D.C. Code § 22-2713 is limited to any “building, erection, or place used for the purpose of prostitution.”²⁷⁹ Third, the Title 42 nuisance provisions do not extend to a prostitution-related nuisance that is established in a “criminal proceeding” as in current D.C. Code § 22-2720. Fourth, the Title 42 nuisance provisions do not punish the violation of a court order pertaining to a prostitution-related nuisance by three to six months’ imprisonment as do the current D.C. Code prostitution nuisance provisions.²⁸⁰ Fifth, while both sets of nuisance provisions provide for a preliminary injunction,²⁸¹ a permanent injunction and order of abatement,²⁸² and a procedure for vacating an order of

²⁷⁷ The Title 42 nuisance provisions define “property” as “tangible real property, or any interest in real property, including an interest in any leasehold, license or real estate, such as any house, apartment building, condominium, cooperative, office building, storage, restaurant, tavern, nightclub, warehouse, park, median, and the land extending to the boundaries of the lot upon which such structure is situated, and anything growing on, affixed to, or found on the land.”

²⁷⁸ The Title 42 nuisance provisions will require conforming amendments to refer to the revised prostitution offenses in RCC §§ 22E-4401 through 22E-4403, which will affect the range of real property subject to the Title 42 nuisance provisions.

²⁷⁹ D.C. Code § 22-2713.

²⁸⁰ D.C. Code §§ 22-2716 (A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 and not more than the amount set forth in § 22-3571.01 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment.”); 22-2717 (“If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”). A violation of a court order “issued under” the Title 42 nuisance provisions is “punishable as a contempt of court.” D.C. Code § 42-3112(a).

²⁸¹ D.C. Code §§ 22-2714 (“ . . . In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course . . .”); 42-3104(a) (“Upon the filing of a complaint to abate the drug-, firearm-, or prostitution-related nuisance, the court shall hold a hearing on the motion for a preliminary injunction, within 10 business days of the filing of such action. If it appears, by affidavit or otherwise, that there is a substantial likelihood that the plaintiff will be able to prove at trial that a drug-, firearm-, or prostitution-related nuisance exists, the court may enter an order preliminarily enjoining the drug-, firearm-, or prostitution-related nuisance and granting such other relief as the court may deem appropriate, including those remedies provided in § 42-3110. . . .”).

²⁸² D.C. Code §§ 22-2717 (“If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716.”); 42-3110(a) (“If the existence of a drug-, firearm-, or prostitution-related nuisance is found, the court shall enter an order permanently enjoining, abating, and preventing the continuance or recurrence of the nuisance. In order to effectuate fully the equitable remedy of abatement, such order may include damages as provided in § 42-3111. The court may grant declaratory relief or any other relief deemed necessary to accomplish the purposes of the judgment. The court may retain jurisdiction of the case for the purpose of enforcing its orders. A drug-, firearm-, or prostitution-related nuisance is a nuisance per se requiring abatement as provided under subsection (b) of this section.”).

abatement,²⁸³ the procedural requirements vary in the Title 42 nuisance provisions as compared to the current D.C. Code prostitution nuisance provisions,²⁸⁴ as do the types of equitable relief.²⁸⁵ This change improves the clarity, consistency, and proportionality of the revised statutes.

Beyond these eleven changes to current District law, eight other aspects of the revised trafficking in commercial sex statute may be viewed as substantive changes of law.

²⁸³ D.C. Code §§ 22-2719 (“If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law.); 42-3112(c) (“Upon motion, the court may vacate an order or judgment of abatement if the owner of the property satisfies the court that the drug-, firearm-, or prostitution-related nuisance has been abated for 90 days prior to the motion, corrects all housing code and health code violations on the property, and deposits a bond in an amount to be determined by the court, which shall be in an amount reasonably calculated to ensure continued abatement of the nuisance. Any bond posted under this subsection shall be forfeited immediately if the drug-, firearm-, or prostitution-related nuisance recurs during the 2-year period following the date on which an order under this section is entered. At the close of 2 years following the date on which an order under this section is entered, the bond shall be returned.”).

²⁸⁴ For example, the Title 42 nuisance provisions require that the plaintiff must establish the existence of a nuisance by a preponderance of the evidence. D.C. Code § 42-3108 (“The plaintiff must establish that a drug-, firearm-, or prostitution-related nuisance exists by a preponderance of the evidence. Once a reasonable attempt at notice is made pursuant to § 42-3103, the owner of the property shall be presumed to have knowledge of the drug-, firearm-, or prostitution-related nuisance. A plaintiff is not required to make any further showing that the owner knew, or should have known, of the drug-, firearm-, or prostitution-related nuisance to obtain relief under § 42-3110 or § 42-3111.”). There is no such requirement specified in the current D.C. Code prostitution nuisance provisions. D.C. Code §§ 22-2713 through 22-2720.

