First Draft of Report #20
Abuse & Neglect of Children, Elderly, and Vulnerable Adults

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

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 20, *Abuse & Neglect of Children, Elderly, and Vulnerable Adults* is May 11, 2018 (eight weeks from the date of issue). Oral comments and written comments received after May 11, 2018 may not be reflected in the Second Draft of Report No. 20. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

Chapter 15. Abuse and Neglect of Vulnerable Persons

Section 1501. Child Abuse.

(a) *First Degree Child Abuse.* A person commits the offense of first degree child abuse when that person:

(1) Either:

(A) Purposely causes serious mental injury to another person, with recklessness that the other person is a child; or

(B) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person, with recklessness that the other person is a child; and

(2) In fact:

(A) That person is an adult at least two years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

(b) *Second Degree Child Abuse.* A person commits the offense of second degree child abuse when that person:

(1) Recklessly:

(A) Causes serious mental injury to a child; or

(B) Causes significant bodily injury to a child; and

(2) In fact:

(A) That person is an adult at least two years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

(c) *Third Degree Child Abuse.* A person commits the offense of third degree child abuse when that person:

(1)

(A) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a child; or

(B) Recklessly causes bodily injury to, or uses physical force that overpowers, a child; and

(2) In fact:

(A) That person is an adult at least two years older than the child; or

(B) That person is a parent, legal guardian, or other person who has assumed the obligations of a parent.

(d) *Penalties*.

(1) *First Degree Child Abuse*. First degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Child Abuse*. Second degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Child Abuse*. Third degree child abuse is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," and "recklessly" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "bodily injury," "physical force," "child," and "adult," have the meanings specified in § 22A-1001.

(f) *Defenses*.

(1) *Parental Discipline Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, it is an affirmative defense to third degree child abuse if:

(A) A parent, legal guardian, or other person who has assumed the obligations of a parent:

(i) Caused bodily injury to a child 18 months or older, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(ii) Used overpowering physical force against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(iii) Committed harassment per RCC § 22A-XXXX, menacing per RCC § 22A-1203, threats per RCC § 22A-1204, restraint per RCC § 22A-XXXX, or first degree offensive physical contact per RCC § 22A-1205(a) against any child, other than by means of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;

(B) The bodily injury, use of overpowering physical force, or harassment, menacing, threats, restraint, or offensive physical contact was for the purpose of exercising discipline;

(C) The exercise of such discipline was reasonable in manner and degree; and

(D) The conduct did not include:

(i) Burning, biting, or cutting;

(ii) Striking with a closed fist;

(iii) Shaking, kicking, or throwing; or

(iv) Interfering with breathing.

(2) *Burden of Proof for Parental Discipline Defense*. If evidence is present at trial of the defendant's purpose of exercising reasonable discipline, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1501 Child Abuse

Commentary

Explanatory Note. *The RCC child abuse offense proscribes a broad range of conduct in which there is harm to a child's bodily integrity or mental well-being, as well as conduct that constitutes harassment, menacing, threats, restraint, or first degree offensive physical contact, as those crimes are defined in the RCC.*[1] *The penalty gradations are primarily based on the degree of bodily harm or mental harm. Along with the revised child neglect offense,*[2] *the revised child abuse offense replaces the child cruelty offense*[3] *and the failure to provide for a child offense*[4] *in the current D.C. Code. Insofar as it is applicable to the current child cruelty offense, the revised child abuse statute also replaces the current enhancement for certain crimes committed against minors.*[5]

Subsection (a) specifies the two types of prohibited conduct in first degree child abuse, the highest grade of the revised child abuse offense. Subsection (a)(1)(A) specifies one type of prohibited conduct—causing "serious mental injury," a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (a)(1)(A) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22A-206 to mean the accused must consciously desire that his or her conduct causes "serious mental injury." Subsection (a)(1)(A) specifies that the culpable mental state for the fact that the complaining witness is a "child" is "recklessness," defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (a)(1)(B) specifies the second type of prohibited conduct—causing "serious bodily injury," a term defined in RCC § 22A-1001 as injury involving a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Subsection (a)(1)(B) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly, under circumstances manifesting extreme indifference to the value of human life." This culpable mental state is defined in RCC § 22A-206 to mean "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury, where "the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." Subsection (a)(1)(B) specifies that the culpable mental state for the fact that the complaining witness is a "child" is "recklessness, defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (b)(1)(A) specifies one type of prohibited conduct for second degree child abuse—causing "serious mental injury," a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (b)(1) specifies that the culpable mental state for causing "serious mental injury" in subsection

[1] RCC §§ 22A-XXXX (harassment), 22A-1203 (menacing), 22A-1204 (threats), 22A-XXXX (restraint), 22A-1205(a) (first degree offensive physical contact).
[2] RCC § 22A-1502.
[3] D.C. Code § 22-1101.
[4] D.C. Code § 22-1102.
[5] D.C. Code § 22-3611.

(b)(1)(A) is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will cause serious mental injury. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "child," and requires that the accused disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (b)(1)(B) specifies the second type of prohibited conduct—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subsection (a)(1)(B) specifies that the culpable mental state for causing "significant bodily injury" is "recklessly," defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause "significant bodily injury." Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "child," and requires that the accused disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (c)(1) specifies the two types of prohibited conduct for third degree child abuse. Subsection (c)(1)(A) specifies that the accused must commit harassment, menacing, threats, restraint, or first degree offensive physical contact as those crimes are defined in the RCC.[6] "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses. Subsection (c)(1)(A) specifies a culpable mental state of "recklessness" for the fact that the complaining witness is a "child," defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (c)(1)(B) specifies the second type of prohibited conduct for second degree child abuse—causing "bodily injury" or using "physical force that overpowers" the child. "Bodily injury" is the lowest level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 to require "physical pain, illness, or any impairment of condition." "Physical force" is defined in RCC § 22A-1001 to mean "the application of physical strength." Subsection (c)(1)(B) specifies that the culpable mental state for causing bodily injury or using physical force that overpowers is "recklessly," defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will cause bodily injury or result in the use of physical force that overpowers. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "child," and requires that the accused disregard a substantial and unjustifiable risk that the complainant is a "child." "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Each gradation of the revised child abuse offense requires either that the accused is "an adult at least two years older than the child" (subsections (a)(2)(A), (b)(2)(A), and (c)(2)(A)) or "a parent, legal guardian, or other person who has assumed the obligations of a parent" (subsections (a)(2)(B), (b)(2)(B), and (c)(2)(B). In each gradation, "in fact," a defined term, indicates that there is no culpable mental state requirement as to either requirement (subsections

[6] RCC §§ 22A-XXXX (harassment), 22A-1203 (menacing), 22A-1204 (threats), 22A-XXXX (restraint), 22A-1205(a) (first degree offensive physical contact).

(a)(2), (b)(2), and (c)(2)). "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age." "Adult" is defined in RCC § 22A-1001 as "a person who is 18 years of age or older."

Subsection (d) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (f) specifies the parental discipline defense for child abuse. Subsection (f)(1) states that the parental discipline defense is in addition to any defenses otherwise applicable to the conduct at issue.[7] Subsection (f)(1) further states that the defense is applicable only to third degree child abuse. Subsections (f)(1)(A)(i), (f)(1)(A)(ii), and (f)(1)(A)(iii) list in detail the conduct that third degree child abuse covers, with the additional requirement that a firearm not be used, as "firearm" is defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded. In the case of causing bodily injury, subsection (f)(1)(1) further limits the defense to causing bodily injury to a child 18 months of age or older. Subsection (f)(1)(B) requires that the bodily injury, the use of overpowering physical force, or harassment, menacing, threats, restraint, or first degree offensive physical contact was for the purpose of exercising discipline. Subsection (f)(1)(C) requires that the use of the discipline was "reasonable in manner and degree." Subsection (f)(1)(D) excludes several types of conduct from the defense, such as burning, biting, or cutting. If an individual utilizes one of the prohibited types of conduct in subsections (f)(1)(D)(i) through (f)(1)(D)(iv), the defense does not apply, even if the rest of the requirements for the defense were somehow satisfied. Finally, subsection (f)(2) describes the burden of proof for the parental discipline defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

Relation to Current District Law. *The revised child abuse statute changes existing District law in six main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised child abuse statute does not criminalize as a completed offense conduct that does not actually harm a child. The current second degree child cruelty statute criminalizes not only actual "maltreatment" of a child, but causing a "grave risk of bodily injury," without any distinction in penalty.[8] The revised statute, by contrast, does not criminalize as a completed offense mere risk creation. Conduct that results in a mere risk of certain types of physical or mental harm is criminalized by the revised child neglect statute in RCC § 22A-1501, or may constitute attempted child abuse. The clarity and proportionality of the revised child abuse statute improve if the offense is limited to actual mental or physical injury or the use of overpowering physical force.

[7] For example, a person who, to avoid greater harm, amputates the finger of a person caught in machinery on request of the victim may have available a general justification defense of necessity. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982). The codification of this reference to general justification defenses in the preface to subsection (f)(1) clarifies that courts should not interpret the codification of these special defenses to abrogate the applicability of general defenses under an exp*ressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

[8] Second degree child cruelty prohibits "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(1). Despite the wide range of harm in second degree cruelty to children, the offense has a single penalty, a ten year maximum possible sentence. D.C. Code § 22-1101(c)(2).

Second, the revised child abuse statute partially grades the offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury." The current District child abuse statute is silent as to whether the offense covers purely psychological harms.[9] However, DCCA case law is clear that the current child cruelty statute extends at least to serious psychological harm.[10] Moreover, the current child cruelty statute provides for the same penalties whether such harm was inflicted "intentionally, knowingly, or recklessly."[11] By contrast, the revised child abuse statute specifically prohibits "serious mental injury," defined in RCC § 22A-1001.[12] There are two gradations for "serious mental injury" in the revised statute depending on the culpable mental state—purposely causing "serious mental injury" in first degree child abuse (subsection (a)(1)(A)) and recklessly causing "serious mental injury" in second degree child abuse (subsection (b)(1)(A)). The revised child abuse statute improves the clarity and proportionality of the revised offense by codifying "serious mental injury" and grading based on the culpable mental state.

Third, the revised child abuse statute limits liability to adults that are at least two years older than the child, or to the "parent, legal guardian, or other person who has assumed the obligations of a parent," regardless of age. The current child cruelty statute requires that the child be under 18 years of age,[13] but does not have any requirements for the age of the defendant or the defendant's relationship to the child. As a result, under the current statute, defendants who are under 18 years of age, and potentially younger than their victims, may themselves be convicted of child cruelty. By contrast, the revised child abuse statute does not permit a person under the age of 18 to be convicted of child abuse unless that person is the child's "parent, legal guardian, or other person who has assumed the obligations of a parent." "Other person who has assumed the obligations of a parent" reflects District case law describing persons standing *in loco parentis* in the parental discipline defense,[14] and is not intended to include individuals with more limited responsibility for the child.[15] The revised child abuse statute also requires a two year minimum age difference between an "adult"—defined in RCC § 22A-1001 as a person who

[9] D.C. Code § 22-1101.

[10] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[11] Both first degree child cruelty and second degree child cruelty require "intentionally, knowingly, or recklessly." D.C. Code § 22-1101(a), (b), (c).

[12] For example, confining a child in a closet for a long period of time.

[13] D.C. Code § 22-1101.

[14] *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood *in loco parentis* with his 13-year-old cousin because the record reflected "at best . . . that appellant *helped* on occasion with the basic running of the household," that disciplinary authority over the cousin had never been "specifically delegated" to appellant, and appellant had not "assumed any obligations (such as financial support) that would be 'associated with one standing as a natural parent to a child.'") (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969). The court in *Martin* stated that "*in loco parentis* refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties." *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that *in loco parentis* involves "more than a duty to aid or assist . . . It arises only when one is willing to assume *all* the obligations and to receive *all* the benefits associated with one standing as a natural parent to a child." *Id.* (emphasis in original) (internal citations omitted).

[15] For example, a babysitter under 18 may not be within the scope of the revised child abuse offense.

is 18 years of age or older—and the child—defined in RCC § 22A-1001 as a person who is less than 18 years old.[16] Individuals who do not satisfy these requirements may still have liability under other revised offenses, such as the assault statute in RCC § 22A-1202, the harassment statute (RCC § 22A-XXXX), the menacing statute (RCC § 22A-1203), the threats statute (RCC § 22A-1204), the restraint statute (RCC § 22A-XXXX), or first degree of the revised physical contact offense (RCC § 22A-1205). The consistency and proportionality of the revised child abuse statute improves if it is limited to adults at least two years older than a child or parents, legal guardians, or persons standing *in loco parentis*, regardless of age.

Fourth, the revised first degree child abuse statute requires the defendant to act "recklessly, under circumstances manifesting extreme indifference to human life" (subsection (a)(1)(B)). The current first degree child cruelty statute requires that the defendant "intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats" or "engages in conduct which creates a graves risk of bodily injury to a child and thereby causes bodily injury."[17] The current second degree child cruelty statute requires, in part, "intentionally, knowingly, or recklessly" "maltreat[ing]." The current statutes do not define these culpable mental states terms, and there is limited case law.[18] By contrast, the revised first degree child abuse statute specifies the required culpable mental state of "recklessly, under circumstances manifesting extreme indifference to human life" (subsection (a)(1)(B)) and defines this culpable mental state in RCC § 22A-206. The new culpable mental state matches the culpable mental state in the current aggravated assault statute,[19] and the higher gradations of the RCC assault statute (RCC § 22A-1202). Codifying a higher culpable mental state that is equivalent to the mental state in serious forms of assault improves the proportionality of the revised child abuse statute.

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[16] Several current District offenses require a similar age difference, as does the sentencing enhancement for committing certain violent crimes against a child (referred to as a "minor" in the statute). *See, e.g.*, D.C. Code §§ 22-3611(a), (c)(3) (enhancement for committing certain violent crimes against a "minor" applying to "any adult, being at least 2 years older than a minor" and defining a "minor" as a "person under 18 years of age at the time of the offense."); 22-3001(3), 22-3008, 22-3009 (first degree sexual abuse of a child and second degree sexual abuse of a child requiring that the defendant be "at least 4 years older than a child" and defining "child" as "a person who has not yet attained the age of 16 years."); 22-811(a), (f)(1), (f)(2) (contributing to the delinquency of a minor statute requiring "an adult being 4 or more years older than a minor" and defining "adult" as "a person 18 years of age or older at the time of the offense" and "minor" as "a person under 18 years of age at the time of the offense.")

[17] D.C. Code § 22-1101(a).

[18] In *Jones v. United States*, the DCCA held that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct." *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002). The court noted that the definitions of "intentionally," "knowingly," and "recklessly" are consistent with the definitions in other DCCA case law, including the definition of "recklessly" in the Model Penal Code. *Jones*, 813 A.2d at 225. The meaning of these culpable mental state terms in the current first degree child cruelty offense is particularly confusing because it appears to equate "recklessly" with "willfully."

[19] The current aggravated assault statute requires that the defendant "knowingly or purposely cause[] serious bodily injury to another person" or "under circumstances manifesting extreme indifference to human life . . . intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury, and thereby causes serious bodily injury." D.C. § 22-404.01(a). The DCCA, however, has stated that "[i]n order to give effect to the [aggravated assault] statute as a whole, subsection (a)(2) must be read as requiring a different type of mental element—gross recklessness." *Perry*, 36 A.3d at 817.

Despite the higher required injury ("serious bodily injury" as opposed to "bodily injury") and higher culpable mental state, the current aggravated assault statute has a ten year maximum prison sentence, as opposed to the 15 year maximum sentence in the current first degree child cruelty statute. D.C. Code § 22-1101(a), (c)(1).

Fifth, the revised child abuse statute is not subject to a penalty enhancement as a crime committed against a minor. Under a current District statute, first degree child cruelty (D.C. Code § 22-1101(a)) is subject to a penalty enhancement if the defendant is 18 years of age or older and is at least two years older than the child.[20] There is no case law interpreting this enhancement as applied to child cruelty.[21] The proportionality of the revised child cruelty statute improves if it is not subject to a duplicative enhancement.

Sixth, the revised child abuse statute is not subject to a separate penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and does not grade the offense by the use of a weapon. Current D.C. Code § 22-4502 provides severe, additional penalties for committing, attempting, soliciting, or conspiring to commit an array of serious crimes, including first degree child cruelty,[22] "while armed with" or "having readily available" a dangerous weapon.[23] By contrast, the revised child abuse statute does not grade the offense based on the use of a weapon, and is not subject to a separate while armed weapons enhancement. Use of a weapon to commit conduct that satisfies the revised child abuse statute may instead be chargeable under the RCC assault statute (RCC § 22A-1202), which includes gradations elevating penalties for the use of a weapon.[24] Unlike current District law,[25] it

[20] D.C. Code § 22-3611. The enhancement refers to a "minor" instead of a "child," but defines a "minor" as a person under the age of 18. D.C. Code § 22-3611(c)(3). Under the enhancement, the defendant "may" receive a fine of up to 1½ times the maximum fine for first degree child cruelty, a term of imprisonment of up to 1½ times the maximum term of imprisonment for first degree child cruelty, or both. D.C. Code § 22-3611(a).

[21] However, the DCCA has declined to allow enhancement of another offense where the enhancement concerns an element in the underlying offense. The DCCA has held that the "while armed" enhancement in D.C. Code § 22-4502(a)(1) may not apply to the offense of assault with a dangerous weapon because the offense already provides for an enhancement. *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [the "while armed" enhancement in D.C. Code § 22-4502(a)(1) may not apply to [assault with a dangerous weapon] since [the assault with a dangerous weapon offense] provides for enhancement and is a more specific and lenient provision."). Similarly, it could be argued that the enhancement for crimes against a minor enhances a crime which is already enhanced due to the complainant being under 18 years of age.

[22] D.C. Code § 22-1101(a).

[23] For a first offense of committing specified crimes of violence "while armed with or having readily available" a dangerous weapon, the defendant "may" receive a maximum term of imprisonment of up to 30 years. D.C. Code § 22-4502(a)(1). If the defendant committed the offense "while armed with any pistol or firearm," however, he or she "shall" receive a five year "mandatory-minimum" term of imprisonment of not less than 5 years. D.C. Code § 22-4502(a)(1). If the current conviction is for committing a specified crime of violence "while armed with or having readily available" a dangerous weapon and the defendant has at least one prior conviction for an armed crime of violence, the defendant "shall" be sentenced to "not less than 5 years" imprisonment and not more than 30 years. D.C. Code § 22-4502(a)(2). If the current conviction is for committing a specified crime of violence "while armed with any pistol or firearm" and the defendant has the required prior conviction for an armed crime of violence, the defendant "shall" be "imprisoned for a mandatory-minimum term of not less than 10 years." D.C. Code § 22-4502(a)(2).

[24] If an individual merely possesses a deadly or dangerous weapon during while committing child abuse, the individual may still be subject to liability for possessing a dangerous weapon in furtherance of a crime of violence per RCC § 22A-XXXX [revised PFCOV-similar offense]. In addition, depending on the facts of a given case, the display of a deadly or dangerous weapon may be sufficient to establish liability for aggravated criminal menace per RCC § 22A-1203.

[25] There are several penalty enhancements under current District law based upon status of the complaining witness. *See, e.g.*, D.C. Code §§ 22-3601 (enhancement for specified crimes committed against senior citizens); 22-3611 (enhancement for specified crimes committed against minors); 22-3751 (enhancement for specified crimes committed against taxicab drives); 22-3751.01 (enhancement for specified crimes committed against a transit operator or Metrorail station manager). Nothing in current District law appears to prohibit enhancing an assault with one or more of these separate enhancements based on age or work status, in addition to the weapon enhancement in

is not possible in the RCC child abuse offense to stack an enhancement for use of a weapon and an enhancement based on the identity of the complainant. The proportionality of the revised child abuse statute improves if the offense is not subject to a separate enhancement for the use of a weapon.

Beyond these six substantive changes to current District law, seven other aspects of the revised child abuse statute may be viewed as a substantive change of law.

First, the revised child abuse statute defines "serious mental injury" in RCC § 22A-1001. The current District child cruelty statute is silent as to whether it includes psychological harm, although DCCA case law is clear that the current child cruelty statute extends to at least serious psychological injury.[26] However, the court has not articulated a precise definition of the requisite psychological harm. RCC § 22A-1001 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current juvenile law statutes[27] by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse, but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. Codifying a definition of "serious mental injury" in the revised statute clarifies the law.

Second, the revised child abuse statute prohibits harassment (RCC § 22A-XXXX), menacing (RCC § 22A-1203), threats (RCC § 22A-1204), and restraint (RCC § 22A-XXXX) against a child. Although the current child abuse statute is silent as to whether psychological harms may be the basis of liability, DCCA case law is clear that the statute prohibits more than physical abuse.[28] However, the DCCA has stated that a high level of psychological harm may be sufficient for liability under the current child cruelty statute, although the court has not provided

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current D.C. Code § 22-4502. Indeed, the facts as discussed in several DCCA cases indicate that such stacking does occur with the weapon enhancement and senior citizen enhancement. *See, e.g., McClain v. United States*, 871 A.2d 1185 (D.C. 2005) (determining "whether the trial court committed plain error when it instructed the jury regarding to lesser-included offenses of the crime of armed robbery of a senior citizen," charged under the enhancements in now D.C. Code §§ 22-4502 and 22-3601).