²⁸⁵ For example, the current D.C. Code prostitution nuisance provisions specifically require the removal and sale of all “fixtures, furniture, musical instruments, or movable property used in conducting the nuisance.” D.C. Code § 22-2717 (“an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution . . .”). The Title 42 nuisance provisions do not specifically allow for such a sale, but do grant the court broad powers to order equitable relief that may extend to such a sale. D.C. Code § 42-3110(b) (“Any order issued under this section may include the following relief: (1) Assessment of reasonable attorney fees and costs to the prevailing party; (2) Ordering the owner to make repairs upon the property; (3) Ordering the owner to make reasonable expenditures upon the property, including the installation of secure locks, hiring private security personnel, increasing lighting in common areas, and using videotaped surveillance of the property and adjacent alleys, sidewalks, or parking lots; (4) Ordering all rental income from the property to be placed in an escrow account with the court for up to 90 days or until the drug-, firearm-, or prostitution-related nuisance is abated; (5) Ordering all rental income for the property transferred to a trustee, to be appointed by the court, who shall be empowered to use the rental income to make reasonable expenditures related to the property in order to abate the drug-, firearm-, or prostitution-related nuisance; (6) Ordering the property vacated, sealed, or demolished; or (7) Any other remedy which the court, in its discretion, deems appropriate.”).

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability “arranging for” prostitution. Current D.C. Code § 22-2707 prohibits receiving anything of value “for or on account of arranging for . . . any individual to engage in prostitution.”²⁸⁶ “Arranging for prostitution” is defined in current D.C. Code § 22-2701.01, in part, as “any act to procure . . . or otherwise arrange for the purpose of prostitution.”²⁸⁷ It is unclear what conduct this definition covers beyond procuring an individual for prostitution. There is no DCCA case law interpreting the current D.C. Code definition of “arranging for prostitution.” Resolving this ambiguity, paragraph (a)(2) of the revised trafficking in commercial sex statute prohibits knowingly receiving anything of value as a result of the prohibited conduct—causing, procuring, etc., a person to engage in or submit to a commercial sex act. The prohibited conduct encompasses what is ordinarily considered “arranging” for prostitution. This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC trafficking in commercial sex statute limits liability for procuring to procuring a person for a “commercial sex act.” Two of the current D.C. Code procuring statutes prohibit receiving anything of value for procuring an individual for “debauchery” or an “immoral” act or purpose, in addition to prostitution.²⁸⁸ “Debauchery” and “immoral” are undefined statutorily and there is no DCCA case law interpreting these terms. It is unclear to what extent these terms refer to conduct other than prostitution. Resolving this ambiguity, the procuring provisions in the RCC trafficking in commercial sex statute are limited to a “commercial sex act,” as that term is defined in RCC § 22E-701. The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.²⁸⁹ To the extent that “debauchery” and “immoral” act or purpose refer to private sexual conduct other than prostitution, the current D.C. Code procuring statutes may be unconstitutional. This change improves the clarity, consistency, and proportionality of the revised statutes.

Third, the RCC trafficking in commercial sex statute clarifies that a promise for payment is sufficient for liability. The current D.C. Code definition of “prostitution” is “a sexual act or sexual contact with another person in exchange for giving or receiving anything of value.”²⁹⁰ The current D.C. Code pandering statute prohibits “causing” a

²⁸⁶ D.C. Code § 22-2707.

²⁸⁷ D.C. Code § 22-271.01(1). The full definition is “any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or anything of value was given or received.” The scope of the “attempt” language is unclear. To the extent the current D.C. Code definition of “arranging for prostitution” includes an attempted offense in current D.C. Code § 22-2707, the RCC trafficking in commercial sex statute is limited to a completed offense. This is discussed elsewhere in this commentary as a substantive change in law.

²⁸⁸ D.C. Code §§ 22-2710 (“Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution, debauchery, or other immoral act, any individual”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution, debauchery, or other immoral purposes any individual”).

²⁸⁹ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (concerning the right to homosexual intercourse and other nonprocreative sexual activity); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (concerning marital privacy and contraceptives).

²⁹⁰ D.C. Code § 22-2701.01(3).

person to engage in “prostitution,”²⁹¹ the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for “arranging for or causing” a person to engage in “prostitution,”²⁹² and the current D.C. Code house of prostitution statute prohibits “furnishing” or “servicing” a place “for prostitution.”²⁹³ It is unclear whether “giving or receiving anything of value” in the current D.C. Code definition of “prostitution” limits these offenses to sexual activity when anything of value is given or received, or if sexual activity when there is promise to give or receive anything of value in the future is sufficient.²⁹⁴ There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term “commercial sex act,” defined in RCC § 22E-701 as “any sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” The definition makes clear that a promise for payment is sufficient for liability. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fourth, the RCC trafficking in commercial sex statute clarifies that payment can be given to, received, or promised to “any person.” The current D.C. Code definition of “prostitution” is “a sexual act or sexual contact with another person in exchange for giving or receiving anything of value.”²⁹⁵ The current D.C. Code pandering statute prohibits “causing” a person to engage in “prostitution,”²⁹⁶ the current D.C. Code procuring for prostitution statute prohibits receiving anything of value for “arranging for or causing” a person to engage in “prostitution,”²⁹⁷ and the current D.C. Code operating a house of prostitution statute prohibits “furnishing” or “servicing” a place “for prostitution.”²⁹⁸ It is unclear whether the recipient of payment for the sexual activity²⁹⁹

²⁹¹ D.C. Code § 22-2705(a)(2)(C) (“(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.”).

²⁹² D.C. Code § 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”). The other current D.C. Code procuring statutes require procuring for “sexual intercourse, prostitution, debauchery, or other immoral [purposes].” D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code definition of “prostitution” excludes a promise to pay for sexual activity, that sexual activity would likely fall under the other prohibited purposes in these statutes.

²⁹³ D.C. Code § 22-2712.

²⁹⁴ The current D.C. Code house of prostitution statute prohibits providing a place “for prostitution,” and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of “prostitution” limits the offense to a place where sexual activity may occur and payment is only promised. D.C. Code § § 22-2712

²⁹⁵ D.C. Code § 22-2701.01(3).

²⁹⁶ D.C. Code § 22-2705(a)(2)(C) (“(a) It is unlawful for any person, within the District of Columbia to . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (C) To engage in prostitution.”).

²⁹⁷ D.C. Code § 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”). The other current D.C. Code procuring statutes require procuring for “sexual intercourse, prostitution, debauchery, or other immoral [purposes].” D.C. Code §§ 22-2710 (procuring for a house of prostitution); 22-2711 (procuring for a third party). Even if the current D.C. Code definition of “prostitution” excludes sexual activity based upon the recipient of payment, that sexual activity would likely fall under the other prohibited purposes in these statutes.

²⁹⁸ D.C. Code § 22-2712.

must be the person engaging in sexual activity for payment or if a third party, such as the owner of a prostitution business, would be sufficient.³⁰⁰ There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute uses the RCC term “commercial sex act,” defined in RCC § 22E-701 as “any sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” This language clarifies that the recipient or promised recipient of payment can either be the individual engaging in the sexual activity for payment or a third party. This change improves the clarity and consistency of the revised statutes and removes a possible gap in liability.

Fifth, the RCC trafficking in commercial sex statute requires a “knowingly” culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. The current D.C. Code pandering³⁰¹ and procuring³⁰² statutes do not specify any culpable mental states. However, the current D.C. Code operating a house of prostitution statute specifies a culpable mental state of “knowingly,”³⁰³ which is codified in paragraph (a)(3) of the RCC trafficking in commercial sex statute. There is no DCCA case law interpreting the required mental states, if any, for the current D.C. Code pandering and procuring statutes. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a “knowingly” culpable mental state for the prohibited conduct in subparagraph (a)(2)(A)—receiving anything of value as a result of causing, procuring, etc., a person to engage in or submit to a commercial sex act with or for another person. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁰⁴ This change improves the clarity and consistency of the revised statutes.

²⁹⁹ The current D.C. Code procuring statutes require that the defendant receive anything of value for causing prostitution or procuring for purposes of prostitution. D.C. Code §§ 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”); 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution”). However this requirement is independent of whether the sexual activity satisfies the current D.C. Code definition of “prostitution”— a sexual act or sexual contact with another person in exchange for giving or receiving anything of value.”

³⁰⁰ The current D.C. Code house of prostitution statute prohibits providing a place “for prostitution,” and appears to be satisfied if prostitution does not occur, but is the purpose of a place. In this situation, it is similarly unclear whether the D.C. Code definition of “prostitution” limits the offense to a place where sexual activity may occur and the recipient of payment is a person other than the individual engaging in the sexual activity.

³⁰¹ D.C. Code § 22-2705.

³⁰² D.C. Code §§ 22-2707; 22-2710; 22-2711.

³⁰³ D.C. Code § 22-2712 (“Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.”).

³⁰⁴ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

Sixth, the RCC trafficking in commercial sex statute requires a “knowingly” culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The current D.C. Code keeping a disorderly house or bawdy house statute³⁰⁵ (“bawdy house statute) does not specify any culpable mental states. DCCA case law for the current bawdy house statute requires that the defendant “know or should know” of the commission of the prohibited activities and “does nothing to prevent them.”³⁰⁶ There is no further discussion of the meaning of “know or should know” in this case law. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a “knowingly” culpable mental state for the prohibited conduct in subparagraph (a)(2)(B)—receiving anything of value as a result of providing or maintaining a location for a person to engage in or submit to a commercial sex act. The “knowingly” culpable mental state as defined in RCC § 22E-206 may be a higher culpable mental state than “should know” that is sufficient under DCCA case law. However, the scope of the RCC offense is narrower—the defendant must knowingly receive anything of value “as a result” of providing the premises. The civil nuisance and abatement provisions in D.C. Code §§ 42-3101 provide a remedy when an individual merely “should know” that premises he or she owns or maintains are being used for a commercial sex act, and are discussed elsewhere in this commentary. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.³⁰⁷ This change improves the clarity and consistency of the revised statutes.