[26] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[27] D.C. Code § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[28] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

a definition that establishes minimally sufficient psychological harms.[29] The revised child abuse statute reflects current case law by including "serious mental injury" in both first degree and second degree child abuse, and in third degree child abuse by providing liability for criminal conduct that may cause less-serious psychological harms—harassment (RCC § 22A-XXXX), menacing (RCC § 22A-1203), threats (RCC § 22A-1204), and restraint (RCC § 22A-XXXX),. The clarity and consistency of the revised statute improves if lesser psychological harms are more specifically described as the harms resulting from harassment, menacing, threats, or restraint.

Third, the revised child abuse statute requires a culpable mental state of "recklessness" as to the fact that the complainant is a child. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a child. There is no DCCA case law discussing concerning the culpable mental state for this element. However, under the current enhancement for certain crimes against minors, it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[30] There is no separate enhancement for crimes committed against minors applicable to child abuse in the RCC. However, the "reckless" culpable mental state in the revised child abuse statute preserves the substance of the current defense.[31] The clarity, completeness, and proportionality of the revised child abuse statute improves if there is a culpable mental state of "recklessness" for the fact that the complaining witness is a child.

Fourth, the revised child abuse statute specifies the types of physical injury that are a basis for liability. The current first degree child cruelty statute prohibits, in part, conduct that "tortures,"[32] "beats,"[33] "maltreats,"[34] and "causes bodily injury."[35] Second degree child cruelty prohibits, in part, conduct that "maltreats."[36] The current offense, however, does not define these terms. DCCA case law suggests that "bodily injury" in the child abuse statute may not require medical attention,[37] but the required amount of physical harm is unclear. Similarly, the DCCA

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[29] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children." *Alfaro*, 859 A.2d at 153-54; *see also Speaks*, 959 A.2d at 717 (stating that the evidence permitted a reasonable juror to conclude beyond a reasonable doubt that two minor children "sustained emotional pain and suffering and a battery (*i.e.*, they were 'terrified' and 'screaming')" and permitting separate convictions for second degree child cruelty under the "grave risk of bodily injury" prong). The DCCA has stated that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 154. The DCCA did not specify a required level of psychological harm for first degree cruelty, but discussed the inclusion of "mental injury" in the civil definition of "abused" child in D.C. Code § 16-2301 and noted that "to suggest that prolonged psychological torment of a child is not 'maltreatment' is to distort the meaning of the term." *Alfaro*, 859 A.2d at 157

[30] D.C. Code § 22-3611(b).

[31] "Reckless" is defined in RCC § 22A-206 and means that the accused must disregard a substantial and unjustifiable risk that the complainant was under 18. The enhancement for crimes against minors has an affirmative defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness as to the age of the complaining witness because the accused would not consciously disregard a substantial and unjustifiable risk that the complainant was under 18 years of age.

[32] D.C. Code § 22-1101(a).

[33] D.C. Code § 22-1101(a).

[34] D.C. Code § 22-1101(a).

[35] D.C. Code § 22-1101(a).

[36] D.C. Code § 22-1101(b)(1).

[37] DCCA case law suggests that "bodily injury" is a relatively low threshold. *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

has not determined the required amount of physical harm for "tortures," "beats," or "maltreats."[38] The revised child abuse statute specifies the minimal degree of physical harm required for each grade of the offense—"serious bodily injury" (subsection (a)(1)(B)), "significant bodily injury" (subsection (b)(1)(B)), "bodily injury" (subsection (c)(1)(B)), or conduct that satisfies first degree offensive physical contact in RCC § 22A-1205(a) (causing physical contact with bodily fluids or excrement). These specified types of physical harm are defined in RCC § 22A-1001 and are intended to cover conduct prohibited by the words "tortures," "beats," "maltreats," and "causes bodily injury" in the current child cruelty statute. The definition of "bodily injury," in particular, accords with the limited DCCA case law on "bodily injury" in the current statute.[39] The clarity and proportionality of the revised statute improve because the required levels of physical injury for each grade are specified and defined.

Fifth, the revised child abuse statute clarifies that there is liability for "physical force that overpowers the child" (subsection (c)(1)(B)). It is unclear whether the current child cruelty offense criminalizes the use of overpowering physical force because the current statute does not define "maltreats"[40] or "bodily injury"[41] and there is limited DCCA case law construing those terms. The DCCA has, however, noted that "physically assaultive conduct" is included in the cruelty to children offense,[42] and the current assault statute includes physical force that overpowers,[43] as does the revised assault statute (RCC § 22A-1202). The consistency and proportionality of the revised child abuse statute improves by inclusion of "physical force that overpowers the child" because it is the same level of harm in the current and revised assault statutes.

Sixth, the revised child abuse statute codifies a parental discipline defense. The District's current child abuse and assault statutes are silent as to whether there is a defense for parental discipline. However, while there is no case law on the applicability of the parental defense to child abuse, the DCCA has recognized the defense for assault. The DCCA has not addressed the limits of permissible force in the parental discipline defense other than requiring that the force be "reasonable."[44] Also, no DCCA case law exists regarding whether conduct that does not result in actual harm to a child, such as threats, is subject to the parental discipline defense. However,

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[38] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[39] *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[40] The DCCA has extensively discussed "maltreats" in terms of incorporating serious psychological or emotional harm, but not the required physical harm. *Alfaro v. United States*, 859 A.2d 149, 157-60 (D.C. 2004).

[41] DCCA case law suggests that "bodily injury" is a relatively low threshold. *See, e.g., Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[42] *Speaks v. United States*, 959 A.2d 712, 714–15 (D.C. 2008) ("Cruelty to children—unlike assault—includes the infliction of mental or emotional pain or suffering upon a child, as well as physically assaultive conduct." (citing *Alfaro v. United States*, 859 A.2d 149, 157 (D.C. 2004).

[43] *See, e.g., Mahaise v. United States*, 722 A.2d 29, 30 (D.C. 1988) ("A battery is any unconsented touching of another person. Since an assault is simply an attempted battery, every completed battery necessarily includes an assault. Appellant's statement that he removed the phone from the complainant's hand and then took her cigarette from her other hand and extinguished it is thus an admission, at least *prima facie*, of two separate assaultive acts".") (citing *Ray v. United States*, 575 A.2d 1196, 1199 (D.C. 1990).

[44] *See, e.g., Newby v. United States*, 797 A.2d 1233, 1241-42 (endorsing the common law "reasonable force" standard); *Florence v. United States*, 906 A.2d 889, 893 ("The [parental discipline defense] is established where the defendant uses reasonable force for the purpose of exercising parental discipline.").

DCCA case law does extend the parental discipline defense beyond parents to persons standing *in loco parentis* to the child.[45]

In the revised child abuse statute, subsection (f)(1) states that the defense is applicable only to third degree child abuse. Subsections (f)(1)(A)(i), (f)(1)(A)(ii), and (f)(1)(A)(iii) list in detail the conduct that third degree child abuse covers, with the additional requirement that a firearm not be used, as "firearm" is defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded;. In the case of causing bodily injury, subsection (f)(1)(A)(1) further limits the defense to causing bodily injury to child 18 months of age or older. It seems likely that "bodily injury," as defined in RCC § 22A-1001, the use of "physical force" that overpowers a child, and harassment, menacing, threats, restraint, and first degree offensive physical contact, as those offenses are defined in the RCC,[46] may be considered "reasonable" under some circumstances per current DCCA case law.[47] Moreover, it is inconsistent to exclude potentially less-serious assault-type conduct that does not result in actual harm to a child if the other requirements of the defense are met.

Subsection (f)(1)(B) of the revised child abuse statute codifies the requirement in DCCA assault case law that the purpose of the conduct was discipline.[48] Subsection (f)(1)(C) of the revised child abuse statute codifies the overall reasonableness requirement for the discipline that is required under DCCA case law.[49] Subsection (f)(1)(D) specifically excludes several types of common assaultive conduct from the defense. DCCA case law suggests[50] that the court would

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[45] *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood *in loco parentis* with his 13-year-old cousin because the record reflected "at best . . . that appellant *helped* on occasion with the basic running of the household," that disciplinary authority over the cousin had never been "specifically delegated" to appellant, and appellant had not "assumed any obligations (such as financial support) that would be 'associated with one standing as a natural parent to a child.'") (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969). The court in *Martin* stated that "*in loco parentis* refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties." *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that *in loco parentis* involves "more than a duty to aid or assist . . . It arises only when one is willing to assume *all* the obligations and to receive *all* the benefits associated with one standing as a natural parent to a child." *Id.* (emphasis in original) (internal citations omitted).

[46] RCC §§ 22A-XXXX (harassment), 22A-1203 (menacing), 22A-1204 (threats), 22A-XXXX (restraint), 22A-1205(a) (first degree offensive physical contact).

[47] *See, e.g.*, *Powell v. United States*, 916 A.2d 890, 892, 893, 894 (D.C. 2006) (finding that the government presented insufficient evidence for a reasonable fact finder to conclude beyond a reasonable doubt that the force used by appellant was "unreasonable" when the factual record was limited to a father grabbing his daughter's "right arm and pull[ing] her into the foyer of the house with sufficient force that she fell backwards against a nearby interior stairway" in order to prevent her from going to a friend's house where her father suspected unlawful drug activity); *Longus v. United States*, 935 A.2d 1108, 1110, 1111-1113 (D.C. 2007) (reversing a conviction for assault because the government failed to establish beyond a reasonable doubt that the force used was unreasonable when a father "slapped [his daughter] on the back of the head with an open palm," "grabbed [his daughter's clothing] near her neck, causing her to step backwards into two double doors and to briefly lose her breath," and the daughter did not suffer any physical injuries or exposure to a "substantial risk of significant injury or significant pain, physical or psychological.").

[48] As under current DCCA case law, "uncontrolled anger can be evidence that physical force is not being applied for a disciplinary purpose or to show that the force used was unreasonable," but an individual can "simultaneously be angry be acting lawfully, with the intent to discipline." *Florence v. United States*, 906 A.2d 889, 895 (D.C. 2006).

[49] *See, e.g.*, *Newby v. United States*, 797 A.2d 1233, 1241-42 (endorsing the common law "reasonable force" standard); *Florence v. United States*, 906 A.2d 889, 893 ("The [parental discipline defense] is established where the defendant uses reasonable force for the purpose of exercising parental discipline.").

[50] *See Longus v. United States*, 935 A.2d 1108, 1112-13 (D.C. 2007) (stating that "[e]xposure to a substantial risk of significant physical injury or significant pain may also be relevant in determining whether a parent used excessive

consider these types of assaultive conduct as "unreasonable," and beyond the parental discipline defense, particularly since they are excluded from the parental discipline defense in current District civil law.[51] Subsection (f)(2) codifies the requirement that the government disprove the defense beyond a reasonable doubt, found in DCCA case law.[52] Codifying the parental discipline defense in the revised child abuse statute clarifies the law.

Seventh, the revised child abuse statute no longer separately criminalizes creating "a grave risk of bodily injury to a child, and thereby causes bodily injury." The current first degree child cruelty statute requires, in part, both that the defendant "engage[] in conduct which creates a graves risk of bodily injury to a child" and that the defendant "thereby cause[] bodily injury."[53] However, it is unclear whether or how this requirement differs from the alternative bases of liability in the current first degree child cruelty statute ("beats" or "maltreats" a child). No DCCA case law interprets this part of the current child cruelty statute. The revised child abuse statute is limited to causing specific types of physical or mental harm. Conduct that results in a mere risk of certain types of physical or mental harm is criminalized by the revised child neglect statute in RCC § 22A-1502, or may constitute attempted child abuse. Eliminating as a separate basis for liability risk creation that results in bodily injury improves the clarity of the statute.

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

First, the revised child abuse statute codifies a culpable mental state of "recklessly" in second degree child abuse (subsections (b)(1)(A), (b)(1)(B)) and third degree child abuse (subsection (c)(1)(B)). The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[54] The revised child abuse statute codifies a culpable mental state of "recklessly," which is defined in RCC § 22A-206. Under the general rule of construction in RCC § 22A-206, the higher culpable mental states of "intentionally" and "knowingly" satisfy the lower culpable mental state of "recklessly" and it is unnecessary to codify them. In addition, the definition of "recklessly" in RCC § 22A-206 is consistent with DCCA case law discussing the "recklessly" culpable mental state in the current child cruelty statute.[55] Codifying the culpable mental state of "recklessly" clarifies the statute.

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force under the circumstances" and noting that the complainant was not exposed to "substantial risk of significant injury or significant pain, physical or psychological.") (citing *Powell v. United States*, 916 A.2d 890, 895 (D.C. 2006) (Glickman, J., concurring)); *Lee v. United States*, 831 A.2d 378, 381 (D.C. 2003) (finding that hitting a child with a wooden dowel that left contusions and abrasions and "warranted a trip to the emergency room" was not reasonable.");

[51] D.C. Code Ann. § 16-2301(23) (excluding from the definition of "abused" child "discipline administered by a parent, guardian or custodian to his or her child; provided, that the discipline is reasonable in manner and moderate in degree and otherwise does not constitute cruelty" and excluding from "discipline" several types of assaultive conduct).

[52] *See, e.g., Newby*, 797 A.2d at 1243 ("[T]he government could 'defeat' the parental discipline defense by proving either that the parent did not have a genuine disciplinary purpose or that the force used was immoderate or unreasonable.").

[53] D.C. Code § 22-1101(a).

[54] D.C. Code § 22-1101(a), (b).

[55] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

Second, the revised child abuse statute defines "child" in RCC § 22A-1001. RCC § 22A-1001 defines "child" as "a person who is less than 18 years old." The current child cruelty statute does not define "child," but requires that the complainant be "under 18 years of age."[56] The definition of "child" in RCC § 22A-1001 does not change District law.

Relation to National Legal Trends. *The revised child abuse offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, limiting the revised child abuse statute to conduct that actually harms a child is well-supported by criminal codes in reformed jurisdictions. Twenty of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[57] ("reformed jurisdictions") have specific statutes for child abuse.[58] Fifteen of these jurisdictions limit child abuse crimes to actual harm.[59] An additional eight reformed jurisdictions include gradations in their general assault statutes for causing injury to children,[60] and in so doing, limit the offense to actually harming a child.

The Model Penal Code does not have a child abuse offense or a gradation in its assault statute for injuring a child.[61]

Second, partially grading the revised child abuse offense based on whether the defendant "purposely" or "recklessly" caused "serious mental injury" reflects trends in the criminal codes of reformed jurisdictions. DCCA case law is clear that the current child cruelty statute includes mental harm,[62] but the current statute does not grade based upon the defendant's culpable mental

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[56] D.C. Code § 22-1101(a).

[57] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[58] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[59] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Minn. Stat. Ann. §§ 609.376, 609.377; Mont. Code Ann. § 45-5-212; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[60] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[61] MPC § 211.1.

[62] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54,

state as to that harm.[63] Legal trends in the reformed jurisdictions strongly support grading the revised child abuse offense based, in part, on the culpable mental state. Twenty of the 29 reformed jurisdictions[64] have specific child abuse statutes.[65] Six of these 20 states grade the offense based on the defendant's culpable mental state.[66] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and purposely.[67] Only three of the 20 reformed jurisdictions with specific child abuse statutes include recklessly[68] or negligence[69] without grading the offense based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state by statute.[70]

Notably, the six reformed jurisdictions that grade their child abuse statutes based upon the culpable mental state[71] have far lower penalties for recklessly causing injury to a child than the fifteen year maximum punishment in the District's current first degree child cruelty statute[72]

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157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

[63] Both first degree child cruelty and second degree child cruelty require "intentionally, knowingly, or recklessly." D.C. Code § 22-1101(a), (b), (c).

[64] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

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[66] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[67] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[68] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[69] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

[70] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"), 9:6-3.

[71] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[72] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes

or the ten year maximum punishment in the District's current second degree child cruelty statute.[73] Half of these states make recklessly injuring a child a misdemeanor,[74] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[75] In the remaining three states, the maximum possible penalties are one-and-a-half years,[76] two years,[77] or three-and-a-half years.[78]

In the three reformed jurisdictions that include recklessly or negligently culpable mental states in their child abuse statutes without grading the offense based on the culpable mental state, the penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[79] The remaining two jurisdictions only permit a reckless[80] or negligent[81] culpable mental state to be the basis for liability if a weapon is used. Despite the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[82]

A review of the 20 reformed jurisdictions with specific child abuse statutes revealed that at least five states specifically prohibit mental harm[83] and a sixth state makes causing a child

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bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child."

[73] D.C. Code § 22-1101(b), (c)(2).

[74] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[75] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[76] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[77] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[78] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

[79] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[80] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[81] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[82] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[83] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5)(1); N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22(1); Tex. Penal Code Ann. § 22.04(a)(2); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).

Additional states may include mental harm through case law, especially in statutes like D.C.'s current child cruelty statute that use old, undefined terms such as "tortures" and "maltreats." *See, e.g.*, Ala. Code § 26-15-3 ("torture,

mental harm a separate offense.[84] Two of these states grade the offense based on the culpable mental state[85] and two[86] require a higher culpable mental state than "recklessly" in the current child cruelty statute.[87] One of these states has a culpable mental state similar to recklessness[88] and the remaining state's statute does not specify a culpable mental state.[89]

The Model Penal Code does not have a child abuse offense.

Third, criminal codes in reformed jurisdictions support limiting child abuse to individuals of a certain age or relationship to the child, as opposed to the District's current child cruelty statute, which applies to any individual.[90] Twenty of the 29 reformed jurisdictions[91] have specific child abuse statutes.[92] Seven of these states limit their child abuse statutes to individuals that have a special relationship to the child, like a parent or guardian.[93] Two reformed jurisdictions limit liability to persons 18 years of age or older,[94] with one jurisdiction also

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willfully abuse, cruelly beat, or otherwise willfully maltreat."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("maltreats, tortures, overworks or cruelly or unlawfully punishes."); S.D. Codified Laws § 26-10-1 ("abuses, exposes, tortures, torments, or cruelly punishes.").

[84] Wis. Stat. Ann. § 948.04.

[85] Tex. Penal Code Ann. § 22.04(a)(2), (e); Utah Code Ann. § 76-5-109(1)(f)(i)(C), (2).

[86] Mo. Ann. Stat. § 568.060(1)(3), (2)(1), (5) (requiring a culpable mental state of "knowingly" in both gradations of the offense); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully.").

[87] D.C. Code § 22-1101.

[88] Wis. Stat. Ann. § 948.04(1) ("conduct which demonstrates substantial disregard for the mental well-being of the child.").

[89] This state does not have a culpable mental state codified in its child abuse statute, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. N.J. Stat. Ann. §§ 9:6-1 (definition of "cruelty to a child"); 9:6-3.

[90] D.C. Code § 22-1101.

[91] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[92] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[93] Ala. Code §§ 26-15-2(4), 26-15-3, 26-15-3.1 (requiring that the defendant is a "responsible person" and defining "responsible person" as [a] child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("any person having the custody and control of any child under the age of nineteen years."); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 503.120(1) (requiring having "actual custody."); Minn. Stat. Ann. § 609.377(1) ("parent, legal guardian, or caretaker."); N.J. Stat. Ann. §§ 9:6-1; 9:6-3 (requiring "any parent, guardian, or person having the care, custody or control of any child."); N.D. Cent. Code Ann. § 14-09-22(1) ("a parent, adult family or household member, guardian, or other custodian of any child."); Or. Rev. Stat. Ann. § 163.205(b) ("in violation of a legal duty to provide care for a dependent person . . . or having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person.").

[94] Mont. Code Ann. § 45-5-212(1) ("offender is 18 years of age or older."); Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1) ("person eighteen years of age or older.").

requiring that the child be "under 14 years of age"[95] and the other jurisdiction also requiring that the child be "under the age of thirteen."[96] An additional eight reformed jurisdictions include gradations for assaulting children in their general assault statutes.[97]Six of these jurisdictions limit liability to persons 18 years of age or older,[98] and several require an age difference between the defendant and the child.[99]

The Model Penal Code does not have a child abuse offense.

Fourth, criminal codes of reformed jurisdictions provide mixed support for the revised offense to include a gradation requiring a culpable mental state to match the scope of the current[100] and revised[101] aggravated assault statutes, as well as the revised abuse of a vulnerable adult or elderly person statute. Twenty of the reformed jurisdictions have specific child abuse statutes.[102] None of these states have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life," as in the revised child abuse

[95] Mont. Code Ann. § 45-5-212(1).

[96] Wash. Rev. Code Ann. §§ 9A.36.120(1), 9A.36.130(1), 9A.36.140(1).

[97] A few reformed jurisdictions may have gradations for children in their assault statutes, as well as specific child abuse statutes. In such a case, the jurisdiction's child abuse statutes were used, not the assault statutes. Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3), (b); Ark. Code Ann. §§ 5-13-201(a)(7), 5-13-202(a)(4)(C); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2), (h); Ind. Code Ann. § 35-42-2-1(e)(3); Me. Rev. Stat. tit. 17-A, § 207(B); N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(I)(d); N.Y. Penal Law § 120.05(8), (9); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2), 2702(a)(8), (a)(9).

[98] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i), (a)(3) (requiring that the defendant be "18 years of age or older."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more"); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (requiring that the defendant is "18 years of age or older"), 2702(a)(8), (a)(9) (requiring that the defendant be "18 years of age or older" for two gradations of aggravated assault).