Seventh, paragraph (a)(3) of the RCC trafficking in commercial sex statute requires a “knowingly” culpable mental state for the prohibited conduct in paragraph (a)(3) regarding obtaining anything of value from the proceeds or earnings of a person who has engaged in a commercial sex act without consideration or when the consideration is providing or maintaining a location for a commercial sex act. The current D.C. Code house of prostitution statute specifies a culpable mental state of “knowingly,” making it unlawful to “knowingly . . . accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution.”³⁰⁸ It is unclear, however, if the mental state applies to all of the elements of the offense, or if it is limited to “accept, receive, levy, or appropriate any money or other valuable thing.” There is no DCCA case law on this issue. Resolving this ambiguity, the RCC trafficking in commercial sex statute requires a culpable mental state for all elements in paragraph (a)(3). Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make

³⁰⁵ D.C. Code § 22-2722.

³⁰⁶ *Harris v. United States*, 315 A.2dc 569, 575 (D.C. 1974) (“ In summary, to constitute the offense of keeping a bawdy or disorderly house under D.C. Code 1973, s 22-2722, the government must prove that acts take place on the premises that disturb the public or constitute a nuisance per se in the nature of a gambling house or bawdy house; that the premises are regularly resorted to for the commission of these acts; and, that the proprietor knows or should know of the acts and does nothing to prevent them.”).

³⁰⁷ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³⁰⁸ D.C. Code § 22-2712.

otherwise legal conduct illegal is a generally accepted legal principle.³⁰⁹ This change improves the clarity and consistency of the revised statutes.

Eighth, the RCC trafficking in commercial sex statute does not require that the sexual activity be “with another person.” The current D.C. Code pandering,³¹⁰ procuring,³¹¹ and house of prostitution³¹² statutes incorporate the current D.C. Code definition of “prostitution”—a “sexual act or contact with another person in return for giving or receiving anything of value.”³¹³ The current D.C. Code³¹⁴ and RCC³¹⁵ definitions of “sexual act” and “sexual contact” include masturbation. However, the current statutes’ “with another person” requirement may narrow the offense to exclude a prostitute engaging in or soliciting to engage in masturbation because masturbation is not “with another person.” Alternatively, the current pandering, procuring, and house of prostitution statutes could be interpreted to include a prostitute engaging in or soliciting to engage in masturbation “with another person,” if the latter phrase is construed to mean “for another person to watch.” To resolve this ambiguity, the revised statute does not require that the sexual activity be “with another person.” Masturbation in exchange for anything of value is within the scope of the revised statute. This change improves the clarity, and may improve the proportionality, of the revised statutes.

Other changes to the revised statute are clarificatory in nature and are not intended to substantively change District law.

³⁰⁹ *Elonis v. United States*, 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015).

³¹⁰ D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting causing a person to “engage in prostitution.”).

³¹¹ D.C. Code §§ 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”); 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of . . . prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for . . . prostitution”).

³¹² D.C. Code § 22-2712 (“Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.”).

³¹³ D.C. Code § 22-2701.01(3).

³¹⁴ D.C. Code §§ 22-2701.01(5), (6) (adopting the definition of “sexual act” in D.C. Code § 22-3001(8) and the definition of “sexual contact” in D.C. Code § 22-3001(9) for the prostitution or solicitation statute in D.C. Code § 22-2701); 22-3001(8) (defining “sexual act” as “(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.”); 22-3001(9) (defining “sexual contact” as “the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”).

³¹⁵ RCC § 22E-701.

First, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing a person to reside in a house of prostitution or with another person for the purposes of prostitution. The current D.C. Code pandering statute prohibits placing an individual in a “house of prostitution” with intent that the individual engage in prostitution,³¹⁶ causing an individual to “reside or continue to reside in a house of prostitution,”³¹⁷ or to “reside with any other person for the purpose of prostitution.”³¹⁸ Current D.C. Code § 22-2710 prohibits paying or receiving anything of value for placing a person in a “house of prostitution.”³¹⁹ There is no DCCA case law interpreting these provisions. The RCC trafficking in commercial sex statute replaces reference to a “house of prostitution” and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Second, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability causing the placement of or placing an individual in the “charge or custody” of a third person. The current D.C. Code pandering statute prohibits causing the placing of an individual in “the charge or custody of any other person” with intent that the individual engage in prostitution³²⁰ and current D.C. Code § 22-2711 prohibits receiving anything of value for “for or on account of procuring and placing in the charge and custody of another person” for prostitution.³²¹ There is no DCCA case law interpreting these provisions. The RCC trafficking in commercial sex statute replaces reference to a “house of prostitution” and residing for purposes of prostitution with the conduct prohibited under paragraphs (a)(1) and (a)(2). This change improves the clarity of the revised statutes without changing current District law.

Third, the RCC trafficking in commercial sex statute no longer prohibits receiving anything of value for procuring an individual to engage in a “sexual act” or “sexual

³¹⁶ D.C. Code § 22-2705(a)(1) (“(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual . . . in a house of prostitution, with intent that such individual shall engage in prostitution.”).

³¹⁷ D.C. Code § 22-2705(a)(2)(B) (“(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual . . . (B) To reside or continue to reside in a house of prostitution.”).

³¹⁸ D.C. Code § 22-2705(a)(2)(A) (“(a) It is unlawful for any person, within the District of Columbia to: . . . (2) Cause, compel, induce, entice, or procure or attempt to cause, compel, induce, entice, or procure any individual: (A) To reside with any other person for the purpose of prostitution.”).