[99] Alaska Stat. Ann. §11.41.220(a)(1)(C)(i) ("while being 18 years of age or older, causes physical injury to a child under 12 years of age"), (a)(3) ("while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 12 years of age."); 720 Ill. Comp. Stat. Ann. 5/12C-3.05(b)(1), (b)(2) (requiring that the defendant be "at least 18 years of age" and the child be "under the age of 13 years."); Ind. Code Ann. § 35-42-2-1(e)(3), (j), (k)(1) (requiring that the defendant be "at least eighteen (18) years of age" and the child to be "less than fourteen (14) years of age."); Me. Rev. Stat. tit. 17-A, § 207(B) (requiring that the defendant is "at least 18 years of age" and the child be "less than 6 years of age."); N.Y. Penal Law § 120.05(8), (9) (requiring that the defendant be "eighteen years old or more" and the child be either "less than eleven years" or "less than seven years."); 18 Pa. Stat. Ann. §§ 2701(a)(1), (b)(2) (making it a misdemeanor of the first degree for a person 18 years of age or older to assault a child under 12 years of age), 2702(a)(8), (a)(9) (requiring that the defendant be 18 years of age or older for two gradations of aggravated assault and the child to be either "less than six years of age" or "less than 13 years of age.").

[100] D.C. Code § 22-404.01(a)(2).

[101] RCC § 22A-1202.

[102] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

statute. However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[103]

There is widespread support in the reformed jurisdictions, however, for including a culpable mental state higher than "recklessly" in first degree child abuse, particularly given the District's penalties. For harms inflicted with only a reckless culpable mental state, the District's current first degree child cruelty offense is the most severe in reformed jurisdictions. It has a low culpable mental state of "recklessly," requires only "bodily injury," and has a maximum term of imprisonment of 15 years.[104] Six of the 20 reformed jurisdictions with specific child abuse statutes[105] grade the offense based on the defendant's culpable mental state.[106] An additional eight states are limited to culpable mental states that are higher than recklessness, such as knowingly and purposely.[107] Only three of the 20 reformed jurisdictions include recklessly[108] or negligence[109] without grading the offense based on the culpable mental state. The remaining three states do not clearly specify a culpable mental state.[110]

The six reformed jurisdictions that grade their child abuse statutes based upon a culpable mental state[111] have far lower penalties for recklessly causing injury to a child the fifteen year maximum punishment in the District's current first degree child cruelty statute[112] or the ten year maximum punishment in the District's current second degree child cruelty statute.[113] Half of

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[103] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law § 120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

[104] D.C. Code § 22-1101(a), (c)(1).

[105] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[106] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[107] Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1 (requiring a culpable mental state of "willfully."); Conn. Gen. Stat. Ann. § 53-20(b)(1) ("intentionally."); Kan. Stat. Ann. § 21-5602(a) ("knowingly."); Minn. Stat. Ann. §§ 609.376, 609.377 (requiring a culpable mental state of "intentional."); Mo. Ann. Stat. § 568.060(2), (5)(1) ("knowingly."); N.D. Cent. Code Ann. § 14-09-22(1) ("willfully."); Or. Rev. Stat. Ann. § 163.205(1)(b) ("intentionally or knowingly."); Tenn. Code Ann. §§ 39-15-401(a), (b), 39-15-402 (requiring a culpable mental state of "knowingly.").

[108] Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B (requiring a culpable mental state of "recklessly" or "intentionally," with no distinction in penalty). Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140.

[109] Mont. Code Ann. §§ 45-5-212(1), 45-5-2101(1)(a), (1)(b) (offense of assault on a minor requiring that a person commit assault, as defined in § 45-5-201, which includes "purposely or knowingly" causing bodily injury to another and "negligently" causing bodily injury to another with a weapon).

[110] These states do not have a culpable mental state codified in their child abuse statutes, although it is possible that case law or general rules of construction would supply a culpable mental state or culpable mental states. Ohio Rev. Code Ann. § 2919.22(B), (E); S.D. Codified Laws § 26-10-1; N.J. Stat. Ann. §§ 9:6-1, 9:6-3.

[111] Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wis. Stat. Ann. § 948.03.

[112] D.C. Code § 22-1101(a), (c)(1). For the purpose of this survey, the prong of the current first degree child cruelty statute that requires engaging "in conduct which creates a grave risk of bodily injury to a child and thereby causes bodily injury" was used. It is unclear what level of injury is required in the current first degree child cruelty statute for the prong that requires "tortures, beats, or otherwise maltreats a child.".

[113] D.C. Code § 22-1101(a), (c)(1).

these states make recklessly injuring a child a misdemeanor,[114] and one of these states requires "serious physical injury," as opposed to a lesser physical harm.[115] In the remaining three states, the maximum possible penalties are one-and-a-half years,[116] two years,[117] or three-and-a-half years.[118]

In the three reformed jurisdictions that include recklessly or negligently in their child abuse statutes without grading the offense based on the culpable mental state, the penalties are also significantly lower than the fifteen and ten year penalties in the District's current child cruelty statute. One jurisdiction makes it a misdemeanor to recklessly cause "physical injury" to a child.[119] The remaining two states only permit a reckless[120] or negligent[121] culpable mental state to be the basis for liability if a weapon is used. Despite the weapon requirement, each jurisdiction only has a maximum penalty of five years imprisonment.[122]

The Model Penal Code does not have a child abuse offense.

Fifth, the criminal codes in reformed jurisdictions provide general support for not further enhancing a crime limited to children because the crime involved a child. At least two of the reformed jurisdictions have general penalty enhancements for crimes against children.[123] One of

[114] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(IV) (making it a class 1 misdemeanor to "knowingly or recklessly" injure a child and "any injury other than serious bodily injury" results); Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury."); Utah Code Ann. § 76-5-109(3)(b) (making it a Class B misdemeanor to "recklessly" cause a child "physical injury.").

[115] Ky. Rev. Stat. Ann. § 508.120(1)(a), (2) (making it a class A misdemeanor to "recklessly" abuse another person of whom the defendant "has actual custody" and cause "serious physical injury.").

[116] Ariz. Rev. Stat. Ann. §§ 13-3623(B), (B)(2), 13-702(A), (D) (making it a class 5 felony, punishable by a maximum term of imprisonment of one-and-a-half years for a first offense, to "recklessly" "under circumstances other than those likely to produce death or serious physical injury to a child . . . cause[] a child . . . to suffer physical injury or abuse.").

[117] Tex. Penal Code Ann. §§ 22.04(a)(3), (f), 12.35(a) (making it a state jail felony, punishable by a maximum term of imprisonment of two years, to "recklessly" cause a child "bodily injury.").

[118] Wis. Stat. Ann. §§ 948.03, 939.50(3)(i) (making it a Class I felony, punishable by a maximum of three years and six months in prison, to "recklessly" cause a child "bodily harm.").

[119] Del. Code Ann. tit. 11, § 1103 (making it a class A misdemeanor to "recklessly or intentionally" cause a child physical injury).

[120] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.").

[121] Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[122] Wash. Rev. Code Ann. §§ 9A.20.021(1)(C), 9A.36.140, 9A.36.031(1)(d) (making it a class C felony, punishable by five years maximum imprisonment, to commit assault in the third degree as defined in § 9A.36.031(1)(d), "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm."); Mont. Code Ann. §§ 45-5-212(1), (2)(a), 45-5-2101(1)(b) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon).

[123] *See, e.g.*, Haw. Rev. Stat. Ann. § 706-660.2 (codifying a mandatory minimum with the possibility of parole, the length of which varies with the class of offense, if "(a) The person, in the course of committing or attempting to commit a felony, causes the death or inflicts serious or substantial bodily injury upon another person who is . . . (iii) Eight years of age or younger; and (b) Such disability is known or reasonably should be known to the defendant."); N.H. Rev. Stat. Ann. § 651:6 ("A convicted person may be sentenced [to an extended term of imprisonment, the length of which varies with the class of offense] if the jury also finds beyond a reasonable doubt that such person . . .

these two jurisdictions does not have a separate child abuse statute or enhanced gradations for assaulting a child, but the other jurisdiction enhances gradations in its assault statute based upon the age of complaining witness.[124] Several reformed jurisdictions include the age of the victim as an aggravating factor the court may or shall consider at sentencing,[125] but do not change the statutory maximum for the offense. One of these jurisdictions specifically prohibits considering the age of the victim if it is already an element of the offense.[126]

The Model Penal Code does not have a general penalty enhancement for crimes against children.

Sixth, the criminal codes in reformed jurisdictions provide general support for not including in the child abuse offense a penalty enhancement for committing the offense "while armed" or "having readily available" a dangerous weapon, and not grading the offense by the use of a weapon. Only four[127] of the 20 reformed jurisdictions with specific child abuse statutes[128] have a gradation for weapons. Two of these states penalize the weapon gradation of the child abuse offense more severely than the equivalent weapon gradation in the general assault statute.[129] The remaining two states either punish the weapons gradation of the child abuse

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[h]as committed or attempted to commit any [specified crimes against persons] against a person under 13 years of age.").

[124] N.H. Rev. Stat. Ann. §§ 631:1(I)(d), 631:2(d) (gradations in assault statutes that require causing either "serious bodily injury" or "bodily injury" to a "person under 13 years of age.")

[125] *See, e.g.*, Alaska Stat. Ann. § 12.55.155(c)(5) ("The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125 . . .the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to . . . extreme youth."); Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

[126] Tenn. Code Ann. § 40-35-114(4) ("If appropriate for the offense and if not already an essential element of the offense, the court shall consider, but is not bound by, the following advisory factors in determining whether to enhance a defendant's sentence . . . [a] victim of the offense was particularly vulnerable because of age or physical or mental disability.").

[127] Del. Code Ann. tit. 11, § 1103A(a)(3) ("intentionally or recklessly causes physical injury to a child by means of a deadly weapon or dangerous instrument."); Mont. Code Ann. §§ 45-5-212(1), 45-5-201(1)(b) (offense of assault on a minor prohibiting, in part, committing an assault under § 45-5-201 and defining assault to include "negligently causes bodily injury to another with a weapon."); Tenn. Code Ann. §§ 39-15-401, 39-15-402(a)(2) (offense of aggravated child abuse enhancing requiring "a deadly weapon [or] dangerous instrumentality . . . is used to accomplish the act of abuse, neglect, or endangerment."); Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1) (including in the three degrees of child assault committing first degree assault, second degree assault, and third degree assault, respectively, each of which has a gradation for assault with or use of a weapon).

[128] Reformed jurisdictions may have child abuse offenses in both their criminal codes and civil statutes. This survey uses the child abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child abuse offenses were taken from the civil statutes, if there were any. Ala. Code §§ 26-15-2, 26-15-3, 26-15-3.1; Ariz. Rev. Stat. Ann. § 13-3623; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-20; Del. Code Ann. tit. 11, § 1100, 1103, 1103A, 1103B; Kan. Stat. Ann. § 21-5602; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 503.120; Minn. Stat. Ann. §§ 609.376, 609.377; Mo. Ann. Stat. § 568.060; Mont. Code Ann. § 45-5-212; N.J. Stat. Ann. §§ 9:6-1; 9:6-3; N.D. Cent. Code Ann. § 14-09-22; Ohio Rev. Code Ann. § 2919.22(B), (E); Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws § 26-10-1; Tenn. Code Ann. §§ 39-15-401, 39-15-402; Tex. Penal Code Ann. § 22.04; Utah Code Ann. § 76-5-109; Wash. Rev. Code Ann. §§ 9A.36.120, 9A.36.130, 9A.36.140; Wis. Stat. Ann. § 948.03.

[129] *Compare* Mont. Code Ann. § 45-5-212(1), (2)(a) (offense of assault on a minor, punishable by a maximum term of imprisonment of five years, requiring that a person commit assault, as defined in § 45-5-201, which includes "negligently" causing bodily injury to another with a weapon) *with* § 45-5-2101(1)(b) (making it an offense with six

offense the same[130] or less seriously[131] than the equivalent weapon gradation in the general assault statute.

The Model Penal Code does not have a child abuse offense.

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month maximum term of imprisonment to "negligently cause[] bodily injury to another with a weapon."). *Compare* Tenn. Code Ann. §§ 39-15-401(a), 39-15-402(a)(2), (b) (making it a class B felony to knowingly inflict "injury" to a child with a "deadly weapon" or "dangerous instrumentality") *with* Tenn. Code Ann. § 39-13-102(a)(1)(A)(iii), (e)(1)(A)(ii) (making it a Class C felony to knowingly or intentionally commit assault that "involved the use or display of a deadly weapon.").

[130] In Washington, the three degrees of child assault each include committing first degree assault, second degree assault, and third degree assault, respectively. Wash. Rev. Code Ann. §§ 9A.36.120(1)(a), 9A.36.130(1)(a), 9A.36.140(1). The three degrees of child assault have the same penalties as the assault offenses they incorporate and the assault offenses have gradations for weapons. *Compare* Wash. Rev. Code Ann. §§ 9A.36.120(1)(a)(2), 9A.36.130(1)(a), (2), 9A.36.140(1), (2) *with* Wash Rev. Code Ann. §§ 9A.36.011(1)(a), (2), 9A.36.021(c), (2)(a), 9A.36.031(d), (2).

[131] *Compare* Del. Code Ann. tit. 11, § 1103A(a)(3) (second degree child abuse statute making it a class G felony to "intentionally or recklessly cause[] physical injury to a child by means of a deadly weapon or dangerous instrument.") *with* § 612(a)(2), (d) (general assault statute making it a class D felony to "recklessly or intentionally cause[] physical injury to another person by means of a deadly weapon or a dangerous instrument.").

Chapter 15. Abuse and Neglect of Vulnerable Persons

Section 1502. Child Neglect.

(a) *First Degree Child Neglect.* A person commits the offense of first degree child neglect when that person:
  (1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious bodily injury or death;
  (2) That person knows he or she has a duty of care to the child; and
  (3) In fact, that person violated his or her duty of care to the child.

(b) *Second Degree Child Neglect.* A person commits the offense of second degree child neglect when that person:
  (1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a child would experience:
    (A) Significant bodily injury; or
    (B) Serious mental injury;
  (2) That person knows he or she has a duty of care to the child; and
  (3) In fact, that person violated his or her duty of care to the child.

(c) *Third Degree Child Neglect.* A person commits the offense of third degree child neglect when that person:
  (1) Either:
    (A) Recklessly fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine, or other items or care essential for the physical health, mental health, or safety of a child; or
    (B) Knowingly leaves a child in any place with intent to abandon the child; and
  (2)
    (A) That person knows she or he has a duty of care to the child; and
    (B) In fact, that person violated his or her duty of care to the child.

(d) *Penalties*.
  (1) *First Degree Child Neglect.* First degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Second Degree Child Neglect.* Second degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Child Neglect.* Third degree child neglect is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "recklessly" and "knows" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "duty of care," and "child" have the meanings specified in § 22A-1001.

(f) *Exception to Liability for Newborn Safe Haven.* No person shall be guilty of child neglect for the surrender of a newborn child in accordance with D.C. Code § 4-1451.01 *et seq*.

RCC § 22A-1502. Child Neglect

Commentary

Explanatory Note. *The RCC child neglect offense proscribes a broad range of conduct in which there is a risk of harm to a child's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a child, the RCC child neglect offense prohibits failing to provide a child with necessary items or care, as well as abandoning a child. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised child abuse offense,[132] the revised child abuse offense replaces the child cruelty offense[133] and the failure to provide for a child offense[134] in the current D.C. Code.*

Subsection (a)(1) specifies the prohibited conduct for first degree child neglect, the highest grade of the revised child neglect offense—creating, or failing to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious bodily injury or death. Subsection (a)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious bodily injury or death. "Serious bodily injury" is a defined term in RCC § 22A-1001 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. The "recklessly" culpable mental state in subsection (a)(1) also applies to the fact that the complaining witness is a "child."[135] As defined in RCC § 22A-206, "recklessly" requires the accused to disregard a substantial and unjustifiable risk that the complainant is a "child," as defined in RCC § 22A-1001. "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (b)(1)(A) specifies one type of prohibited conduct for second degree child neglect—creating, or failing to mitigate or remedy, a substantial and unjustifiable risk that a child would experience significant bodily injury. Subsection (b)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a child would experience significant bodily injury. "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. The "recklessly" culpable mental state in subsection (b)(1) also applies to the fact that the complaining witness is a "child."[136] As defined in RCC § 22A-206, "recklessly" requires the accused to disregard a substantial and unjustifiable risk that the

[132] RCC § 22A-1501.
[133] D.C. Code § 22-1101.
[134] D.C. Code § 22-1102.
[135] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a child in (a)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is a child, as that term is defined in RCC § 22A-1001.
[136] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a child in (b)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is a child, as that term is defined in RCC § 22A-1001.

complainant is a "child," as defined in RCC § 22A-1001. "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (b)(1)(B) specifies the second type of prohibited conduct for second degree child neglect—creating, or failing to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious mental injury. Subsection (b)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a child would experience serious mental injury. "Serious mental injury" a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." The "recklessly" culpable mental state in subsection (b)(1) also applies to the fact that the complaining witness is a "child."[137] As defined in RCC § 22A-206, "recklessly" requires the accused to disregard a substantial and unjustifiable risk that the complainant is a "child," as defined in RCC § 22A-1001. "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (c) specifies the two types of prohibited conduct for third degree child neglect. Subsection (c)(1)(A) specifies the first type of prohibited conduct—failing to make a reasonable effort to provide, food, clothing, or other items or care for a child. Subsection (c)(1)(A) specifies that the culpable mental state for this conduct is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care. Subsection (c)(1)(A) requires that the items or care be "essential to the physical health, mental health, or safety of a child." Per the rule of construction in RCC § 22A-207, the culpable mental state of "recklessly" also applies to this element, and requires that the accused to be aware of a substantial risk that the items or care are "essential to the physical health, mental health, or safety of a child." The "recklessly" culpable mental state in subsection (c)(1) also applies to the fact that the complaining witness is a "child."[138] As defined in RCC § 22A-206, "recklessly" requires the accused to disregard a substantial and unjustifiable risk that the complainant is a "child," as defined in RCC § 22A-1001. "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Subsection (c)(1)(B) specifies the second type of prohibited conduct for third degree child neglect—leaving a child in any place. There are two culpable mental states for this gradation. First, the accused must "knowingly" leave a child in any place. "Knowingly" is a defined term in RCC § 22A-206 that means the accused is practically certain that his or her conduct will result in leaving a child. Second, the accused must act "with intent to abandon the child." "Intent" is a defined term in RCC § 22A-206 meaning the accused believed his or her conduct was practically certain to abandon the child. It is not necessary to prove that such abandonment actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that abandonment would result. The "knowingly" culpable mental state in subsection (c)(1)(B) also applies to the fact that the complaining witness is a "child," requiring

[137] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a child in (b)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is a child, as that term is defined in RCC § 22A-1001.

[138] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a child in (c)(2)(A) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is a child, as that term is defined in RCC § 22A-1001.

that the accused is practically certain that the complainant is a "child," as defined in RCC § 22A-1001. "Child" is defined in RCC § 22A-1001 as "a person who is less than 18 years of age."

Each gradation of the revised child neglect statute requires that the complaining witness have a "duty of care" to the child (subsections (a)(2), (b)(2), and (c)(2)(A)). "Duty of care" is defined in RCC § 22A-1001 as a "legal responsibility for the health, welfare, or supervision for another person." "Legal" covers any kind of civil or contractual liability. Each gradation of the revised child neglect statute requires that the accused "know" that he or she has a duty of care to the child (subsections (a)(2), (b)(2), and (c)(2)(A)). "Knowingly" is a defined term in RCC § 22A-206 that means the accused is practically certain that he or she has a duty of care to the child. Finally, each gradation of the revised child neglect statute requires that the accused violates his or her duty of care to the child. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the fact the accused violated the duty of care.

Subsection (d) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (f) codifies an exception to liability for child neglect for the surrender of a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq.*

Relation to Current District Law. *The revised child neglect statute changes existing District law in five main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised child neglect statute prohibits leaving a child with intent to abandon him or her. The current second degree child cruelty statute prohibits, in relevant part, "expos[ing] a child, or aid[ing] and abet[ting] in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child,"[139] as well as "maltreat[ing]" a child.[140] Both these means of committing the current second degree child cruelty have the same maximum ten year penalty.[141] There is no case law defining the meaning of "exposing." By contrast, in the RCC, abandoning a child is prohibited by third degree criminal child neglect (subsection (c)(1)(B)) rather than a higher gradation or the revised child abuse statute (RCC § 22A-1501) because abandonment alone, absent a risk of serious injury or any actual harm, is a relatively minor type of risk creation. Other gradations of the revised child neglect statute and other offenses may apply to abandonment that involves a risk of serious injury or any actual harm.[142] Incorporating child abandonment into the revised child neglect statute reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

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[139] D.C. Code § 22-1101(b)(2).

[140] D.C. Code § 22-1101(b)(1).

[141] D.C. Code § 22-111(c)(2). In addition to abandoning a child, the current second degree cruelty statute prohibits "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(2). It also has a maximum term of imprisonment of ten years. D.C. Code § 22-111(c)(2).

[142] Depending on the facts of the case, an instance of child abandonment may be charged as a more serious gradation of the revised child neglect offense or a different offense. If leaving the child with intent to abandon it results in a *risk* of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to second or first degree child neglect in the revised statute. Moreover, if a child sustains physical or mental injury, or death, as a result of the abandonment, there may be liability under the revised child abuse statute, RCC § 22A-1202, the revised assault statute, RCC § 22A-1202, or the revised homicide statutes, RCC §§ 22A-1101 – 22A-1103.

Second, the revised child neglect statute incorporates a failure to provide certain items and care for any person under 18 years of age. Current D.C. Code § 22-1102 prohibits a parent or guardian of "sufficient financial liability" from refusing or neglecting to provide the "food, clothing, and shelter as will prevent the suffering and secure the safety" of a child under 14 years of age.[143] The offense has a maximum term of imprisonment of three months.[144] By contrast, in the RCC, failing to support a child is criminalized as part of the revised child neglect statute[145] (subsection (c)(1)(A)) and is no longer a separate offense. Also, unlike the current failure to support offense, which is limited to children under 14 years of age,[146] the failure to support gradation in the revised statute applies to any child under 18 years of age so that it matches the current[147] and revised[148] child abuse statutes. Incorporating into the revised child neglect statute a gradation for failing to support a child under the age of 18 years reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised statute.

Third, the revised child neglect statute is limited to conduct that does not actually harm a child. The current second degree child cruelty statute criminalizes not only actual "maltreatment," but also causing a "grave risk of bodily injury" and "exposing a child . . . with intent to abandon it," without any distinction in penalty.[149] By contrast, the revised child neglect statute is limited to conduct that does not actually harm a child. First and second degrees of the revised child neglect statute prohibit endangering a child and third degree prohibits failing to provide for a child or abandoning a child. However, if a child sustains physical or mental injury as a result of the neglect, there may be liability under the revised child abuse statute (RCC § 22A-1501), the revised assault statute (RCC § 22A-1202), or the revised homicide statutes (RCC § 22A-XXXX). Limiting the revised child neglect statute to conduct that does not actually harm a child improves the consistency and proportionality of the revised offense.

Fourth, the revised child neglect statute partially grades the offense based on creating a risk of "serious bodily injury or death" (subsection (a)(1)), "significant bodily injury" (subsection (b)(1)(A)), "or "serious mental injury" (subsection (a)(1)(B)). The current second degree child cruelty offense prohibits, in part, creating "a grave risk of bodily injury."[150] However, the statute does not define "bodily injury." DCCA case law on the current child

[143] D.C. Code § 22-1102.
[144] D.C. Code § 22-1102.
[145] The specification of failing to support a child as third degree criminal child neglect does not preclude the possibility that such failure to support may, depending on the facts of the case, be charged as a more serious gradation or offense. If failing to provide the necessary items or care results in a risk of significant bodily injury, serious mental injury, serious bodily injury, or death, then the defendant's conduct may be subject to second or first degree child neglect. Moreover, if a child sustains physical or mental injury as a result of the failure to provide, there may be liability under the revised child abuse statute, RCC § 22A-1501, or the revised assault statute, RCC § 22A-1202.
[146] D.C. Code § 22-1102
[147] D.C. Code § 22-1101.
[148] RCC § 22A-1501.
[149] First degree child cruelty prohibits "tortur[ing], beat[ing], or otherwise willfully maltreat[ing] a child under 18 years of age" or "engag[ing] in conduct which creates a grave risk of bodily injury to a child and thereby caus[ing] bodily injury." D.C. Code § 22-1101(a). First degree child cruelty has a 15 year maximum possible sentence. D.C. Code § 22-1101(c)(1). Second degree child cruelty prohibits "maltreat[ing] a child" or "engag[ing] in conduct which causes a grave risk of bodily injury to a child." D.C. Code § 22-1101(b)(1). Despite the wide range of harm in second degree cruelty to children, the offense has a single penalty, a ten year maximum possible sentence. D.C. Code § 22-1101(c)(2).
[150] D.C. Code § 22-111(b)(1).

cruelty statute suggests "bodily injury" may have a relatively low threshold for physical harm,[151] but does not provide a clear definition. With regard to mental injury, the DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children."[152] However, the DCCA has not discussed whether a risk of extreme emotional pain or suffering is sufficient for the "grave risk of bodily injury" prong of the current second degree child cruelty offense. By contrast, the revised child neglect statute partially grades the offense based on whether there is a risk of "serious bodily injury or death" (subsection (a)(1)), "significant bodily injury" (subsection (b)(1)(A)), or "serious mental injury," and defines those terms in RCC § 22-1001. The clarity and proportionality of the revised child neglect statute improve with gradations for a risk of "serious bodily injury or death," "significant bodily injury" and "serious mental injury." The consistency of the revised offense with the RCC child abuse and the current and RCC assault statutes also is improved.

Fifth, the revised child neglect statute limits liability to individuals that "know" they have a "duty of care" to the child. The current child cruelty statute does not state any requirements for the defendant's relationship to the child, and any person who creates a "grave risk of bodily injury to a child" or abandons a child appears to be liable for child cruelty. The DCCA has sustained second degree child cruelty convictions for creation of a "grave risk of bodily injury" when an individual has no relationship to the child.[153] There is no DCCA case law interpreting the scope of the abandonment prong of second degree child cruelty. The failure to support a child offense in D.C. Code § 22-1102, however, is limited to a "parent or guardian."[154] In contrast, all gradations of the revised child neglect statute require that the defendant have a "duty of care" to the child, defined in RCC § 22A-1001 as a "legal responsibility for the health, welfare, or supervision for another person," and a knowledge culpable mental state for this element. This may include persons other than a "parent or guardian." While the defendant must know he or she has a duty of care, there is no mental state requirement for the fact that the defendant violated it.[155] Individuals that do not satisfy the duty of care requirement may still have liability under the general reckless endangerment statute in RCC § 22A-XXXX, which prohibits creating a substantial and unjustifiable risk of "serious bodily injury or death" to any person. The revised neglect of a child statute reduces unnecessary overlap between revised offenses, reduces an unnecessary gap in liability with respect to persons with a duty of care, and improves the proportionality and consistency of revised offenses.

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[151] *See, e.g.*, *Jones v. United States*, 67 A.3d 547, 548, 550 (finding the evidence sufficient for second degree child cruelty when the child sustained a "large raised bump on her head.").

[152] *Alfaro*, 859 A.2d at 153-54; *see also Speaks*, 959 A.2d at 717 (stating that the evidence permitted a reasonable juror to conclude beyond a reasonable doubt that two minor children "sustained emotional pain and suffering and a battery (*i.e.*, they were 'terrified' and 'screaming')" and permitting separate convictions for second degree child cruelty under the "grave risk of bodily injury" prong).

[153] D.C. Code § 22-1101. *See, e.g.*, *Coffin v. United States*, 917 A.2d 1089, 1090, 1093 (affirming appellant's convictions for attempted second degree child cruelty when appellant drove a car dangerously while intoxicated with two children in the back seat that were not in seatbelts because he created a grave risk of bodily injury to the child passengers); *Speaks v. United States*, 959 A.2d 712, 713, 714, 716-17 (D.C. 2008) (affirming three counts of second degree cruelty to children while armed (which was subsequently amended to remove the "armed" element) when the appellant carjacked a vehicle containing three small children and crashed the vehicle into a parked car).

[154] D.C. Code § 22-1102.

[155] The phrase "in fact" in subsections (a)(3) and (b)(3) codifies that the violation of the duty of care is a matter of strict liability.

Beyond these five substantive changes to current District law, seven other aspects of the revised child neglect statute may be viewed as substantive changes of law.

First, the revised child neglect statute requires a culpable mental state of "knowingly" for "leav[ing]" a child in subsection (c)(1)(B). The child abandonment prong in the current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly," but also requires the conduct occur "with intent to abandon the child."[156] The current statute does not define its culpable mental state terms, and there is no case law on point The revised child neglect statute codifies a culpable mental state of "knowingly" for the element "leaves a child in any place" and provides that leaving the child must be done "with the intent of" abandoning the child. Requiring a "knowingly" culpable mental state, a standard term defined in RCC § 22A-206, resolves the inconsistent culpable mental states in the current statute[157] and clarifies the law.

Second, the failure to support gradation in the revised child neglect statute broadly includes failures to provide "supervision, medical services, medicine, or other items or care essential for the health or safety of the child." The current failure to support a child offense in D.C. Code § 22-1102 refers only to "food, clothing, and shelter." [158] However, the DCCA has stated that "the broad sweep" of the current statute includes a duty of providing medical care.[159] Current District statutes defining a "neglected child" for civil purposes also specifically refer to a lack of parental "care or control necessary for [the child's] physical, mental, or emotional health."[160] The revised statute's list of items and care in the revised third degree child neglect statute reflects the DCCA's expansive interpretation of current D.C. Code § 22-1102 and the broad sweep of relevant civil laws in the District. The changes reduce possible gaps in the law and improve the consistency of the law with civil statutes.

Third, the failure to support gradation of the revised child neglect statute requires that the defendant "fails to make a reasonable effort" to provide the specified support. The current statute in D.C. Code § 22-1102 refers only to a person "of sufficient financial ability, who shall refuse or neglect to provide…" the specified support.[161] The DCCA has not interpreted the limits of this language. In the revised statute, however, a person must only fail to make a "reasonable effort" to provide the specified support. The revised language would preclude liability where a person does not provide necessary support due, not only to insufficient financial ability, but also due to factors such as a hospitalization or other incapacity.[162] The revised criminal child neglect statute clarifies criminal liability for the failure of a person to actually meet their duty of care to a child.

Fourth, the revised child neglect statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial and unjustifiable risk is sufficient for liability. It is unclear whether the

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[156] D.C. Code § 22-1101(b)(2).

[157] It is unclear how a person could "recklessly" abandon a child "with intent to abandon" the child. However, a knowledge requirement as to leaving the child and an intent requirement as to abandonment, as these terms are defined in the RCC, are compatible. See Commentary to RCC § 22A-XXXX.

[158] D.C. Code § 22-1102.

[159] *Faunteroy v. United States*, 413 A.2d 1294, 1300 (D.C. 1980).

[160] D.C. Code § 16-2301(9A)

[161] D.C. Code § 22-1102.

[162] The District's current civil statutes define "neglect child," in part as "a child:…(ii) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or custodian; (iii) whose parent, guardian, or custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity." D.C. Code § 16-2301(9)(A).

current child cruelty statute includes failing to mitigate or remedy a risk of harm to a child. Current first degree child cruelty criminalizes conduct that "maltreats" a child or "creates a grave risk of bodily injury to a child and thereby causes bodily injury.[163] Current second degree child cruelty statute criminalizes conduct that "maltreats" a child,[164] as well as conduct that "causes a grave risk of bodily injury" to a child.[165] "Maltreats" is not statutorily defined and there is no DCCA case law regarding whether the current child cruelty offense extends to failing to mitigate or remedy a risk of harm. The current failure to support statute criminalizes the refusal or neglect to provide "food, clothing, and shelter as will prevent the suffering and secure the safety of such child," [166] but is silent as to failing to mitigate or remedy a risk and there is no case law on point. However, in the context of parental duties, the DCCA also has recognized the "unique obligation of parents to take affirmative actions for their children's benefit."[167] The revised child abuse statute clarifies that not only creating risks to a child, but also failing to mitigate or remedy a substantial and unjustifiable risk, is sufficient for liability. Under the general provision in RCC § 22A-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[168] However, although technically superfluous, given that child neglect offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Fifth, the revised child neglect statute requires a culpable mental state of recklessness or knowledge as to the fact that the other person is a child. The current child cruelty statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a child. There is no DCCA case law discussing if there is a culpable mental state for this element. However, under the current enhancement for certain crimes against minors it is an affirmative defense that "the accused reasonably believed that the victim was not a minor [person less than 18 years old] at the time of the offense."[169] There is no separate enhancement for crimes committed against minors applicable to child neglect in the RCC. The "reckless" culpable mental state in subsections (a)(1), (b)(1), and (c)(1) of the revised child neglect statute preserves the substance of the defense.[170] However, in practice the more stringent culpable

[163] D.C. Code §22-1101(a). First degree child cruelty also prohibits "tortures" and "beats" a child. *Id.*
[164] D.C. Code § 22-1101(b)(1).
[165] D.C. Code § 22-1101(b)(1).
[166] D.C. Code § 22-1102.
[167] *Young v. United States*, 745 A.2d 943, 948 (D.C. 2000). Similarly, the DCCA has used the common law to find that there is a common law duty of parents to provide medical care for their dependent children. *Faunteroy v. United States*, 413 A.2d at 1299-300 (D.C. 1980) ("The cases of several state courts hold there is a 'common law natural duty of parents to provide medical care for their minor dependent children. . . . Since no statute for the District operates to specifically abolish it, this duty remains the common law of this jurisdiction."). To the extent that the common law imposes a duty to aid a child, the DCCA may find a common law duty in the District. *See generally* § 6.2.Omission to act, 1 Subst. Crim. L. § 6.2 (3d ed.)
[168] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c) ("'Omission' means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law."). [Forthcoming revisions to the general part will make this general principle of omission liability even more explicit.]
[169] D.C. Code § 22-3611(b).
[170] "Reckless" is defined in RCC § 22A-206 and means that the accused must disregard a substantial and unjustifiable risk that the complainant was under 18. The enhancement for crimes against minors has an affirmative

mental state requirement of "knows," which applies to the complainant's status as a child in subsections (a)(2), (b)(2), and (c)(2) of the revised offense, must be proven.[171] The clarity and proportionality of the revised child neglect statute improves if there is a culpable mental state of recklessness or knowledge for the fact that the complaining witness is a child.

Sixth, the revised child neglect statute requires a "substantial and unjustifiable risk" of the specified physical or mental harm. The current second degree child cruelty offense prohibits "engag[ing] in conduct which causes a grave risk of bodily injury."[172] There is no DCCA case law discussing the meaning of "grave risk." However, in an attempted second degree cruelty to children case, the DCCA affirmed a conviction based upon the defendant creating a "grave or substantial risk of bodily injury,"[173] suggesting that "grave" and "substantial" are interchangeable, equivalent terms. The revised child neglect statute clarifies that the required risk must be "substantial and unjustifiable." The "substantial and unjustifiable" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22A-206, also requires that a risk be "substantial" and "grossly deviate from the standard of care that a reasonable person would observe in the person's situation."[174] However, given that neglect offenses will often depend on the nature of the risk to the child, the revised statute specifies the "substantial and unjustifiable" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[175] The clarity and consistency of the revised child neglect statute improves if the required amount of risk is specified.

Seventh, the revised child neglect statute defines "serious mental injury." The current District child cruelty statute is silent as to whether it includes psychological harm, although DCCA case law is clear that the current child cruelty statute extends at least to serious psychological injury.[176] However, the court has not articulated a precise definition of the requisite psychological harm. RCC § 22A-1001 defines "serious mental injury" as "substantial,

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defense that "the accused reasonably believed that the victim was not a minor at the time of the offense." D.C. Code Ann. § 22-3611(b). If an accused reasonably believed that the complaining witness was not a minor, the accused would not satisfy the culpable mental state of recklessness or knowledge as to the age of the complaining witness because the accused would not consciously disregard a substantial and unjustifiable risk (recklessness) or be practically certain (knowledge) that the complainant was under 18 years of age.

[171] See above Commentary regarding the change in law to require the accused to know that she or he has a duty of care to the child.

[172] D.C. Code § 22-111(b)(1).

[173] *Dorsey v. United States*, 902 A.2d 107, 112-13 (D.C. 2006) (discussing the Model Penal Code definition of "recklessly" and affirming the appellant's conviction for attempted second degree cruelty to children because the appellant "created a grave or substantia risk of bodily injury when he struck [the child] in the face and disregarded 'the risk of fractures of the orbital eye socket.'").

[174] See RCC § 22A-206(d) and corresponding Commentary.

[175] For example, where a parent gives her sick child with cancer an experimental and dangerous drug prescribed by the child's oncologist, the fact that the parent *knows* (i.e., is practically certain) that doing so will create a risk of serious bodily injury or death to the child does not, by itself, establish first degree child neglect. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was both *substantial* and *unjustifiable* under the circumstances.

[176] The DCCA has stated that "an attempt to inflict mental or emotional pain or suffering upon a child, if sufficiently extreme or unreasonable, constitutes attempted second-degree cruelty to children and that "maltreats" in first degree child cruelty "cannot reasonably be read as embracing only physical maltreatment." *Alfaro*, 859 A.2d at 153-54, 157. The DCCA has further stated that "the infliction of psychological harm can contravene a criminal statute prohibiting cruelty to children, but the harm must be serious and 'unjustifiable' rather than mild or trivial." *Alfaro*, 859 A.2d at 159 (agreeing with the analysis of the Supreme Court of Louisiana of a Louisiana child abuse statute).

prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current juvenile law statutes[177] by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse, but given the imprecision of current case law it is unclear what change, if any, the definition will have on current District law. Codifying a definition of "serious mental injury" for the revised statute clarifies the law.

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

First, the revised child neglect statute codifies a culpable mental state of "recklessly" for the element "created, or failed to mitigate or remedy, a substantial and unjustifiable risk." The current child cruelty statute requires a culpable mental state of "intentionally, knowingly, or recklessly."[178] Under the general rule of construction in RCC § 22A-206, the higher culpable mental states of "intentionally" and "knowingly" satisfy the lower culpable mental state of "recklessly" and it is unnecessary to codify them. In addition, the definition of "recklessly" in RCC § 22A-206 is consistent with DCCA case law discussing the "recklessly" culpable mental state in the current child cruelty statute.[179] Codifying the culpable mental state of "recklessly" clarifies the statute.

Second, subsection (f) of the revised child neglect statute codifies an exception to criminal liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq*. It is inconsistent for an individual who surrenders a newborn child in accordance with D.C. Code § 4-145.01 *et. seq.* to face criminal liability. Current D.C. Code § 4-1451.02 states such a person "shall not . . . be prosecuted for the surrender of the newborn."[180] Codifying the exception to liability for surrendering a newborn child in accordance with D.C. Code § 4-1451.01 *et. seq.* clarifies the law.

Third, the revised child neglect statute defines "child" in RCC § 22A-1001. The current child cruelty statute does not define "child," but requires that the complainant be "under 18 years

[177] D.C. Code Ann. § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").

[178] D.C. Code § 22-1101(a), (b).

[179] *Jones v. United States*, 813 A.2d 220, 224-25 (D.C. 2002) (stating that the trial court did not err in giving a jury instruction that defined "intentionally or knowingly" as "the defendant acted voluntarily and on purpose, not by mistake or accident" and "recklessly" as "the defendant was aware of and disregarded the grave risk of bodily harm created by his conduct.").

[180] D.C. Code § 4-1451.02(a) ("Except when there is actual or suspected child abuse or neglect, a custodial parent who is a resident of the District of Columbia may surrenders a newborn in accordance with this chapter and shall have the right to remain anonymous and to leave the place of surrender at any time and shall not be pursued by any person at the time of surrender or prosecuted for the surrender of the newborn.").

of age."[181] RCC § 22A-1001 defines "child" as "a person who is less than 18 years of age," and does not change District law.[182]

Relation to National Legal Trends. *The revised child neglect offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First criminal codes in reformed jurisdictions support criminalizing child abandonment separately from child abuse, although only a couple jurisdictions combine such an offense with a child neglect statute. At least 19 of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[183] ("reformed jurisdictions") have separate statutes for abandoning a child, and do not include abandonment as part of child cruelty.[184] An additional two reformed jurisdictions include abandoning a child in their neglect offense,[185] like the revised criminal child neglect statute does. Only one reformed jurisdiction includes abandoning a child in the same statute as child abuse,[186] like the District's current child cruelty statute.[187]

The MPC does not have a child abandonment offense, nor does it include child abandonment in its offense for endangering the welfare of children.[188]

Second, criminal codes in reformed jurisdictions provide mixed support for integrating an offense of nonsupport of a child under 18 in a general child neglect statute. At least 27 of the 29 reformed jurisdictions have separate statutes criminalizing nonsupport of a child, ranging in breadth from failing to provide food, clothing, medical care, and other similar items, to failing to provide monetary child support.[189] At least nine of the 29 reformed jurisdictions include such

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[181] D.C. Code § 22-1101(a).

[182] As discussed earlier in this commentary as a substantive change to District law, the current failure to support a child offense in D.C. Code § 22-1102 is limited to a child under the age of 14 years.

[183] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[184] Ala. Code § 13A-3-5; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53a-23; Del. Code Ann. tit. 11, § 1101; Haw. Rev. Stat. Ann. § 709-902; 720 Ill. Comp. Stat. Ann. 5/12C-10; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. § 530.040; Me. Rev. Stat. tit. 17-A, § 533; Mo. Ann. Stat. §§ 568.030, 568.032; N.J. Stat. Ann. § 9:6-1; N.Y. Penal Law § 260.00; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Stat. Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.535; S.D. Codified Laws § 25-7-15; Wash. Rev. Code Ann. §§ 9A.42.060, 9A.42.070, 9A.42.080, 9A.42.090; Wis. Stat. Ann. § 948.20; Tex. Penal Code Ann. § 22.041.

[185] Ind. Code Ann. § 35-46-1-4(a)(2); N.J. Stat. Ann. § 9:6-1.

[186] Utah Code Ann. § 76-5-109(4).

[187] D.C. Code § 22-1101(b)(2).

[188] MPC § 230.4.