³¹⁹ D.C. Code § 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution, debauchery, or other immoral act, any individual, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.”).

³²⁰ D.C. Code § 22-2705(a)(1) (“(a) It is unlawful for any person, within the District of Columbia to: (1) Place or cause, induce, entice, procure, or compel the placing of any individual in the charge or custody of any other person . . . with intent that such individual shall engage in prostitution.”).

³²¹ D.C. Code § 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution, debauchery, or other immoral purposes any individual shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than the amount set forth in § 22-3571.01.”).

contact”³²² or for purposes of “sexual intercourse.”³²³ This language is unnecessary given the RCC definition of “commercial sex act” in RCC § 22-701³²⁴ and deleting it does not change current District law. This change improves the clarity of the revised statutes without changing current District law.

Fourth, the RCC trafficking in commercial sex statute does not include as a discrete basis of liability paying to obtain an individual for a house of prostitution. Current D.C. Code § 22-2710 prohibits “pay[ing]” for “the procuring for, or placing in, a house of prostitution for purposes of sexual intercourse [or] prostitution . . . any individual.”³²⁵ In the RCC trafficking in commercial sex statute, subparagraph (a)(1)(A) or subparagraph (a)(1)(B) would provide liability for this conduct. This change improves the clarity of the revised statutes without changing current District law.

Fifth, the RCC trafficking in commercial sex statute prohibits receiving anything of value “as a result of” causing, procuring, etc., a person for a commercial sex act with or for another person, or providing or maintaining a location for this purpose. The current D.C. Code procuring for prostitution statute prohibits receiving anything of value “for or on account of” arranging for or causing an individual for prostitution.³²⁶ There is no DCCA case law interpreting this “on account of” language. The phrase “as a result of” clarifies that there must be a nexus between the receipt of anything of value and the prohibited conduct and is not intended to change current District law.

Sixth, the RCC trafficking in commercial sex statute specifically prohibits conduct that “provides” or “recruits” a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute³²⁷ and procuring for prostitution statutes³²⁸ appear to extend to this conduct through use of a variety of verbs, but do not specifically

³²² D.C. Code §§ 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”).

³²³ D.C. Code §§ 22-2710 (“Any person who, within the District of Columbia, shall . . . receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution”).

³²⁴ Subparagraph (a)(2)(A) of the RCC trafficking in commercial sex statute prohibits receiving anything of value as a result of causing, procuring, etc., an individual to engage in or submit to a “commercial sex act.” RCC § 22E-701 defines “commercial sex act” as a “sexual act or sexual contact for which anything of value is given to, promised to, or received by any person.” By receiving anything of value for causing, etc., a person to engage in sexual activity, the defendant satisfies the RCC definition of “commercial sex act.”

³²⁵ D.C. Code §§ 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution”).

³²⁶ D.C. Code § 22-2707(a).

³²⁷ D.C. Code § 22-2705(a)(2)(C) (pandering statute prohibiting, in part, “[c]ause, compel, induce, entice, or procure” an individual to engage in prostitution).

³²⁸ D.C. Code §§ 22-2707 (procuring statute prohibiting receiving anything of value “for or on account of arranging for or causing any individual to engage in prostitution.”); 22-2710 (procuring statute prohibiting paying or receiving anything of value “for or on account of the . . . placing in, a house of prostitution . . . any individual” for purposes of prostitution); 22-2711 (procuring statute prohibiting receiving anything of value “for or on account of procuring and placing in the charge or custody of another person” for prostitution).

use the terms “provides” or “recruits.” Adding the verbs “provides” and “recruits” aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Seventh, the RCC trafficking in commercial sex statute does not include as a discrete means of liability conduct that “induces” a person to engage in or submit to a commercial sex act. The current D.C. Code pandering statute prohibits, in relevant part, “induc[ing]” any individual to engage in prostitution.³²⁹ There is no DCCA case law interpreting the meaning of this “inducing” language. The RCC trafficking in commercial sex statute prohibits “causes, procures, provides, recruits, or entices” a person to engage in or submit to a commercial sex act, which includes conduct ordinarily covered by the verb “inducing.” Removing the verb “induc[ing]” aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Eighth, paragraph (a)(3) of the RCC trafficking in commercial sex statute makes three clarificatory changes to the current D.C. Code house of prostitution statute. First, paragraph (a)(3) of the revised statute prohibits “obtains” anything of value, as opposed to “accept, receive, levy, or appropriate” anything of value in the current D.C. Code house of prostitution statute. “Obtains” is clearer language and is intended to encompass accepting, receiving, levying, and appropriating. Adding the verb “obtains” also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. Second, paragraph (a)(3) refers to “anything of value” instead of “any money or other valuable thing,”³³⁰ consistent with the other provisions in the revised statute. Third, paragraph (a)(3) refers to “providing or maintaining” a location for a commercial sex act, as opposed to “furnishing” or “servicing.”³³¹ “Providing” and “maintaining” are clearer language and are intended to encompass “furnishing or servicing.” Adding the verbs “provides” and “maintains” also aligns the RCC trafficking in commercial sex statute with the verbs RCC human trafficking statutes in RCC Chapter 16 without substantively changing current law. These changes improve the clarity and consistency of the revised statutes.