[189] Reformed jurisdictions may have separate nonsupport statutes in addition to similar provisions in their child abuse and neglect laws. For this limited survey, only the separate statutes were counted. Ala. Code § 13A-13-4; Alaska Stat. Ann. § 11.51.120; Ark. Code Ann. § 5-26-401; Colo. Rev. Stat. Ann. § 14-6-101; Conn. Gen. Stat. Ann. § 53-304; Del. Code Ann. tit. 11, § 1113; Haw. Rev. Stat. Ann. § 709-903; 750 Ill. Comp. Stat. Ann. 16/15; Ind. Code Ann. § 35-46-1-5; Kan. Stat. Ann. § 21-5605; Ky. Rev. Stat. Ann. §§ 530.050; Me. Rev. Stat. tit. 17-A, § 552; Mo. Ann. Stat. § 568.040; Mont. Code Ann. § 45-5-621; N.H. Rev. Stat. Ann. § 639:4; N.J. Stat. Ann. § 2C:24-5; N.Y. Penal Law §§ 260.05, 260.06; N.D. Cent. Code Ann. § 14-07-15; Ohio Rev. Code Ann. § 2919.21; Or. Rev. Stat. Ann. § 163.555; 23 Pa. Stat. Ann. § 4354; S.D. Codified Laws § 25-7-16; Tenn. Code Ann. § 39-15-101; Tex. Penal Code Ann. § 25.05; Utah Code Ann. § 76-7-201; Wash. Rev. Code Ann. § 26.20.035; Wis. Stat. Ann. § 948.22.

failure to support provisions in their child abuse or neglect statutes,[190] like the revised criminal child neglect statute does. However, there is strong support in reformed jurisdictions for making nonsupport crimes applicable to persons under 18 years of age, the limit in the revised statute. Many of the separate nonsupport statutes do not specify the age of the child, but in those statutes that do, a majority covers children less than 18 years of age or 19 years of age.[191] Five of the reformed jurisdictions that include failure to support in their child abuse or neglect statutes apply to children under the age of 18 years.[192]

The MPC has a separate offense for "persistently fail[ing] to support a child,"[193] but it has the same penalty, a misdemeanor, as the MPC's endangering welfare of children offense.[194] The MPC's persistent nonsupport offense does not specify the required age of the child.

Third, criminal codes in reformed jurisdictions support limiting child neglect to conduct that does not actually harm a child, as opposed to the current child cruelty statute, which prohibits both a risk of harm and actual harm in the same gradation.[195] Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[196] Most of these jurisdictions, 13,

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[190] These jurisdictions may also have a separate nonsupport offense in their civil laws. Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[191] Ala. Code § 13A-13-4(a) ("less than 19 years of age."); Ark. Code Ann. § 5-26-401(a)(2), (a)(3) ("[l]egitimate child who is less than eighteen (18) years or age" or "[i]llegitimate child who is less than eighteen (18) years of age and whose parentage has been determined in a previous judicial proceeding."); Colo. Rev. Stat. Ann. § 14-6-101 ("children under eighteen years of age."); Conn. Gen. Stat. Ann. § 53-304 ("child under the age of eighteen."); Del. Code Ann. tit. 11, § 1113(a), (k)(2) (requiring "minor child" and defining "minor child" as "any child, natural, or adopted, whether born in or out of wedlock, under 18 years of age, or over 18 years of age but not yet 19 years of age if such child is a student in high school and is likely to graduate."); Ky. Rev. Stat. Ann. §§ 530.050(1)(a), 500.080 (requiring "minor" and defining "minor" as "any person who has not reached the age of majority as defined in KRS 2.015 [for purposes of the nonsupport statute, 18 years]."); 750 Ill. Comp. Stat. Ann. 16/15(a)(1), (f), 5/505(a) ("requiring "child" and defining "child" as "any child under age 18 and any child age 19 or younger who is still attending high school."); Kan. Stat. Ann. § 21-5606(c) ("a child under the age of 18 years and includes an adopted child or a child born out of wedlock whose parentage has been judicially determined or has been acknowledged in writing by the person to be charged with the support of such child."); Or. Rev. Stat. Ann. § 163.555(1) ("child under 18 years of age."); Tex. Penal Code Ann. § 25.05(a) ("child younger than 18 years of age."); Utah Code Ann. § 76-7-201(1) ("child, or children under the age of 18 years.").

[192] These jurisdictions may also have a separate nonsupport offense in their civil laws. Ind. Code Ann. §§ 35-46-1-4(a)(3), 35-46-1-1(child endangerment and neglect offense requiring that the complaining witness be a "dependent" and defining "dependent," in part, as "an unemancipated person who is under eighteen (18) years of age."); Minn. Stat. Ann. §§ 609.376(2), 609. 378(a)(1) (child endangerment or neglect offense requiring that the complaining witness be a "child" and defining "child" as "any person under the age of 18 years."); Mo. Ann. Stat. § 568.060(1)(4), (2)(1) (neglect offense defining "neglect," in part, as a failure to provide to a "child under the age of eighteen years."); Wash. Rev. Code Ann. §§ 9A.42.010(3), 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037 (defining "child" as "a person under eighteen years of age."); Wis. Stat. Ann. §§ 948.21, 948.01(1) (defining "child" as a person who has not attained the age of 18 years, except that for purposes of prosecuting a person who is alleged to have violated a state or federal criminal law, "child" does not include a person who has attained the age of 17 years.").

[193] MPC § 230.5.

[194] MPC § 230.4.

[195] D.C. Code § 22-1101(b), (c)(2) (second degree child cruelty prohibiting both "maltreats" and "engages in conduct which creates a grave risk of bodily harm.").

[196] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there

criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse.[197] Nine of the 29 reformed jurisdictions have failure to provide provisions or offenses[198] similar to third degree of the revised criminal child neglect statute (subsection (c)(1)(A)). All but three[199] of these states codify their failing to provide offenses separately from child or abuse.

The MPC does not have a child abuse offense, but does limit its offense for endangering the welfare of a child to "knowingly enander[ing] the child's welfare by violating a duty of care, protection, or support."[200]

Fourth, criminal codes in reformed jurisdictions generally do not support grading child neglect on a risk of "serious bodily injury or death" (subsection (a)(1)), "significant bodily injury" (subsection (b)(1)(A)), "or "serious mental injury" (subsection (a)(1)(B)). Eighteen of the 29 reformed jurisdictions have child endangerment statutes.[201] Thirteen of these jurisdictions criminalize child endangerment separately from child abuse or do not have a child abuse offense, or grade child endangerment differently from child abuse. [202] Six of these jurisdictions do not grade their child endangerment offense and limit the offense to one type of risk creation.[203]

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were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

[197] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[198] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. § 14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[199] Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1.

[200] MPC § 230.4.

[201] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401; Conn. Gen. Stat. Ann. § 53-21; Del. Code Ann. tit. 11 §§ 1100, 1102; Haw. Rev. Stat. Ann. §§ 709-903.5, 703-904; 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 554; Minn. Stat. Ann. §§ 609.376, 609.378; Mo. Ann. Stat. § 568.045; Mont. Code Ann. § 45-5-628; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; Ohio Rev. Code Ann. § 2919.22; 18 Pa. Stat. Ann. § 4304.

[202] Ark. Code Ann. §§ 5-27-205, 5-27-206, 5-27-207; Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death or injury results); Conn. Gen. Stat. Ann. § 53-21(a)(1); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b); 720 Ill. Comp. Stat. Ann. 5/12-C; Ind. Code Ann. § 35-46-1-4; Kan. Stat. Ann. § 21-5601; Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b)(1); Mont. Code Ann. § 45-5-622; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law § 260.10; 18 Pa. Stat. Ann. § 4304.

[203] Conn. Gen. Stat. Ann. § 53-21(a)(1), (A), (making it a class C felony to "willfully or unlawfully cause[] or permit[] any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is

In the remaining seven states that do grade their child endangerment offenses, only two states grade child endangerment based on the type of risk, but they both have gradations for a risk of death or serious physical injury.[204] The other five states grade the offense based on whether actual harm resulted and the type of that harm, including death or serious bodily injury.[205]

None of these 13 jurisdictions grade their child endangerment offenses based on a risk of intermediate bodily injury such as "significant bodily injury" in the revised child neglect statute or "serious mental injury." None of these 13 jurisdictions grade their child endangerment offenses based on a risk of serious mental injury. However, four of these jurisdictions specifically include endangering a child's mental welfare in the scope of the endangerment offense.[206]

The MPC offense for endangering the welfare of a child is a misdemeanor and requires "knowingly endangers the child's welfare by violating a duty of care, protection, or support."[207]

Fifth, criminal codes in the reformed jurisdictions generally support limiting liability for their neglect statutes to individuals that "know" they have a "duty of care" to the child. Ten of

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endangered, the health of such child is likely to be injured or the morals of such child are likely to be injured."); Kan. Stat. Ann. § 21-5601(a), (b) (two gradations of endangering a child depending on whether the "child's life, body or health" "may" be endangered or "is" endangered); Me. Rev. Stat. tit. 17-A, § 554(C) (making it a Class D crime to "otherwise recklessly endanger[] the health, safety or welfare of the child by violating a duty of care or protection."); Mont. Code Ann. § 45-5-622(1), (5) (making the general endangering the welfare of a child offense punishable by a maximum term of imprisonment of six months); N.H. Rev. Stat. Ann. § 639:3(I), (V) (making it a misdemeanor to "endanger[] the welfare of a child under 18 years of age . . . by violating a duty of care, protection or support he owes to such child."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[204] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); 18 Pa. Stat. Ann. § 4304(a)(1), (b)(iii) (grading the offense, in part, based on whether there was a "substantial risk of death or serious bodily injury.").

[205] Colo. Rev. Stat. Ann. § 18-6-401(1)(a), (7)(a), (7)(b) (offense of child abuse prohibiting both causing injury and "permit[ing] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," but grading differently depending on whether death, injury, or no death, "serious bodily injury," "any injury other than serious bodily injury," or no death or injury results); Del. Code Ann. tit. 11 § 1102(a)(1)(a), (a)(1)(b), (b)(1), (b)(2), (b)(4) (grading endangering the welfare of a child based on whether death or "serious physical injury" resulted, and having a gradation for "all other cases."); 720 Ill. Comp. Stat. Ann. 5/12-C(a)1), (a)(2), (d) (grading the offense of endangering the life or health of a child based, in part, on whether the violation "is a proximate cause of the death of the child."); Ind. Code Ann. § 35-46-1-4(a)(1), (b)(1)A), (b)(2), (b)(3) (grading the offense of neglect of a dependent, in part, based on whether "bodily injury," "serious bodily injury," or death resulted); Minn. Stat. Ann. § 609.378(b)(1) (grading the offense of based on whether "substantial harm to the child's physical, mental, or emotional health" resulted).

[206] Ark. Code Ann. §§ 5-27-205(a)(1), 5-27-206(a)(1), 5-27-207(a)(1) (first degree endangering the welfare of a minor prohibiting "creating a substantial risk of death or serious physical injury" and second and third degree prohibiting "creating a substantial risk of serious harm to the physical or mental welfare."); Del. Code Ann. tit. 11 § 1102(a)(1)(a) ("acts in a manner likely to be injurious to the physical, mental or moral welfare of the child."); Minn. Stat. Ann. § 609.378(b)(1) ("causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death."); N.Y. Penal Law § 260.10(1) (making it a misdemeanor to "act[] in such a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.").

[207] MPC § 230.4.

the eighteen reformed jurisdictions with child endangerment offenses[208] have a "duty of care" element or similar requirement.[209] However, due to the varying rules of construction amongst states, it is difficult to determine what culpable mental state, if any, applies to these elements. The nine reformed jurisdictions with failure to provide provisions or offenses all require a "duty of care" element or similar requirement,[210] but it is similarly difficult to determine what culpable mental state, if any, applies to those elements.

The MPC's endangering the welfare of children offense specifies a "knowingly" culpable mental state, but it is unclear if it applies to the fact that the accused has a "duty of care, protection or support."[211] The MPC's persistent nonsupport offense, however, requires that the accused "know[] he is legally obliged to provide to a . . . child."[212]

[208] Reformed jurisdictions may have child endangerment offenses in both their criminal codes and civil statutes. This survey uses the child endangerment laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, child endangerment offenses were taken from the civil statutes, if there were any.

[209] Del. Code Ann. tit. 11 § 1102(a)(1)(a); Haw. Rev. Stat. Ann. § 709-903.5(2); Ind. Code Ann. § 35-46-1-4(a)(1); Ky. Rev. Stat. Ann. §§ 508.100(1)(b), 508.110(1)(b), 508.120(1)(b); Me. Rev. Stat. tit. 17-A, § 554(C); Minn. Stat. Ann. § 609.378(b); Mont. Code Ann. § 45-5-628(1); N.H. Rev. Stat. Ann. § 639:3(I); Ohio Rev. Code Ann. § 2919.22(A); 18 Pa. Stat. Ann. § 4304(a)(1).

[210] Alaska Stat. Ann. § 11.51.100(a)(4); Conn. Gen. Stat. Ann. § 53-20(b)(1), (b)(2); Ind. Code Ann. § 35-46-1-4(a)(3); Minn. Stat. Ann. §§ 609.376, 609. 378(a)(1); Mo. Ann. Stat. § 568.060(1)(4), (2)(1); N.J. Stat. Ann. § 9:6-1; N.D. Cent. Code Ann. §14-09-22.1(1); Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030(1)(a), 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 948.21.

[211] MPC § 230.4 ("knowingly endangers the child's welfare by violating a duty of care, protection or support."). The MPC's general rules of statutory construction, however, may supply a culpable mental state.

[212] MPC § 230.5.

Chapter 15. Abuse and Neglect of Vulnerable Persons

Section 1503. Abuse of a Vulnerable Adult or Elderly Person.

(a) *First Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of first degree abuse of a vulnerable adult or elderly person when that person:

(1) Purposely causes serious mental injury to a another person, with recklessness that the other person is a vulnerable adult or elderly person; or

(2) Recklessly, under circumstances manifesting extreme indifference to human life, causes serious bodily injury to another person, with recklessness that the other person is a vulnerable adult or elderly person.

(b) *Second Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of second degree abuse of a vulnerable adult when that person:

(1) Recklessly causes serious mental injury to a vulnerable adult or elderly person; or

(2) Recklessly causes significant bodily injury to a vulnerable adult or elderly person.

(c) *Third Degree Abuse of a Vulnerable Adult or Elderly Person.* A person commits the offense of third degree abuse of a vulnerable adult or elderly person when that person:

(1) In fact, commits harassment per § 22A-XXXX, menacing per § 22A-1203, threats per § 22A-1204, restraint per § 22A-XXXX, or first degree offensive physical contact per § 22A-1205(a) against another person, with recklessness that the other person is a vulnerable adult or elderly person; or

(2) Recklessly causes bodily injury to, or uses physical force that overpowers, a vulnerable adult or elderly person.

(d) *Penalties*.

(1) *First Degree Abuse of a Vulnerable Adult or Elderly Person*. First degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Abuse of a Vulnerable Adult or Elderly Person*. Second degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Abuse of a Vulnerable Adult or Elderly Person*. Third degree abuse of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) Definitions: The terms "purposely," "recklessly, under circumstances manifesting extreme indifference to human life," and "recklessly" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant

bodily injury," "bodily injury," "physical force," "effective consent," "vulnerable adult," and "elderly person" have the meanings specified in § 22A-1001.

(f) *Defenses.*

(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the victim gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if:

(A) The conduct did not inflict significant bodily injury, serious bodily injury, serious mental injury, or involve the use of a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; or

(B) The conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or

(C) The conduct involved was the use of religious prayer alone, in lieu of medical treatment which the defendant otherwise had a duty to provide.

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1503. Abuse of a Vulnerable Adult or Elderly Person

Commentary

Explanatory Note. *The RCC abuse of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is harm to a vulnerable adult or elderly person's bodily integrity or mental well-being, as well as conduct that constitutes harassment, menacing, threats, restraint, or first degree offensive physical contact, as those crimes are defined in the RCC.*[213] *The penalty gradations for the revised offense are primarily based on the degree of bodily harm or mental harm. Along with the revised neglect of a vulnerable adult or elderly person offense,*[214] *the revised abuse of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person offense and penalties;*[215] *neglect of a vulnerable adult or elderly person offense and penalties;*[216] *the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person;*[217] *and the definitions of "elderly person"*[218] *and "vulnerable adult"*[219] *that apply to the current abuse and neglect of a vulnerable adult or elderly person statutes.*

Subsection (a) specifies the two types of prohibited conduct in first degree abuse of a vulnerable adult or elderly person, the highest grade of the revised offense. Subsection (a)(1) specifies one type of prohibited conduct—causing "serious mental injury," a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (a)(1) specifies that the culpable mental state for causing "serious mental injury" is "purposely," a term defined in RCC § 22A-206 to mean the accused must consciously desire that his or her conduct causes "serious mental injury." Subsection (a)(1) specifies that the culpable mental state for the fact that the complaining witness is a "vulnerable adult" or "elderly person" is "recklessness, defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

Subsection (a)(2) specifies the second type of prohibited conduct—causing "serious bodily injury," a term defined in RCC § 22A-1001 as injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. Subsection (a)(2) specifies that the culpable mental state for causing "serious bodily injury" is "recklessly, under circumstances manifesting extreme indifference to the value of human life." This culpable mental state is defined in RCC § 22A-206 to mean "being aware of a substantial risk" that the accused's conduct will cause serious bodily injury, where "the person's conduct must constitute an extreme deviation from the standard of care that a reasonable person would observe in the person's situation." Subsection (a)(2) specifies that the culpable mental state for the fact that the complaining witness is a "vulnerable adult" or "elderly person" is "recklessness, defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

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[213] RCC §§ 22A-XXXX (harassment), 22A-1203 (menacing), 22A-1204 (threats), 22A-XXXX (restraint), 22A-1205(a) (first degree offensive physical contact).
[214] RCC § 22A-1504.
[215] D.C. Code §§ 22-933, 22-936.
[216] D.C. Code §§ 22-934, 22-936.
[217] D.C. Code § 22-935.
[218] D.C. Code § 22-932(3).
[219] D.C. Code § 22-932(5).

Subsection (b) specifies the two types of prohibited conduct in second degree abuse of a vulnerable adult or elderly person. Subsection (b)(1) specifies one type of prohibited conduct—causing "serious mental injury," a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." Subsection (b)(2) specifies that the culpable mental state for causing "serious mental injury" is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will cause serious mental injury. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "vulnerable adult" or "elderly person," and requires that the accused disregard a substantial and unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

Subsection (b)(2) specifies the second type of prohibited conduct—causing "significant bodily injury." "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. Subsection (a)(2) specifies that the culpable mental state for causing "significant bodily injury" is "recklessly," defined in RCC § 22A-206 to mean being aware of a substantial risk that one's conduct will cause "significant bodily injury." Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "vulnerable adult" or "elderly person," and requires that the accused disregard a substantial and unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

Subsection (c)(1) specifies the two types of prohibited conduct for third degree abuse of vulnerable adult or elderly person. Subsection (c)(1) specifies that the accused must commit harassment, menacing, threats, restraint, or first degree offensive physical contact as those crimes are defined in the RCC.[220] "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses. Subsection (c)(1) specifies a culpable mental state of "recklessness" for the fact that the complaining witness is a "vulnerable adult" or "elderly person" is "recklessness, defined in RCC § 22A-206 to mean that the accused must disregard a substantial and unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

Subsection (c)(2) specifies the second type of prohibited conduct for second degree child abuse—causing "bodily injury" or using "physical force that overpowers" the vulnerable adult or elderly person. "Bodily injury" is the lowest level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 to require "physical pain, illness, or any impairment of condition." "Physical force" is defined in RCC § 22A-1001 to mean "the application of physical strength." Subsection (c)(2) specifies that the culpable mental state for causing bodily injury or using physical force that overpowers is "recklessly," defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will cause bodily injury or result in the use of physical force that overpowers. Per the rule of construction in RCC § 22A-207, the culpable mental state "recklessly" also applies to the fact that the complaining witness is a "vulnerable adult" or "elderly person," and requires that the accused disregard a substantial and

[220] RCC §§ 22A-XXXX (harassment), 22A-1203 (menacing), 22A-1204 (threats), 22A-XXXX (restraint), 22A-1205(a) (first degree offensive physical contact).

unjustifiable risk that the complainant is a "vulnerable adult" or "elderly person," as those terms are defined in RCC § 22A-1001.

Each gradation of the revised abuse of a vulnerable adult or elderly person offense requires that the complaining witness be either a "vulnerable adult" or an "elderly person." Both terms are defined in RCC § 22A-1001. "Elderly person" is defined in RCC § 22A-1001 as a "person who is 65 years of age or older." "Vulnerable adult" is defined in RCC § 22A-1001 as a person who is 18 years of age or older with physical or mental limitations that substantially impair the person's ability to independently provide for or care for himself or herself.

Subsection (d) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (f) describes the defense of effective consent for abuse of a vulnerable adult or elderly person. Subsection (f)(1) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the conduct at issue.[221] The effective consent defense requires either proof of "effective consent," a defined term in RCC § 22A-2001 that excludes consent obtained by means coercion or deception, or the actor's reasonable belief that the complainant consented to the actor's conduct. Under subsection (f)(1)(A), the defense is available only for those grades of assault that do not result in "significant bodily injury," "serious bodily injury," or "serious mental injury," as those terms are defined in RCC § 22A-1001, or conduct that involved a firearm as "firearm" is defined at D.C. Code 22-4501(2A), regardless of whether the firearm is loaded.[222] Under subsection (f)(1)(B), the defense is also available if the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law.[223] The effective consent defense is available per subsection (f)(1)(B) even if significant bodily injury or serious bodily injury results, or a firearm is used. Under subsection (f)(1)(C) effective consent is a defense to any conduct that otherwise constitutes abuse of a vulnerable adult or elderly person if the conduct was the use of religious prayer alone, in lieu of medical treatment which the defendant otherwise had a duty to provide.. Subsection (f)(2) describes the burden of proof for the effective consent defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

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[221] For example, a person who, to avoid greater harm, amputates the finger of a person caught in machinery on request of the victim may have available a general justification defense of necessity. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982). The codification of this reference to general justification defenses in the preface to subsection (i)(1) clarifies that courts should not interpret the codification of these special defenses to abrogate the applicability of general defenses under an exp*ressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

[222] Third degree abuse of a vulnerable adult or elderly person is the only gradation of the offense subject to the subsection (f)(1)(A) effective consent defense, provided no firearm is used. For example, the following activities would not give rise to assault liability where there is effective consent per subsection (i)(1)(A): piercing someone's ear for an earring, serving alcohol to a restaurant patron, or roughly pushing someone when playing football. Constitutionally protected activities, such as sexual activity involving consensual infliction of pain, also may be subject to criminal liability absent a defense. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.").