Ninth, the RCC trafficking in commercial sex statute prohibits causing, etc., a person to “engage in or submit to” a commercial sex act (subparagraphs (a)(1)(A) and (a)(2)(A)), or providing or maintaining a location for a person to “engage in or submit to” a commercial sex act (subparagraphs (a)(1)(B) or (a)(2)(B)). Similarly, subparagraph (a)(3) refers to a person who has “engaged in or submitted to” a commercial sexual act. The current D.C. Code pandering statute prohibits causing a person to “engage” in prostitution³³² and the current D.C. Code procuring statutes prohibit either causing a person to “engage” in prostitution³³³ or procure “for” prostitution.³³⁴ The use of the

³²⁹ D.C. Code § 22-2705(a)(2)(C).

³³⁰ D.C. Code § 22-2712.

³³¹ D.C. Code § 22-2712.

³³² D.C. Code § 22-2705(a)(2)(C).

³³³ D.C. Code § 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing for or on account of arranging for or causing any individual to engage in prostitution or a sexual act or contact.”).

phrase “engage in or submit to” aligns the RCC trafficking in commercial sex statute with the verbs RCC sex offense statutes in RCC Chapter 13 without substantively changing current law. This change improves the clarity and consistency of the revised statutes.

Tenth, the revised trafficking in commercial sex statute replaces references to “money or other valuable thing” in the current D.C. Code procuring statutes³³⁵ with “anything of value” through the statute’s use of the RCC definition of “commercial sex act.” This clarifies the revised statute without changing current District law.

Eleventh, the revised trafficking in commercial sex statute is no longer subject to the definition of “anything of value” in D.C. Code § 22-1802 that applies to the current D.C. Code pandering,³³⁶ procuring,³³⁷ and house of prostitution³³⁸ statutes.³³⁹ Current D.C. Code § 22-1802 states that “anything of value” “shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value.”³⁴⁰ This definition is unnecessary, and not explicitly specifying that money and commercial paper is included within “anything of value” in the revised offense is not intended to change current District law.

Twelfth, the RCC trafficking in commercial sex statute deletes the requirement in the current D.C. Code pandering,³⁴¹ procuring,³⁴² house of prostitution,³⁴³ and keeping a disorderly or bawdy house³⁴⁴ statutes that the offense occur in the “District” or the “District of Columbia.” This language is surplusage and deleting it does not change current District law.

³³⁴ D.C. Code §§ 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution”).

³³⁵ D.C. Code §§ 22-2707(a) (“It is unlawful for any person, within the District of Columbia, to receive any money or other valuable thing.”); 22-2710 (“Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing.”); 22-2711 (“Any person who, within the District of Columbia, shall receive any money or other valuable thing.”).

³³⁶ D.C. Code § 22-2705.

³³⁷ D.C. Code §§ 22-2707; 22-2710; 22-2711.

³³⁸ D.C. Code § 22-2712.

³³⁹ The current D.C. Code pandering (D.C. Code § 22-2705), procuring (D.C. Code §§ 22-2707; 22-2710; 22-2711), and house of prostitution (D.C. Code § 22-2712) statutes incorporate the current D.C. Code definition of “prostitution,” which requires “anything of value.” D.C. Code § 22-2701.01(a)(3).

³⁴⁰ D.C. Code § 22-1802.

³⁴¹ D.C. Code § 22-2705(a).

³⁴² D.C. Code §§ 22-2707(a); 22-2710; 22-2711.

³⁴³ D.C. Code § 22-2712.

³⁴⁴ D.C. Code § 22-2722.

RCC § 22E-4404. Civil Forfeiture.

- (a) *Property subject to forfeiture.* The following are subject to civil forfeiture:
- (1) In fact, all conveyances, including aircraft, vehicles or vessels, which are possessed with intent to be used, or are, in fact, used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403); and
 - (2) In fact, all money, coins, and currency which are possessed with intent to be used, or are, in fact, used, to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403).
- (b) *Requirements for forfeiture.* All seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.
- (c) *Definitions.* The term “intent” has the meaning specified in RCC § 22E-206; the term “in fact” has the meaning specified in RCC § 22E-207; and the term “possess” has the meaning specified in RCC § 22E-701.

COMMENTARY

***Explanatory Note.** This section establishes civil forfeiture rules for conveyances and money that are intended to be used, or are used, in violation of the RCC trafficking in commercial sex statute.³⁴⁵ All seizures and forfeitures under this section shall be pursuant to D.C. Law 20-278. The revised statute replaces the current forfeiture statute applicable to prostitution and related offenses.³⁴⁶*

Subsection (a) establishes the types of property that are subject to civil forfeiture under the revised statute. Paragraph (a)(1) applies to any property that is, in fact, a conveyance, including aircraft, vehicles, or vessels. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the property is a conveyance. There are two alternative bases for forfeiture of a conveyance in paragraph (a)(1). The first requires that the conveyance is possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). “Possess” is defined in RCC § 22E-701 as either to “hold or carry on one’s person” or to “have the ability and desire to exercise control over.” “Intent” is a defined term in RCC § 22E-206 that here means a person was practically certain that a conveyance would be used to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Per RCC § 22E-205, the object of the phrase “with intent to” is not an objective element that requires separate proof—only the person’s culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the conveyance was used to facilitate commission of an RCC human trafficking offense, just that a person believed to a practical certainty that a conveyance would be so used. Applying the RCC definition of “intent” does not change the mental state requirements for forfeiture in D.C. Law 20-278.³⁴⁷

The alternative basis for forfeiture of a conveyance in paragraph (a)(1) is a conveyance which is, “in fact,” used to facilitate the commission of the RCC trafficking

³⁴⁵ RCC § 22E-4403.