[223] For example, the following otherwise legal activities would not give rise to assault liability where there is effective consent per subsection (f)(1)(B): performing elective surgery that results in permanent and significant disfigurement, lowering a person on a rope from a rooftop as part of a movie stunt that results in a death, or adding chemicals to a highly combustible solution as part of a scientific experiment that explodes and causes death.

Relation to Current District Law. *The revised abuse of a vulnerable adult or elderly person statute changes existing District law in five main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised abuse of a vulnerable adult or elderly person statute includes a gradation for causing "significant bodily injury," and defines that term. The current abuse of a vulnerable adult or elderly person grades, in part, based on whether "physical pain or injury,"[224] "serious bodily injury,"[225] or "permanent bodily harm"[226] resulted. The statute does not define any of these terms and there is no DCCA case law interpreting these terms for this statute. It is unclear how "serious bodily injury" and "permanent bodily harm" differ, if at all, particularly given that DCCA case law for the current aggravated assault statute includes permanent bodily injury in the definition of "serious bodily injury."[227] By contrast, the revised abuse of a vulnerable adult or elderly person statute includes an additional gradation for causing "significant bodily injury," using the revised definition in RCC § 22A-1001. Both the current[228] and revised[229] assault statutes use "significant bodily injury" to partially grade the offenses, and the revised definition is modified from the definition in the current assault with significant bodily injury statute.[230] Including a gradation for abuse that causes "significant bodily injury" improves the clarity and proportionality of the revised offense.

Second, the revised abuse of a vulnerable adult or elderly person statute does not recognize as a distinct basis of liability causing permanent bodily harm or death of the vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on the "permanent bodily harm or death" of the vulnerable adult or elderly person,[231] providing a maximum term of imprisonment of 20 years for such conduct. The current statute does not define "permanent bodily harm" and there is no comparable grade in the District's current assault statutes. However, the current aggravated assault statute does prohibit "serious bodily injury"[232] and DCCA case law for this statute includes permanent bodily injury in the definition of "serious bodily injury."[233] By contrast, the revised abuse of a vulnerable

[224] D.C. Code § 22-933(1); D.C. Code § 22-936(a).
[225] D.C. Code § 22-936(b).
[226] D.C. Code § 22-936(c).
[227] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).
[228] D.C. Code § 22-404(a)(2).
[229] RCC § 22A-1202.
[230] Significant bodily injury" is currently used in the assault with significant bodily injury statute, D.C. Code § 22-404(a)(2). It is defined as an "injury that requires hospitalization or immediate medical attention." *Id.*
[231] D.C. Code § 22-936(c).
[232] D.C. Code § 22-404.01.
[233] The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse

adult or elderly person statute does not grade based on the permanent bodily harm or death of the vulnerable adult or elderly person. The actual death of a vulnerable adult or elderly person in violation of the abuse offense is covered by the revised homicide statutes in RCC § 22A-XXXX. Use of homicide statutes to address the killing of an elderly person or vulnerable adult reduces unnecessary overlap and eliminates an inconsistency in current District penalties. [234] Instead of grading based upon "permanent bodily harm," the revised statute grades based upon "serious bodily injury" and defines that term in RCC 22A-1001.[235] The consistency and proportionality of the revised statute improves if permanent bodily harm is no longer recognized as a separate basis of liability and instead "serious bodily injury" is relied upon for gradation.

Third, the revised abuse of a vulnerable adult or elderly person statute has two grades that provide liability for causing "serious mental injury," depending on whether the conduct is done purposely or recklessly. The current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "severe mental distress" resulted.[236] Such injury requires a culpable mental state of either "intentionally" or "knowingly,"[237] although neither the current statute nor case law defines these culpable mental state terms and the current statute does not distinguish the penalty based on the differing culpable mental states. In the revised statute, by contrast, "purposely" causing "serious mental injury" is included in first degree abuse of a vulnerable adult or elderly person (subsection (a)(1)) and "recklessly" causing "serious mental injury" is included in second degree abuse of a vulnerable adult or elderly person (subsection (b)(1)). Both grades in the revised statute recognize that psychological harm may not result in bodily harm.[238] In addition, including a "recklessly" culpable mental state also makes the

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statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[234] The current maximum penalty for first degree abuse of a vulnerable adult or elderly person is inconsistent with applicable homicide penalties currently in the D.C. Code. Currently, the maximum penalty for first degree murder, absent aggravating circumstances, is 60 years. The maximum penalty for second degree murder, absent aggravating circumstances, is 40 years. If an aggravating circumstance is present, the maximum penalty for first and second degree murder is incarceration for life. Notably, one aggravating factor for both first and second degree murder is that the victim was "more than 60 years old." The maximum penalty for voluntary and involuntary manslaughter is 30 years.

[235] "Permanent bodily harm" would also likely constitute "serious bodily injury" under current District law, too. The District's current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[236] D.C. Code §§ 22-933, 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).

[237] D.C. Code § 22-933.

[238] For example, confining a vulnerable adult or elderly person to a closet may cause such serious mental injury but cause no physical injury.

revised abuse of a vulnerable adult or elderly person statute consistent with the current[239] and revised[240] assault offenses and the current[241] and revised[242] child abuse statutes, which either require or have gradations for a "recklessly" culpable mental state. The consistency and proportionality of the revised abuse of a vulnerable adult or elderly person statute improve if there are two gradations for "serious mental injury," with either a "purposely" or "recklessly" culpable mental state.

Fourth, the revised abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessly" or "recklessly, under circumstances manifesting extreme indifference to human life" for physical harm. The current abuse of a vulnerable adult or elderly person statute requires a culpable mental state of either "intentionally" or "knowingly."[243] However, neither the current statute nor case law defines these culpable mental state terms. By contrast, the first degree revised abuse of a vulnerable adult or elderly person statute requires "recklessly, under circumstances manifesting extreme indifference to human life" for causing "serious bodily injury" (subsection (a)(2)). This change makes the revised abuse of a vulnerable adult or elderly person statute consistent with gradations in the current[244] and revised[245] aggravated assault offenses and first degree of the revised child abuse statute.[246] The revised abuse of a vulnerable adult or elderly person statute also requires a "recklessly" culpable mental state in subsections (b)(2) and (c)(2), which matches gradations in the current[247] and revised[248] assault offenses and the current[249] and revised[250] child abuse statutes. Requiring the culpable mental states of "recklessly, under circumstances manifesting extreme indifference to human life" and "recklessly" improves the consistency and proportionality of the revised statute.

Fifth, the revised abuse of a vulnerable adult or elderly person statute is no longer limited to "corporal means." The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to inflict physical pain or injury by hitting, slapping,

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[239] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[240] RCC § 22A-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[241] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[242] RCC § 22A-1501 (requiring a culpable mental state of "recklessly" in several gradations).

[243] D.C. Code § 22-933.

[244] D.C. Code § 22-404.01(a)(2).

[245] RCC § 22A-1202(a).

[246] RCC § 22A-1501.

[247] *See, e.g.*, D.C. Code § 22-404(a)(2) (offense of assault with significant bodily injury requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state). The District's current simple assault statute, D.C. Code § 22-404(a)(1) does not specify a culpable mental state. Current District case law suggests that recklessness may suffice, however, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. The culpable mental state for simple assault is discussed in First Draft of Report #15 Recommendations for Assault & Offensive Physical Contact Offenses.

[248] RCC § 22A-1202 (requiring a culpable mental state of "recklessly" in several gradations).

[249] D.C. Code § 22-1101(a), (b) (requiring a culpable mental state of "intentionally," "knowingly," or "recklessly," but not grading the penalty based on the culpable mental state).

[250] RCC § 22A-1501 (requiring a culpable mental state of "recklessly" in several gradations).

kicking, pinching, biting, pulling hair or other corporal means."[251] In contrast, the revised statute requires that the defendant "cause[]" the specified type of physical or mental injury, by any means.[252] The requirement of causing injury by any means matches the current[253] and revised[254] assault statutes and the current[255] and revised[256] child abuse statutes. The revised statute reduces an unnecessary gap in the offense's coverage and improves the consistency of the statute with similar statutes.

Beyond these five substantive changes to current District law, eight other aspects of the revised abuse of a vulnerable adult or elderly person statute may be viewed as substantive changes of law.

First, the revised abuse of a vulnerable adult or elderly person statute generally prohibits behavior that would constitute harassment, menacing, threats, or restraint, as defined by the RCC. The current abuse of a vulnerable adult or elderly person statute prohibits, in part, conduct that "threatens to inflict physical pain or injury,"[257] uses "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening,"[258] or involves "unreasonable confinement or involuntary seclusion, including but not limited to, the forced separation from other persons against his or her will or the directions of any legal representative."[259] There is no DCCA case law interpreting the meaning of these provisions in the current statute, or how such conduct may differ from conduct covered in other current statutes that generally prohibit threats,[260] stalking,[261] or involuntary confinement.[262] The revised abuse of a vulnerable adult or elderly person statute clearly states that third degree abuse of a vulnerable adult or elderly person has the same scope as RCC offenses pertaining to harassment, menacing, threats, or restraint, as defined by the RCC. The revised threats statute (RCC § 22A-1204), revised menacing statute (RCC § 22A-1203), and revised harassment (RCC § 22A-XXXX) statutes cover conduct threatening "physical pain or injury" and "repeated or malicious oral or written statements that would be considered by a reasonable person to be harassing or threatening." The revised restraint statute (RCC § 22A-XXXX) covers conduct involving unreasonable confinement or involuntary seclusion. This change improves the clarity of the revised offense and creates consistency between the revised offense and other closely related offenses pertaining to threats, harassment, menacing, and restraint.

Second, the revised abuse of a vulnerable adult or elderly person statute generally prohibits behavior that satisfies first degree offensive physical contact as defined in RCC § 22A-1205 (knowingly causing physical contact with bodily fluid or excrement). The current abuse of a vulnerable adult or elderly person statute requires, in part, "inflict[ing] or threat[ening] to

[251] D.C. Code § 22-933(1).
[252] For example, throwing a caustic substance on someone, causing burns, or mixing a toxic ingredient in someone's food.
[253] *See, e.g.*, D.C. Code §§ 22-404(a)(2) ("causes significant bodily injury to another."); 22-404.01(a)(1), (2) ("causes serious bodily injury.").
[254] RCC § 22A-1202.
[255] D.C. Code § 22-1101(a) ("causes bodily injury.").
[256] RCC § 22A-1501.
[257] D.C. Code § 22-933(1).
[258] D.C. Code § 22-933(2).
[259] D.C. Code § 22-933(3).
[260] D.C. Code §§ 22-404(a)(1); 22-1810.
[261] D.C. Code § 22-3133.
[262] D.C. Code § 22-2001.

inflict physical pain or injury by hitting, slapping, kicking, pinching, biting, pulling hair or other corporal means."[263] The DCCA has interpreted "physical pain or injury…or other corporal means" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[264] but did not provide a definition of the terms. The revised abuse of a vulnerable adult or elderly person statute clarifies that, whether or not it would constitute a physical injury by corporal means, causing offensive physical contact with bodily fluid or excrement is within the scope of the offense. The revised statute clarifies and potentially fills a gap in the current statute.

Third, the revised abuse of a vulnerable adult or elderly person statute requires a culpable mental state of "recklessness" as to the fact that the other person is a vulnerable adult or elderly person. The current abuse of a vulnerable adult or elderly person statute does not specify what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[265] There is no DCCA case law discussing if there is a culpable mental state for this element. However, the current enhancement for certain crimes committed against senior citizens provides a defense that the accused did not know or reasonably believed that the victim was not 65 years or older.[266] In the revised offense, a "reckless" culpable mental state matches the culpable mental state for the fact that the complaining witness is a child in the revised child abuse and child neglect statutes (RCC §§ 22A-1501 and 22A-1502), and the "protected person" gradations in the revised assault statute (RCC § 22A-1202). A "reckless" culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[267] The consistency and proportionality of the revised offense improves if a culpable mental state of recklessness applies to the fact that the other person is a vulnerable adult or elderly person.

Fourth, the revised statute in subsection (f) clarifies that "effective consent," a defined term in RCC § 22A-1001, is a defense to less serious forms of abuse of a vulnerable adult or elderly person. The current District statutes for abuse of a vulnerable adult or elderly person and current assault statutes are silent as to whether effective consent is a defense to minor bodily harms. DCCA case law does not discuss the matter. Current District case law, however, does

[263] D.C. Code § 22-933(1).

[264] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[265] The current neglect of a vulnerable adult or elderly person statute requires a culpable mental state of "intentionally or knowingly." D.C. Code § 22-933. It appears that "vulnerable adult" or "elderly person" are not actually elements of the abuse offense in D.C. Code § 22-933, nor is it an element in the penalties. D.C. Code §§ 22-933, 22-936. Both terms are defined, however, in D.C. Code § 22-932.

[266] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). Abuse of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[267] "Reckless" is defined in RCC § 22A-206 and means that the accused must disregard a substantial and unjustifiable risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant, per the current enhancement for crimes against senior citizens, would not satisfy the culpable mental state of recklessness as to the age of the complaining witness. The accused would not consciously disregard a substantial and unjustifiable risk that the complainant was 65 years of age or older.

recognize a consent defense for some forms of assault,[268] as does current District practice.[269] In addition, current D.C. Code § 22-935 exempts from liability for abuse of a vulnerable adult or elderly person anyone who "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[270] However, for the spiritual healing exemption to apply, a person must have the "express consent" of the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[271]

The revised abuse of a vulnerable adult or elderly person statute clarifies that effective consent[272] by the complainant, or reasonable belief that the complainant gave effective consent, is a defense to abuse of a vulnerable adult or elderly person in several circumstances. First, effective consent is always a defense to conduct that only results in bodily injury or using overpowering physical force, without the use of a firearm. Second, effective consent is a defense to any type of reasonably foreseeable injury that may occur in lawful sports, contests and other concerted activities,[273] even if significant bodily injury, serious bodily injury, or serious mental injury results or a firearm is used. Third, effective consent is a defense to any conduct that otherwise constitutes abuse of a vulnerable adult or elderly person if the conduct was the use of religious prayer alone, in lieu of medical treatment which the defendant otherwise had a duty to provide. The prefatory language in subsection (f)(1) clarifies that any general justification defense under District law continues to be available to a defendant in an abuse of a vulnerable adult or elderly person statute prosecution. Subsection (f)(2) further clarifies the burden of proof for the defense, consistent with current District practice.[274] Codifying the effective consent defense improves the clarity of the law and, to the extent it may result in a change, improves the

[268] The District's current assault statutes do not address whether consent of the complainant is a defense to liability for assault, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching. 131 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932)."). A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. 132 *Woods v. United States*, 65 A.3d 667, 672 (D.C. 2013).

[269] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

[270] D.C. Code § 22-935.

[271] D.C. Code § 22-935.

[272] I.e., consent not obtained by coercion or deception. This limitation on consent may address the *Woods* court's dicta concerning "absurd realities" of providing a defense to significant bodily injury in some situations. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013)("such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout").

[273] Note that such a defense is not categorically applicable to conduct in a legal sporting event or other concerted activity—the assault must be a reasonably foreseeable hazard of participation. This means that, for example, a hockey player could not claim a defense for assaulting a player during an intermission. Similarly, infliction of a significant bodily injury pursuant to illegal activity such as a disturbance of the peace—per the facts in *Woods v. U.S.*, 65 A.3d 667 (D.C. 2013)—would not be able to raise a defense under subsection (i)(1)(B).

[274] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

proportionality of the offense by ensuring that consensual and legal activities are not criminalized.[275]

Fifth, the revised abuse of a vulnerable adult or elderly person statute uses standardized definitions for the terms "serious bodily injury" and "bodily injury" in RCC § 22A-1001. The District's current abuse of a vulnerable adult or elderly person statute is graded, in part, based on whether "physical pain or injury"[276] or "serious bodily injury" results.[277] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[278] but did not provide a definition of either term. There is no DCCA case law interpreting "serious bodily injury" in the current abuse of a vulnerable adult or elderly person statute.[279]

The revised abuse of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "bodily injury" per RCC § 22A-1001. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute[280] and would encompass "permanent bodily harm" in the current abuse of a vulnerable adult or elderly person statute. It is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. The revised definition of "bodily injury" in RCC § 22A-1001 encompasses the limited DCCA case law interpreting "bodily injury" for the current abuse of a vulnerable adult or elderly person

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[275] Absent such an effective consent defense, recklessly causing injury to an elderly person or vulnerable adult is a criminal act, even if the person was competent and fully aware of the risks of a bodily injury from mutual activity (e.g. playing tennis) with the defendant.

[276] D.C. Code § 22-933(1).

[277] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[278] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[279] However, there is DCCA case law interpreting "serious bodily injury" in the current aggravated assault statute. "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[280] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

statute, as well as the alternative basis for liability in the current statute, that the conduct cause "physical pain."[281] Defining "serious bodily injury" and "bodily injury" improves the clarity, consistency, and proportionality of the revised abuse of a vulnerable adult or elderly person statute.

Sixth, the revised third degree abuse of a vulnerable adult or elderly person statute clarifies that the offense includes "physical force that overpowers" the vulnerable adult or elderly person (subsection (c)(2)). The current abuse of a vulnerable adult or elderly person statute includes some forms of physical force that have negative effects besides "physical pain or injury,"[282] but the precise scope is unclear. The revised statute codifies as a predicate for liability the use of "physical force that overpowers" the vulnerable adult or elderly person even if it does not result in pain or injury. "Physical force" is defined in RCC § 22A-1001 as merely "the application of physical strength," and is distinct from "bodily injury," defined in RCC § 22A-1001 as "physical pain, illness, or any impairment of physical condition." By specifying that the revised offense includes "physical force that overpowers," the revised statute clarifies the law.

Seventh, the revised abuse of a vulnerable adult or elderly person statute defines "serious mental injury" in RCC § 22A-1001. The current abuse of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[283] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22A-1001 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current juvenile law statutes[284] by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[285] and the revised child abuse and criminal child neglect statutes use the term "serious mental injury." Using the same term in the revised abuse of a vulnerable adult or elderly person clarifies the law and improves the consistency of the revised offenses.

Eighth, the revised abuse of a vulnerable adult or elderly person statute requires a culpable mental state as to the resulting physical or mental injury. The current abuse of a vulnerable adult or elderly person statute requires culpable mental states of "intentionally or knowingly" as to the prohibited conduct.[286] However, the current offense's penalty gradations do not specify culpable mental states for whether the prohibited conduct "causes" "serious bodily injury or severe mental distress"[287] or "permanent bodily harm or death."[288] The DCCA has not

[281] D.C. Code § 22-933(1) ("[i]nflicts or threatens to inflict physical pain or injury . . . by corporal means.").
[282] Subsection (1) of the current statute includes "threat[ening] to inflict physical pain or injury." D.C. Code § 22-933(1). Subsection (3) of the current statute requires "unreasonable confinement or involuntary seclusion." D.C. Code § 22-933(3).
[283] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results).
[284] D.C. Code Ann. § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").
[285] *Alfaro v. United States*, 859 A.2d 149 (D.C. 2004); *Speaks v. United States*, 959 A.2d 712 (D.C. 2008).
[286] D.C. Code § 22-934.
[287] D.C. Code § 22-936(b).

determined whether there is a culpable mental state for the resulting physical or mental harm in the abuse of a vulnerable adult or elderly person statute. Unlike the current statute, the revised statute clarifies that a culpable mental state applies to the resulting physical or mental harm—"recklessly" (subsections (a)(1), (a)(2) (b)(1), (b)(2), and (c)(2)). Codifying that a culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm improves the clarity and proportionality of the revised statute.

Relation to National Legal Trends. *The revised abuse of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support grading abuse of vulnerable adults and elderly persons statutes according to different degrees of harm, although only one does so with a gradation like "significant bodily injury." Sixteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[289] ("reformed jurisdictions") have specific abuse of a vulnerable adult or elderly person statutes.[290] Only one of these jurisdictions incorporates an intermediate level of bodily harm into the offense similar to "significant bodily injury" in the revised abuse of a vulnerable adult or elderly person statute.[291] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes differentiate low and severe levels of injury in their gradations.[292]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Second, criminal codes in reformed jurisdictions support removal of "permanent bodily harm or death" of the vulnerable adult or elderly person as a separate basis for liability. Of the

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[288] D.C. Code § 22-936(c).

[289] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[290] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[291] Minn. Stat. Ann. § 609.233(3)(2).

[292] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes,[293] only three grade base on whether death resulted.[294] However, many of the 16 reformed jurisdictions' vulnerable adult or elderly person abuse statutes have clearly differentiated levels of injury.[295]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Third, criminal codes in reformed jurisdictions provide mixed support for using mental injury as a basis for liability and grading on whether such conduct is done "purposely" or "recklessly." Sixteen of the 29 reformed jurisdictions have specific abuse of a vulnerable adult or elderly person statutes.[296] At least eight of the 16 reformed jurisdictions prohibit results like mental distress as in the current abuse of a vulnerable adult or elderly person statute, or behaviors that potentially could involve mental distress, such as harassment.[297] Four of these

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[293] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[294] Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a); Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2); Wis. Stat. Ann. § 940.258.