³⁴⁶ D.C. Code § 22-2723.

³⁴⁷ This issue is discussed in detail later in the commentary to this revised statute.

in commercial sex offense (RCC § 22E-4403). “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the conveyance was used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.³⁴⁸

Paragraph (a)(2) applies to any property that is, “in fact,” money, coins, and currency. “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the property is money, coins, or currency. There are two alternative bases for forfeiture of money, coins, and currency in paragraph (a)(2). The first requires that the money, coins, or currency are possessed with intent to facilitate commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). “Possess” is defined in RCC § 22E-701 as either to “hold or carry on one’s person” or to “have the ability and desire to exercise control over.” The culpable mental state requirement of “intent” and the strict liability requirements of “in fact” are the same in paragraph (a)(2) as they are in paragraph (a)(1).

The alternative basis for forfeiture of money, coins, or currency in paragraph (a)(2) is if it is, “in fact,” used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). “In fact” is a defined term in RCC § 22E-207 that indicates there is no culpable mental state for a given element. Here, “in fact” means that there is no culpable mental state required for the fact that the money, coins or currency were used to facilitate the commission of the RCC trafficking in commercial sex offense (RCC § 22E-4403). Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.³⁴⁹

Paragraph (b) establishes that the seizures and forfeitures under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.

Subsection (c) cross-references applicable definitions located elsewhere in the RCC.

Relation to Current District Law. *The revised forfeiture statute changes current District law in two main ways.*

First, the revised prostitution forfeiture statute is limited to the RCC trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture provision applies to a “prostitution-related offense.”³⁵⁰ “Prostitution-related offenses” is defined to include all prostitution offenses in the current D.C. Code, including the misdemeanor offenses of prostitution and solicitation for prostitution.³⁵¹ In contrast, the RCC limits the prostitution forfeiture provision to the RCC trafficking in commercial sex statute and no

³⁴⁸ See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

³⁴⁹ See, e.g., D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

³⁵⁰ D.C. Code § 22-2723.

³⁵¹ D.C. Code § 22-2701.01(4) (defining “prostitution-related offenses” as “those crimes and offenses defined in this subchapter.”).

longer uses the terms “prostitution-related offense” or “prostitution-related offenses.” Forfeiture of a vehicle or money used in furtherance of prostitution or solicitation is a disproportionate penalty for otherwise very low-level conduct, and in some instances may violate the Excessive Fines Clause of the U.S. Constitution as the DCCA held under an earlier version of the prostitution forfeiture statute.³⁵² However, a vehicle or money used to violate the RCC trafficking in commercial sex statute (RCC § 22E-4403) remains subject to forfeiture under RCC § 22E-4404 because the statute targets “pimps” and owners of prostitution businesses. This change improves the consistency and proportionality of the revised statutes.

Second, the revised prostitution forfeiture provision applies to money, coins, and currency which are used, or intended to be used, “to facilitate commission” of the RCC trafficking in commercial sex statute. The current D.C. Code prostitution forfeiture statute applies to conveyances that are used, or intended to be used, “to facilitate a violation” of the current D.C. Code prostitution statutes³⁵³ and to currency that is used, or intended to be used, “in violation” of the current D.C. Code prostitution statutes.³⁵⁴ “In violation” appears to be narrower than “to facilitate a violation,” but there is no DCCA case law on this issue. In contrast, the revised prostitution forfeiture provision applies to currency that is used, or intended to be used, “to facilitate the commission of” of the RCC trafficking in commercial sex statute, which is consistent with the scope of conveyances subject to forfeiture. It is inconsistent to include in forfeiture conveyances that are used, or intended to be used, “to facilitate a violation” of a prostitution offense, but to limit forfeiture of currency to currency that is used, or intended to be used “in violation” of a prostitution offense. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these two substantive changes to current District law, three other aspects of the revised forfeiture statute may be viewed as a substantive change of law.

First, the RCC definition of “intent to” applies to the revised forfeiture provision. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are “intended for use” in a prostitution offense.³⁵⁵ The meaning of “intended to” is unclear and there is no DCCA case law on this issue.³⁵⁶ Resolving this ambiguity, the revised prostitution forfeiture provision applies the RCC definition of “intent” in RCC

³⁵² This case, *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (D.C. 1998) is discussed in detail in the commentaries to the RCC prostitution and RCC patronizing prostitution statutes.