[295] Ala. Code § 38-9-7(b)-(e) (prohibiting "serious physical injury" and "physical injury."); Ark. Code Ann. § 5-28-103(b), (c) (prohibiting "serious physical injury or a substantial risk of death" and "physical injury."); Colo. Rev. Stat. Ann. § 18-6.5-103(2)(a), (2)(b), (2)(c) (prohibiting "death," "serious bodily injury," and "bodily injury."); Minn. Stat. Ann. § 609.233(3) (grading the offense based on whether "death," "great bodily harm," or "substantial bodily harm or the risk of death" resulted); N.Y. Penal Law §§ 260.32(1), (2), 260.34(1), (2) (prohibiting "physical injury" and "serious physical injury."); Tenn. Code Ann. §§ 71-6-117, 71-6-119(a) (prohibiting "serious mental or physical harm" in the higher gradation); Tex. Code Ann. § 22.04(a)(1), (a)(3) (prohibiting "serious bodily injury" and "bodily injury."); Utah Code Ann. § 76-5-111(2), (3) (prohibiting "serious physical injury" in the higher gradation); Wis. Stat. Ann. § 940.258(b)(1g), (b)(1m), (b)(2) (grading, in part, based on whether "death," "great bodily harm," or "bodily harm" resulted).

[296] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[297] See, e.g., Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish."); Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117; 71-6-119 (prohibiting "abuse or neglect" and defining "abuse or neglect" as including "the infliction of . . . mental anguish."); Tex. Penal Code Ann. § 22.04(a)(2) (prohibiting, in part, "serious mental deficiency, impairment, or injury."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," and defining " "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally."); Ariz. Rev. Stat. Ann. § 13-3623(D), (F)(3) (prohibiting "emotional abuse" and defining emotional abuse as "a pattern of ridiculing or demoing a vulnerable adult, making derogatory remarks to a vulnerable adult, verbally harassing a vulnerable adult or threatening to inflict physical or emotional harm on a vulnerable adult."); Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D) ("harasses, intimidates."); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically

eight states include "recklessly" as a culpable mental state,[298] while the remaining four states are limited to culpable mental states of "knowingly,"[299] or "willfully."[300] Looking at the sixteen reformed jurisdictions' grading schemes for physical harm, nine of the jurisdictions include "recklessly" as a culpable mental state.[301]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fourth, reformed jurisdictions' criminal codes provide mixed support for requiring a culpable mental state of "recklessly" or "recklessly, under circumstances manifesting extreme indifference to human life" for physical harm in abuse of a vulnerable adult or elderly person statutes. None of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or

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abus[ing]" and defining "emotional and psychological abuse" as "a caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability."); Wis. Stat. Ann. §§ 940.258; 46.90(cm) (including "emotional abuse" and defining "emotional abuse" as "language or behavior that serves no legitimate purpose and is intended to be intimidating, humiliating, threatening, frightening, or otherwise harassing, and that does or reasonably could intimidate, humiliate, threaten, frighten, or otherwise harass the individual to whom the conduct or language is directed.").

[298] Ala. Code §§ 38-9-2(6), 38-9-7(f) (including "emotional abuse" and defining "emotional abuse," in part, as "[t]he willful or reckless infliction of emotional or mental anguish.");Tex. Penal Code Ann. § 22.04(a)(2), (e) (grading the offense on whether the culpable mental state was "intentionally or knowingly" or "recklessly."); Utah Code Ann. §§ 76-5-111(1)(i), (3) (prohibiting, in part, "harm, abuse, or neglect," defining "harm" as "pain, mental anguish, emotional distress, hurt, physical or psychological damage, physical injury, suffering, or distress inflicted knowingly or intentionally," and grading the offense based on whether the culpable mental state was "intentionally or knowingly," "recklessly," or "criminal negligence."); Wis. Stat. Ann. § 940.258(1)(ag), (2), (b) (including "emotional abuse" in the definition of "abuse" and grading the offense, in part, based on the culpable mental state of "intentionally," "recklessly," or "negligently.").

[299] Tenn. Code Ann. §§ 71-6-102(1)(A); 71-6-117(a); 71-6-119(a); Ariz. Rev. Stat. Ann. § 13-3623(D) ("intentionally or knowingly.").

[300] Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(D); S.D. Codified Laws Ann. § 22-46-1(4); 22-46-2 (prohibiting "emotionally or psychologically abus[ing]" and defining "emotional and psychological abuse" as "a caretaker's willful, malicious, and repeated infliction of: (a) A sexual act or he simulation of a sexual act directed at and without the consent of the elder or adult with a disability that involves nudity or is obscene; (b) Unreasonable confinement; (c) Harm or damage or destruction of the property of an elder or adult with a disability, including harm to or destruction of pets; or (d) Ridiculing or demeaning conduct, derogatory remarks, verbal harassment, or threats to inflict physical or emotional and psychological abuse, directed at an elder or adult with a disability.")."

[301] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

elderly person statutes[302] have a culpable mental state equivalent to "recklessly, under circumstances manifesting extreme indifference to human life." However, at least 12 of the 29 reformed jurisdictions do have this culpable mental state in the highest gradations of their assault statutes.[303]

Nine of the 16 reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes[304] include "recklessly" as a culpable mental state.[305]

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Fifth, criminal codes in reformed jurisdictions strongly support the elimination of a restriction on criminal abuse of a vulnerable adult or elderly person to physical harms committed by "corporal means." None of the sixteen reformed jurisdictions with specific abuse of a vulnerable adult or elderly person statutes limits the offense to corporal means.[306]

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[302] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[303] *See, e.g.*, Ala. Code § 13A-6-20(a)(3); Alaska Stat. Ann. § 11.41.200(a)(3); Ark. Code Ann. § 5-13-201(a)(3); Colo. Rev. Stat. Ann. § 18-3-202(1)(c); Conn. Gen. Stat. Ann. §53a-59; Ky. Rev. Stat. Ann. § 508.010(1)(b); Me. Rev. Stat. tit. 17-A, § 208-B(1)(B); N.J. Stat. Ann. § 2C:12-1(b)(1); N.Y. Penal Law § 120.10(3); Or. Rev. Stat. Ann. § 163.65(1)(b); 18 Pa. Stat. Ann. § 2702(a)(1); S.D. Codified Laws § 22-18-1.1(1).

[304] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

[305] Ala. Code § 38-9-7(b)-(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ariz. Rev. Stat. Ann. § 13-3623(A), (B) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "criminal negligence."); Colo. Rev. Stat. Ann. § 18-6.5-103 (grading the offense, in part, based on whether the culpable mental state is "negligence," but also the culpable mental states required in the assault statutes); Ky. Rev. Stat. Ann. §§ 508.100(1), 508.110(1), 508.120(1) (grading the offense based on whether the culpable mental state is "intentionally," "wantonly," or "recklessly."); N.H. Rev. Stat. Ann. § 631.8(II), (III) (grading the offense, in part, based on whether the culpable mental state is "purposely" or "knowingly or recklessly."); N.Y. Penal Law §§ 260.32(1), (2), (3), 260.34(1), (2) (grading the offense, in part, based on whether the culpable mental state is "with intent," "recklessly," or "criminal negligence."); Tex. Code Ann. § 22.04(e) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly" or "recklessly."); Utah Code Ann. § 76-5-111(2), (3) (grading the offense, in part, based on whether the culpable mental state is "intentionally or knowingly," "recklessly," or "with criminal negligence."); Wis. Stat. Ann. § 940.258(2)a), (b) (grading the offense, in part, based on whether the culpable mental state is "intentionally," "recklessly," or "negligently.").

[306] Reformed jurisdictions may have abuse of a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the abuse laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, abuse of a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Ariz. Rev. Stat. Ann. § 13-3623; Ark.

The Model Penal Code does not have an offense for abusing a vulnerable adult or elderly person.

Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. §§ 18-6.5-102, 18-6.5-103; Ill. Comp. Stat. Ann. 5/12-4.4a(b), (d)(2), (e); Kan. Stat. Ann. § 21-5417; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120, 530.080; Minn. Stat. Ann. § 609.233; N.H. Rev. Stat. Ann. § 631.8; N.Y. Penal Law §§ 260.31, 260.32, 260.34; Or. Rev. Stat. Ann. § 163.205; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Tex. Code Ann. § 22.04; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.258.

Chapter 15. Abuse and Neglect of Vulnerable Persons

Section 1504. Neglect of a Vulnerable Adult or Elderly Person.

(a) *First Degree Neglect of a Vulnerable Adult or Elderly Person.* A person commits the offense of first degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious bodily injury or death;

(2) That person knows he or she has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

(b) *Second Degree Neglect of a Vulnerable Adult or Elderly Person.* A person commits the offense of second degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly created, or failed to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience:

(A) Significant bodily injury; or

(B) Serious mental injury;

(2) That person knows he or she has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

(c) Third Degree Neglect of a Vulnerable Adult or Elderly Person. A person commits the offense of third degree neglect of a vulnerable adult or elderly person when that person:

(1) Recklessly fails to make a reasonable effort to provide food, clothing, shelter, supervision, medical services, medicine or other items or care essential for the physical health, mental health, or safety of a vulnerable adult or elderly person;

(2) That person knows she or he has a duty of care to the vulnerable adult or elderly person; and

(3) In fact, that person violated his or her duty of care to the vulnerable adult or elderly person.

(d) *Penalties*.

(1) *First Degree Neglect of a Vulnerable Adult or Elderly Person.* First degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Second Degree Neglect of a Vulnerable Adult or Elderly Person.* Second degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) *Third Degree Neglect of a Vulnerable Adult or Elderly Person.* Third degree neglect of a vulnerable adult or elderly person is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(e) *Definitions:* The terms "recklessly" and "knows" have the meanings specified in § 22A-206; and the terms "serious mental injury," "serious bodily injury," "significant bodily injury," "effective consent," "duty of care," "vulnerable adult," and "elderly person" have the meanings specified in § 22A-1001.

(f) *Defenses*.

(1) *Effective Consent Defense*. In addition to any defenses otherwise applicable to the defendant's conduct under District law, the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent to the defendant's conduct is an affirmative defense to prosecution under this section if the conduct did not involve a firearm, as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded

(2) *Burden of Proof for Effective Consent Defense.* If evidence is present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant consented to the defendant's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

RCC § 22A-1504. Neglect of a Vulnerable Adult or Elderly Person

Commentary

Explanatory Note. *The RCC neglect of a vulnerable adult or elderly person offense proscribes a broad range of conduct in which there is a risk of harm to a vulnerable adult or elderly person's bodily integrity or mental well-being. In addition to prohibiting a risk of harm to a vulnerable adult or elderly person, the RCC neglect of a vulnerable adult or elderly person offense prohibits failing to provide a vulnerable adult or elderly person with necessary items or care. The penalty gradations are primarily based on the type of physical or mental harm that is risked. Along with the revised abuse of a vulnerable adult or elderly person offense, the revised neglect of a vulnerable adult or elderly person offense replaces several offenses and provisions in the current D.C. Code: abuse of a vulnerable adult or elderly person;*[307] *neglect of a vulnerable adult or elderly person;*[308] *the spiritual healing defense for abuse or neglect of a vulnerable adult or elderly person;*[309] *and the definitions of "elderly person"*[310] *and "vulnerable adult"*[311] *that apply to the current abuse and neglect of a vulnerable adult or elderly person statutes.*

Subsection (a)(1) specifies the prohibited conduct for first degree neglect of a vulnerable adult or elderly person, the highest grade of the revised offense—creating, or failing to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious bodily injury or death. Subsection (a)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious bodily injury or death. "Serious bodily injury" is a defined term in RCC § 22A-1001 that means injury involving a substantial risk of death, or protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. The "recklessly" culpable mental state in subsection (a)(1) also applies to the element that the complaining witness is either a "vulnerable adult" or an "elderly person."[312] As defined in RCC § 22A-206, "recklessly" requires that the accused be aware of a substantial risk that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001. "Elderly person" is defined in RCC § 22A-1001 as a "person who is 65 years of age or older." "Vulnerable adult" is defined in RCC § 22A-1001 as a person who is 18 years of age or older with physical or mental limitations that substantially impair the person's ability to independently provide for or care for himself or herself.

Subsection (b)(1)(A) specifies one type of prohibited conduct for second degree neglect of a vulnerable adult or elderly person—creating, or failing to mitigate or remedy, a substantial

[307] D.C. Code §§ 22-933, 22-936.
[308] D.C. Code §§ 22-934, 22-936.
[309] D.C. Code § 22-935.
[310] D.C. Code § 22-932(3).
[311] D.C. Code § 22-932(5).
[312] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a vulnerable adult or elderly person in (a)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001.

and unjustifiable risk that a vulnerable adult or elderly person would experience significant bodily injury. Subsection (b)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience significant bodily injury. "Significant bodily injury" is the intermediate level of bodily injury in the revised offenses against persons statutes and is defined in RCC § 22A-1001 as an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. The "recklessly" culpable mental state in subsection (b)(1) also applies to the element that the complaining witness is either a "vulnerable adult" or an "elderly person."[313] As defined in RCC § 22A-206, "recklessly" requires that the accused be aware of a substantial risk that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001. "Elderly person" is defined in RCC § 22A-1001 as a "person who is 65 years of age or older." "Vulnerable adult" is defined in RCC § 22A-1001 as a person who is 18 years of age or older with physical or mental limitations that substantially impair the person's ability to independently provide for or care for himself or herself.

Subsection (b)(1)(B) specifies the second type of prohibited conduct for second degree child neglect—creating, or failing to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious mental injury. Subsection (b)(1) further specifies that the culpable mental state for creating, or failing to mitigate or remedy, such a risk is "recklessly," a term defined in RCC § 22A-206 as being aware of a substantial risk that one's conduct will create, or fail to mitigate or remedy, a substantial and unjustifiable risk that a vulnerable adult or elderly person would experience serious mental injury. "Serious mental injury" a term defined in RCC § 22A-1001 as "substantial, prolonged harm to a person's psychological or intellectual functioning." The "recklessly" culpable mental state in subsection (b)(1) also applies to the element that the complaining witness is either a "vulnerable adult" or an "elderly person."[314] As defined in RCC § 22A-206, "recklessly" requires that the accused be aware of a substantial risk that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001. "Elderly person" is defined in RCC § 22A-1001 as a "person who is 65 years of age or older." "Vulnerable adult" is defined in RCC § 22A-1001 as a person who is 18 years of age or older with physical or mental limitations that substantially impair the person's ability to independently provide for or care for himself or herself.

Subsection (c)(1) specifies the prohibited conduct for third degree neglect of a vulnerable adult or elderly person—failing to make a reasonable effort to provide, food, clothing, or other items or care for a vulnerable adult or elderly person. Subsection (c)(1) specifies that the culpable mental state for this conduct is "recklessly," a term defined in RCC § 22A-206 as being

[313] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a vulnerable adult or elderly person in (b)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001.

[314] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a vulnerable adult or elderly person in (b)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001.

aware of a substantial risk that one's conduct will fail to make a reasonable effort to provide the items or care. Subsection (c)(1) requires that the items or care be "essential to the physical health, mental health, or safety of a vulnerable adult or elderly person." Per the rule of construction in RCC § 22A-207, the culpable mental state of "recklessly" also applies to this element, and requires that the accused to be aware of a substantial risk that the items or care are "essential to the physical health, mental health, or safety of a vulnerable adult or elderly person." The "recklessly" culpable mental state in subsection (c)(1) also applies to the element that the complaining witness is either a "vulnerable adult" or an "elderly person."[315] As defined in RCC § 22A-206, "recklessly" requires that the accused be aware of a substantial risk that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001. "Elderly person" is defined in RCC § 22A-1001 as a "person who is 65 years of age or older." "Vulnerable adult" is defined in RCC § 22A-1001 as a person who is 18 years of age or older with physical or mental limitations that substantially impair the person's ability to independently provide for or care for himself or herself.

Each gradation of the revised neglect of a vulnerable adult or elderly person statute requires that the complaining witness has a "duty of care" to the vulnerable adult or elderly person (subsections (a)(2), (b)(2), and (c)(2)). "Duty of care" is defined in RCC § 22A-1001 as a "legal responsibility for the health, welfare, or supervision for another person." "Legal" covers any kind of civil or contractual liability. Each gradation of the revised neglect of a vulnerable adult or elderly person statute requires that the accused "know" that he or she has a duty of care to the vulnerable adult or elderly person (subsections (a)(2), (b)(2), and (c)(2)). "Knowingly" is a defined term in RCC § 22A-206 that means the accused is practically certain that he or she has a duty of care to the vulnerable adult or elderly person. Finally, each gradation of the revised neglect of a vulnerable adult or elderly person statute requires that the accused violates his or her duty of care to the vulnerable adult or elderly person. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the fact the accused violated the duty of care.

Subsection (d) specifies relevant penalties for the offense. [RESERVED]

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

Subsection (f) describes the defense of effective consent for neglect of a vulnerable adult or elderly person. The defense is available to all grades of the revised offense provided that the conduct did not involve a "firearm" as defined at D.C. Code 22-4501(2A), regardless of whether the firearm is loaded. Subsection (f)(1) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the conduct at issue.[316] The effective consent defense requires either proof of "effective consent," a defined term in RCC § 22A-2001 that excludes consent obtained by means coercion or deception, or the actor's reasonable belief that the

[315] Note, however, that in practice the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as a vulnerable adult or elderly person in (c)(2) of the revised offense, must be proven. As defined in RCC § 22A-206, the knowledge culpable mental state requires that the accused be practically certain that the complaining witness is either a "vulnerable adult" or an "elderly person" as those terms are defined in RCC § 22A-1001.

[316] For example, a person who, to avoid greater harm, amputates the finger of a person caught in machinery on request of the victim may have available a general justification defense of necessity. *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982). The codification of this reference to general justification defenses in the preface to subsection (i)(1) clarifies that courts should not interpret the codification of these special defenses to abrogate the applicability of general defenses under an exp*ressio unius* canon of construction. *See, e.g., Bolz v. D.C.*, 149 A.3d 1130, 1140 (D.C. 2016).

complainant consented to the actor's conduct. Subsection (f)(2) describes the burden of proof for the effective consent defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

Relation to Current District Law. *The revised neglect of a vulnerable adult or elderly person statute changes existing District law in three main ways that reduce unnecessary overlap with other offenses, improve the proportionality of penalties, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised neglect of a vulnerable adult or elderly person statute is limited to conduct that does not actually harm a person. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[317] The penalties for the offense, however, partially grade the offense on actual harm to the vulnerable adult or elderly person,[318] and partially on a failure to discharge the required duty.[319] By contrast, the revised criminal neglect of a vulnerable adult or elderly person statute no longer grades the offense based on whether actual harm to the vulnerable adult or elderly person resulted. The revised statute is instead limited to creating, or failing to mitigate or remedy, a risk of harm to an elderly person or vulnerable adult, or a failure to provide necessary items or care. However, if physical or mental injury or death results, there still may be liability under the revised abuse of a vulnerable adult or elderly person statute (RCC § 22A-1504), the revised general assault statute (RCC § 22A-1202), or the revised homicide offenses[320] (RCC § 22A-XXXX). Limiting the revised neglect of a vulnerable adult or elderly person statute to conduct that creates or fails to mitigate a risk to, or fails to provide necessary items or care to, a vulnerable adult or elderly person reduces unnecessary overlap between offenses and improves the consistency and proportionality of the revised offense.

Second, the revised neglect of a vulnerable adult or elderly person statute applies a recklessness requirement to whether items or care are essential for the well-being of the vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute requires "that a reasonable person would deem the items or care essential for the well-

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[317] D.C. Code § 22-934.

[318] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[319] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[320] The current abuse of a vulnerable adult or elderly person statute prohibits, in part, "intentionally or knowingly impos[ing] unreasonable confinement or involuntary seclusion." D.C. Code § 22-933(3). In one gradation of the current offense, if the defendant "causes permanent bodily harm or death," there is a maximum term of imprisonment of 20 years. D.C. Code § 22-934(c). The current statute does not specify any culpable mental state as to causing death and there is no DCCA case law, meaning that current District law may apply strict liability. For example if, after a defendant cuts off an elderly person's phone lines, the elderly person falls and dies because he or she cannot call for help, a court could find that the defendant "caused" the elderly person's death, even if the defendant was unaware that there was a risk of death. It is unclear whether current District homicide laws would cover imposing "unreasonable confinement or involuntary seclusion" that leads to death, as in this scenario.
The revised abuse of a vulnerable adult or elderly person statute no longer specifically prohibits "unreasonable confinement or involuntary seclusion," although this conduct may be covered under the revised criminal coercion offense (RCC § 22A-XXXX). However, the RCC has a revised negligent homicide offense (RCC § 22A-XXXX) that may cover this conduct, and, depending on the facts of the case, the revised manslaughter offense (RCC § 22A-XXXX) may cover it.

being of the vulnerable adult or elderly person."[321] It is unclear under the current statute what culpable mental state, if any, applies to the fact that the items or care are essential, although the statute's "reasonable person" standard may suggest a culpable mental state of negligence for this element. DCCA case law has not specifically addressed this culpable mental state, but has generally found that "wanton, reckless or willful indifference," two of the culpable mental states specified in the current statute, requires something similar to recklessness.[322] By contrast, the revised neglect of a vulnerable adult or elderly person statute eliminates the current statute's reasonable person requirement and applies a "recklessly" culpable mental state as defined in RCC § 22A-206. As applied in the revised statute, "recklessly" requires that a person is aware of a substantial risk that the items or care are "essential for the health or safety of a vulnerable adult or elderly person." Requiring recklessness for this element improves the clarity and proportionality of the revised offense.[323]

Third, the revised neglect of a vulnerable adult or elderly person statute in subsection (f) clarifies that "effective consent," a defined term in RCC § 22A-1001, is a defense to neglect of a vulnerable adult or elderly person if the conduct did not involve a firearm. Current D.C. Code § 22-935 exempts from liability a person that "provides or permits to be provided treatment by spiritual means through prayer alone in accordance with a religious method of healing, in lieu of medical treatment."[324] However, for the spiritual healing exemption to apply, a person must have the "express consent" of the vulnerable adult or elderly person or act "in accordance with the practice of the vulnerable adult or elderly person."[325] The current District statute for neglect of a vulnerable adult or elderly person is silent as to whether a consent defense, apart from spiritual healing, applies to the offense. There is no DCCA case law on point. Current District case law, however, does recognize a consent defense for some forms of assault,[326] as does current District practice.[327]

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[321] D.C. Code § 22-934.