³⁵³ D.C. Code Ann. § 22-2723(a)(1) (“(a) The following are subject to forfeiture: (1) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.”).

³⁵⁴ D.C. Code Ann. § 22-2723(a)(2) (“(a) The following are subject to forfeiture: . . . (2) All money, coins, and currency which are used, or intended for use, in violation of a prostitution-related offense.”).

³⁵⁵ D.C. Code § 22-2723(a)(1), (a)(2).

³⁵⁶ The words “intended to” as used in the current prostitution forfeiture statute may refer to what was commonly known as “specific intent.” However, even if this is the case, current District case law is unclear as to whether “specific intent” may be satisfied by mere knowledge, or if conscious desire is required. Compare, *Logan v. United States*, 483 A.2d 664, 671 (D.C. 1984) (“[a] specific intent to kill exists when a person acts with the purpose . . . of causing the death of another,”) with *Peoples v. United States*, 640 A.2d 1047, 1055-56 (D.C. 1994) (proof that the appellant, who set fire to a building “knew” people inside a would suffer injuries sufficient to infer that the appellant “had the requisite specific intent to support his convictions of malicious disfigurement”).

§ 22E-206. “Intent” is a defined term in RCC § 22E-206 that here means the actor was practically certain that the property would be used in a prostitution offense.³⁵⁷ Applying the RCC definition of “intent” does not change the mental state requirements for forfeiture in D.C. Law 20-278.³⁵⁸ This change improves the clarity, consistency, and proportionality of the revised statutes.

Second, the RCC establishes that strict liability is a distinct basis for the forfeiture of property. The current D.C. Code prostitution forfeiture provision applies to conveyances and money that are “are used” in a prostitution offense.³⁵⁹ It is unclear whether “are used” applies strict liability. There is no DCCA case law on this issue. Resolving this ambiguity, the revised prostitution forfeiture provision, by use of the phrase “in fact,” clarifies that strict liability is a distinct basis for the forfeiture of property. Applying strict liability does not change the mental state requirements for forfeiture in D.C. Law 20-278.³⁶⁰ This change improves the clarity, consistency, and proportionality of the revised statutes.

The remaining changes are clarificatory and are not intended to substantively change current District law.

First, the revised forfeiture provision deletes the language “to transport.” The current D.C. Code prostitution forfeiture provision includes “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport, or in any manner to facilitate a violation of a prostitution-related offense.” The term “conveyances” sufficiently communicates an object designed to transport. The verb “to transport” is unnecessary and deleting it improves the clarity of the revised statutes.

Second, the revised forfeiture provision deletes the language “in any manner.” The current D.C. Code prostitution forfeiture provision includes “[a]ll conveyances, including aircraft, vehicles, or vessels, which are used, or intended for use, to transport,

³⁵⁷ Relying on the RCC definition of “intent” may produce an additional change in current District law. Under the RCC, the “intent” mental state may be satisfied by knowledge of a circumstance or result. The RCC also provides that knowledge of a circumstance may be imputed if a person is reckless as to whether the circumstance exists, and with the purpose of avoiding criminal liability, avoids confirming or fails to investigate whether the circumstance exists. Applied to this forfeiture provision, if an owner does *not* know that property is to be used to violate the trafficking in forced commercial sex offense, but was reckless as to this fact, and avoided investigating whether this circumstance exists in order to avoid criminal liability, the imputation rule may allow a fact finder to impute knowledge to the owner. It is unclear under current District law whether a similar rule of imputation would apply. Current D.C. Code § 41-306 states that “[n]o property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.” However, this provision applies when an actual *act or omission* is the basis for forfeiture. It is unclear whether an owner’s willful blindness as to *intended* uses of property still authorizes civil forfeiture. If this provision does apply even when property has not yet been used, the term “willfully blind” is undefined, and it is unclear how it differs from the deliberate ignorance provision under the RCC.

³⁵⁸ *See, e.g.*, D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

³⁵⁹ D.C. Code § 22-2723(a)(1), (a)(2).

³⁶⁰ *See, e.g.*, D.C. Code § 41-302(b) (“No property shall be subject to forfeiture by reason of an act or omission committed or omitted without the actual knowledge and consent of the owner, unless the owner was willfully blind to the knowledge of the act or omission.”).

or in any manner to facilitate a violation of a prostitution-related offense.”³⁶¹ “To facilitate” is sufficiently broad to encompass all methods of facilitation, particularly since the revised statute, as is discussed above, no longer specifies “to transport.” Deleting “in any manner” improves the clarity of the revised statutes.

Third, the revised forfeiture provision deletes the term “property.” The current D.C. Code prostitution forfeiture provision states that “All seizures and forfeitures of property under this section shall be pursuant to the standards and procedures set forth in D.C. Law 20-278.”³⁶² The term “property” is unnecessary because paragraphs (a)(1) and (a)(2) of the revised provision and the current forfeiture provision³⁶³ are limited to types of property—vehicles and money. This change improves the clarity of the revised statutes.

³⁶¹ D.C. Code § 22-2723(a)(1).

³⁶² D.C. Code § 22-2723(b).

³⁶³ D.C. Code § 22-2723(a)(1), (a)(2).