[322] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[323] Although "essential for the health or safety of a vulnerable adult or elderly person" is an element of the revised third degree criminal neglect of a vulnerable adult or elderly person, the issue may be included in the other degrees of the offense that prohibit "a substantial and unjustifiable risk" of specified physical and mental harms. In these degrees, the "recklessly" culpable mental state would encompass recklessness as to whether items or care were essential for the health or safety of the vulnerable adult or elderly person.

[324] D.C. Code § 22-935.

[325] D.C. Code § 22-935.

[326] The District's current assault statutes do not address whether consent of the complainant is a defense to liability for assault, nor do District statutes otherwise codify general defenses to criminal conduct. Longstanding case law of the United States Court of Appeals District of Columbia Circuit (D.C. Cir.) in *Guarro v. United States* has recognized that consent is a defense to assault, at least in the case of a nonviolent sexual touching. 131 237 F.2d 578, 581 (1956) ("Nevertheless the evidence in the instant case cannot support a conviction for assault unless it appears that there was no actual or apparent consent. Generally where there is consent, there is no assault. 1 Wharton, Criminal Law §§ 180, 751 (12th ed. 1932)."). A recent DCCA opinion in *Woods v. United States*, however, held that consent of the complainant is not a defense to assault in a public place that causes significant bodily injury, but explicitly declined to rule on the effect of consent in other circumstances. 132 Woods v. U.S., 65 A.3d 667, 672 (D.C. 2013).

[327] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

In contrast, the revised criminal neglect of a vulnerable adult or elderly person statute provides a broader effective consent[328] defense to all forms of criminal neglect under the revised statute that do not involve a firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded. Unlike the effective consent defense in the revised abuse of a vulnerable adult or elderly person statute (RCC § 22A-1503), the effective consent defense for neglect of a vulnerable adult or elderly person statute applies to all forms of neglect, even if they involve a risk of serious bodily injury or death. Absent such an effective consent defense, a broad swath of ordinary and legal activities potentially would fall within the scope of the revised criminal neglect of a vulnerable adult or elderly person offense.[329] District practice[330] has long recognized the general existence of a consent defense that is consistent with the RCC effective consent defense.

The prefatory language in subsection (f)(1) of the revised statute clarifies that any general justification defense under District law continues to be available to a defendant in an criminal neglect of a vulnerable adult or elderly person statute prosecution. Subsection (f)(2) further clarifies the burden of proof for the defense, consistent with current District practice.[331] Codifying a broad effective consent defense improves the proportionality and clarity of the revised criminal neglect of a vulnerable adult or elderly person statute.

Beyond these three substantive changes to current District law, eight other aspects of the revised neglect of a vulnerable adult or elderly person statute may be viewed as a substantive change of law.

First, the revised neglect of a vulnerable adult or elderly person statute requires a general "duty of care," as defined in RCC § 22A-1001. The current neglect of a vulnerable adult or elderly person statute requires "a duty to provide care and services necessary to maintain the physical and mental health of a vulnerable adult or elderly person."[332] The extent of such care and services, however, is unclear under the statute, and "duty of care" is not defined. DCCA case law does not provide additional detail. By contrast, the revised neglect of a vulnerable adult or elderly person statute requires a "duty of care," defined in RCC § 22A-1001 as "a legal responsibility for the health, welfare, or supervision for another person." "Legal" covers any kind of civil or contractual liability. "Duty of care," as defined in RCC § 22A-1001, may be broader than the current neglect of a vulnerable adult or elderly person statute insofar as it specifically addresses a duty of "supervision,"[333] but it would still specifically prohibit failing to

[328] I.e., consent not obtained by coercion or deception. This limitation on consent may address the Woods court's dicta concerning "absurd realities" of providing a defense to significant bodily injury in some situations. Woods v. U.S., 65 A.3d 667, 672 (D.C. 2013)("such as a loan shark lending money on the condition that non-payment authorizes a beating or gang members who agree to settle old scores by a shootout").

[329] For example, a doctor might be held liable for failing to administer a life saving treatment to a competent elderly person under their care, even though that person explicitly stated their decision to forego medical treatment.

[330] D.C. Crim. Jur. Instr. § 9-320 ("If [name of complainant] voluntarily consented to [the act] [insert description of the act], or [name of defendant] reasonably believed [name of complainant] was consenting, the crime of [insert offense] has not been committed.").

[331] D.C. Crim. Jur. Instr. § 9-320 ("The government must prove beyond a reasonable doubt that [name of complainant] did not voluntarily consent to the acts [or that [name of defendant] did not reasonably believe [name of complainant] was consenting].").

[332] D.C. Code § 22-934.

[333] Depending on the situation, an individual's duty of care to a vulnerable adult or elderly person may extend to areas such as preventing a third party from harming the vulnerable adult or elderly person. It is unclear whether such a duty of "supervision" would constitute "care or services" under the current statute.

provide "care and services" to the vulnerable adult or elderly person. The clarity and consistency of the revised neglect of a vulnerable adult or elderly person statute improves by codifying a broader "duty of care" requirement and defining a "duty of care."

Second, the revised neglect of a vulnerable adult or elderly person statute requires that the defendant "knows" that he or she has a duty of care. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states apply to the fact that the defendant has a duty to provide such care and services. There is no DCCA case law on point, but the DCCA has generally found that "wanton, reckless, or willful indifference" requires something similar to recklessness.[334] The revised statute requires that the defendant "know" that he or she has a "duty of care," defined in RCC § 22A-1001 as a "legal responsibility for the health, welfare, or supervision for another person." However, while the defendant must know he or she has a duty of care, there is no mental state requirement for the fact that the defendant violated it.[335] Individuals that do not satisfy the duty of care requirement may still have liability under the general reckless endangerment statute in RCC § 22A-XXXX, which prohibits creating a substantial and unjustifiable risk of "serious bodily injury or death" to any person. Requiring a knowing culpable mental state for the duty of care element clarifies the law and ensures that the penalties are proportionate as compared to the general reckless endangerment statute in RCC § 22A-XXXX.

Third, the revised neglect of a vulnerable adult or elderly person statute requires a culpable mental state of recklessness or knowledge as to the fact that the other person is a vulnerable adult or elderly person. The current neglect of a vulnerable adult or elderly person statute is silent as to what culpable mental state, if any, applies to the fact that the complaining witness is a vulnerable adult or elderly person.[336] There is no DCCA case law discussing the matter. However, the current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to a vulnerable adult or elderly person, which may imply awareness of the complainant's status which is the basis of the "duty." In the revised offense, a "reckless" culpable mental state is required in subsections (a)(1), (b)(1), and (c)(1) as to the complainant's status as an elderly or a vulnerable adult. However, in practice, the more stringent culpable mental state requirement of "knows," which applies to the complainant's status as an elderly person or a vulnerable adult in subsections (a)(2), (b)(2), and (c)(2) of the revised offense, must be proven.[337] Applying a reckless or knowledge culpable mental state requirement matches the culpable mental state required as to the fact that the complaining witness is a child in the revised child abuse and child neglect statutes (RCC § 22A-1501 and § 22A-1502) and the "protected person" gradations in the revised assault statute (RCC § 22A-1202). A "reckless" or knowledge

[334] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[335] The phrase "in fact" in subsections (a)(3) and (b)(3) codifies that the violation of the duty of care is a matter of strict liability.

[336] The current neglect of a vulnerable adult or elderly person statute requires, in part, that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person.

[337] See above Commentary regarding the change in law to require the accused to know that she or he has a duty of care to the child.

culpable mental state is also consistent with the culpable mental state requirements in the current enhancement for certain crimes committed against senior citizens.[338] The consistency and proportionality of the revised offense improves if a culpable mental state of recklessness or knowledge applies to the fact that the other person is a vulnerable adult or elderly person.

Fourth, the revised neglect of a vulnerable adult or elderly person statute requires a "substantial and unjustifiable risk" of the specified physical or mental harm. The current neglect of a vulnerable adult or elderly person statute requires a failure to discharge a duty to provide necessary care and services to a vulnerable adult or elderly person.[339] The penalties for the offense partially grade on a failure to discharge the required duty.[340] In such a situation, it appears that an actual risk of harm may not be necessary,[341] although failure to mitigate a risk has been the basis in at least one case.[342] The revised neglect of a vulnerable adult or elderly person statute clarifies that the required risk must be "substantial and unjustifiable." The "substantial and unjustifiable" language is technically superfluous where recklessness is alleged because the "reckless" culpable mental state, as defined in RCC § 22A-206, also requires that a risk be "substantial" and "grossly deviate from the standard of care that a reasonable person would observe in the person's situation."[343] However, given that neglect offenses will often depend on the nature of the risk to the vulnerable adult or elderly person, the revised statute specifies the "substantial and unjustifiable" requirement to clarify the statute, particularly where the defendant is alleged to act knowingly, intentionally, or purposely.[344] The clarity and

[338] The current enhancement for crimes against senior citizens makes it an affirmative defense that "the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed." D.C. Code § 223601(c). "Reckless" is defined in RCC § 22A-206 and means that the accused must disregard a substantial and unjustifiable risk that the complainant was 65 years of age or older. In the RCC, an accused that knew or reasonably believed that the complainant was not 65 years or older or could not have known or determined the age of the complainant would not satisfy the culpable mental states of recklessness or knowledge as to the age of the complaining witness. The accused would not consciously disregard a substantial and unjustifiable risk (recklessness) or be practically certain (knowledge) that the complainant was 65 years of age or older.
Criminal neglect of a vulnerable adult or elderly person is not one of the crimes to which the current senior citizens enhancement applies.

[339] D.C. Code § 22-934.

[340] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days."). The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[341] For example, a caretaker who knowingly fails to discharge their duty to provide necessary medicine to a vulnerable person may be liable under the current statute even though the vulnerable person was not actually at risk of an adverse consequence due to the intervention of a third party.

[342] *Jackson v. United States*, 996 A.2d 796, 797, 798 (D.C. 2010) (finding the evidence sufficient for criminal neglect of a vulnerable adult because "a reasonable factfinder could conclude that, under the statute, appellant failed to take steps that a 'reasonable person would deem essential for the well-being of the complainant' when appellant was involved in an altercation with the vulnerable adult, which left visible and significant injuries, and appellant did not inform his supervisor or file an incident report as required by his job duties).

[343] See RCC § 22A-206(d) and corresponding Commentary.

[344] For example, where a caregiver gives an elderly person with cancer an experimental and dangerous drug prescribed by the elderly person's oncologist, the fact that the caregiver *knows* (i.e., is practically certain) that doing so will create a risk of serious bodily injury or death to the elderly person does not, by itself, establish first degree neglect of a vulnerable adult or elderly person. Rather, it would also have to be proven by the government, as an affirmative element of the offense, that this risk was both *substantial* and *unjustifiable* under the circumstances.

consistency of the revised neglect of a vulnerable adult or elderly person statute improves if the required amount of risk is specified.

Fifth, the revised neglect of a vulnerable adult or elderly person statute uses standard definitions for the terms "serious bodily injury" and "significant bodily injury" in RCC § 22A-1001. The District's current neglect of a vulnerable adult or elderly person statute is graded, in part, on whether "serious bodily injury," "permanent bodily harm," or a lesser, unspecified, physical harm results.[345] The current statute, however, does not define these terms. The DCCA has interpreted "physical pain or injury" in the current abuse of a vulnerable adult or elderly person statute to include a contusion and an abrasion in a case where the complainant testified that he was "hurt,"[346] but did not provide a general definition. There is no DCCA case law interpreting these terms for the current neglect of a vulnerable adult or elderly person statute. The revised neglect of a vulnerable adult or elderly person statute codifies and uses standard definitions of "serious bodily injury" and "significant bodily injury" per RCC § 22A-1001. The revised definition of "serious bodily injury" is modified from the definition that the DCCA applies to the current aggravated assault statute.[347] The revised definition of "serious bodily injury" would encompass "permanent bodily harm" in the current neglect of a vulnerable adult or elderly person statute, but it is unclear whether the revised definition otherwise changes "serious bodily injury" in the current statute. Defining "serious bodily injury" and "significant bodily injury" improves the clarity, consistency, and proportionality of the revised neglect of a vulnerable adult or elderly person statute.

Sixth, the revised neglect of a vulnerable adult or elderly person statute defines "serious mental injury" in RCC § 22A-1001. The current neglect of a vulnerable adult or elderly person statute grades, in part, based on whether "severe mental distress" resulted,[348] but the statute does not define the term. There is no DCCA case law interpreting "serious mental distress." RCC § 22A-1001 defines "serious mental injury" as "substantial, prolonged harm to a person's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression,

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[345] If "serious bodily injury or severe mental distress" results, the current abuse of a vulnerable adult offense has a maximum term of imprisonment of 10 years. D.C. Code § 22-936(b). If "permanent bodily harm or death" results, the current offense has a maximum term of imprisonment of 20 years. D.C. Code § 22-936(c). If the offense results in a lesser harm than "serious bodily injury," "severe mental distress," "permanent bodily harm," or death the current offense is a misdemeanor with a maximum term of imprisonment of 180 days. D.C. Code § 22-936(a).

[346] *Poole v. United States*, 929 A.2d 413, 415 (D.C. 2007) (finding sufficient evidence of "physical pain or injury" when appellant "put his knee into [the complaining witness's back] in an attempt to restrain [the complaining witness]" and threatened appellant, and appellant suffered a contusion and abrasion and testified that he was "hurt.").

[347] "The current aggravated assault statute prohibits causing "serious bodily injury," but does not define the term. D.C. Code § 22-404.01. The DCCA has applied the definition of "serious bodily injury" that is codified in the District's current sexual abuse statutes to the aggravated assault statute. *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999) ("Since the definition of "serious bodily injury" which appears in . . . the District's sexual abuse statute . . . is consistent with that followed in the majority of jurisdictions, we adopt it for the purpose of determining whether the government met its burden to prove 'serious bodily injury' under the aggravated assault statute."). The definition is "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty." D.C. Code § 22-3001(7).

[348] D.C. Code § 22-936(b) (making it a felony with a maximum term of imprisonment of 10 years if "serious bodily injury or severe mental distress" results). In the revised neglect of a vulnerable adult or elderly person statute, risk of mental harm that does not satisfy the definition of "serious mental injury" may be covered by attempted criminal neglect of a vulnerable adult or elderly person, or as third degree abuse of a vulnerable adult or elderly person in RCC § 22A-1503.

withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition." The RCC definition of "serious mental injury" modifies the definition of "mental injury" in the District's current juvenile law statutes[349] by adding the requirement that the harm be "substantial" and "prolonged." The requirements of "substantial" and "prolonged" reflect DCCA case law supporting a high standard for psychological harm for child abuse,[350] and the revised child abuse and child neglect statutes use the term "serious mental injury." Using the same term in the revised neglect of a vulnerable adult or elderly person statute clarifies the law and improves the consistency of the revised offenses.

Seventh, the revised neglect of a vulnerable adult or elderly person statute codifies a "reckless" culpable mental state, defined in RCC § 22A-206, with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items. The current neglect of a vulnerable adult or elderly person statute prohibits failing to discharge a duty to provide necessary care and services "willfully or through wanton, reckless or willful indifference,"[351] but does not define any of these terms. The DCCA in *Tarpeh v. United States* discussed the meaning of "reckless" under the statute and said that it is a "state of mind that falls somewhere between simple negligence . . . and an intentional or willful decision to cause harm to a person."[352] The court stated that to prove "reckless indifference" in the neglect of a vulnerable adult or elderly person statute, "the evidence, as found by the trier of fact, must show not only that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of risks involved in light of known alternative courses of action."[353] In *Tarpeh*, the DCCA explicitly referred to the Model Penal Code definition of "reckless," which requires the defendant to "consciously disregard[] a substantial and *unjustified* risk that the material element exists or will result from his conduct."[354] The RCC defines "reckless" in RCC § 22A-206, similar to the Model Penal Code.[355] Codifying a culpable mental state of recklessness with respect to creating or failing to mitigate or remedy a risk, or to provide essential care or items does not change current District law. Codifying a culpable mental state of "recklessly" improves the clarity of the revised statute.

Eighth, the revised neglect of a vulnerable adult or elderly person statute requires a "recklessly" culpable mental state as to the risk of physical or mental injury. The current neglect of a vulnerable adult or elderly person statute requires proof that the defendant "willfully or through a wanton, reckless, or willful indifference fails to discharge a duty" to provide necessary care and services to a vulnerable adult or elderly person. However, the statute is unclear as to whether any of these culpable mental states applies to the fact that, per the penalty gradations, the neglect causes "serious bodily injury or severe mental distress"[356] or "permanent bodily harm

[349] D.C. Code Ann. § 16-2301(31) ("The term 'mental injury' means harm to a child's psychological or intellectual functioning, which may be exhibited by severe anxiety, depression, withdrawal, or outwardly aggressive behavior, or a combination of those behaviors, and which may be demonstrated by a change in behavior, emotional response, or cognition.").
[350] *Alfaro v. United States*, 859 A.2d 149 (D.C. 2004); *Speaks v. United States*, 959 A.2d 712 (D.C. 2008).
[351] D.C. Code § 22-934.
[352] *Tarpeh*, 62 A.2d at 1270.
[353] *Tarpeh*, 62 A.2d at 1270.
[354] *Tarpeh*, 62 A.2d at 1270 (emphasis in original).
[355] See Commentary to RCC § 22A-206.
[356] D.C. Code § 22-936(b).

or death."[357] DCCA case law has not specifically addressed whether a culpable mental state applies to the penalty gradations, but has found that "reckless indifference" with respect to the failure to provide care and services in the current offense requires something similar to recklessness.[358] As was discussed earlier in this Commentary as a substantive change to current District law, the revised neglect of a vulnerable adult or elderly person statute is limited to conduct that results in a risk of harm or failure to provide necessary items or care to a vulnerable adult or elderly person. The revised statute clarifies that a culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm—"recklessly" (subsections (a)(1)), (b)(1)(A), and (b)(2)(A)). Codifying that a culpable mental state of "recklessly" applies to the resulting risk of physical or mental harm improves the clarity and proportionality of the revised statute.

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

The revised neglect of a vulnerable adult or elderly person statute specifies that "fail[ing] to mitigate" or "fail[ing] to remedy" a substantial and unjustifiable risk is sufficient for liability. The current neglect of a vulnerable adult or elderly person statute criminalizes conduct that "fails to discharge a duty" to provide necessary care and services.[359] The revised statute clarifies that not only creating risks to a vulnerable adult or elderly person, but also failing to mitigate or remedy a substantial and unjustifiable risk, is sufficient for liability. Under the general provision in RCC § 22A-202, omissions are equivalent to affirmative conduct and sufficient for liability for any offense in the RCC where the defendant had a duty of care to the complainant.[360] However, although technically superfluous, given that neglect of a vulnerable adult or elderly person offenses usually will involve an omission, the revised statute explicitly codifies "fail[ing] to remedy" or "fail[ing] to remedy" as a basis for liability. The change clarifies the revised statute.

Relation to National Legal Trends. *The revised neglect of a vulnerable adult or elderly person offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*

First, criminal codes in reformed jurisdictions generally support limiting neglect of a vulnerable adult or elderly person to conduct that does not actually harm a vulnerable adult or elderly person, as opposed to the current neglect statute, which partially grades on actual

[357] D.C. Code § 22-936(c).

[358] In *Tarpeh v. United States*, the DCCA held that "reckless indifference" requires not only "that the actor did not care about the consequences of his or her actions, but also that the actor was consciously aware of the risks involved in light of known alternative courses of action." *Tarpeh v. United States*, 62 A.3d 1266, 1271 (D.C. 2013).

[359] D.C. Code § 22-934.

[360] This principle is reflected in the current version of the draft general provision on omission liability. See RCC § 202(c) ("'Omission' means a failure to act when (i) a person is under a legal duty to act and (ii) the person is either aware that the legal duty to act exists or, if the person lacks such awareness, the person is culpably unaware that the legal duty to act exists. For purposes of this Title, a legal duty to act exists when: (1) The failure to act is expressly made sufficient by the law defining the offense; or (2) A duty to perform the omitted act is otherwise imposed by law."). [Forthcoming revisions to the general part will make this general principle of omission liability even more explicit.]

harm,[361] and partially on a failure to discharge the required duty.[362] Fourteen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[363] (reformed jurisdictions) have offenses for endangering a vulnerable adult or elderly person.[364] Ten of these states criminalize endangerment separately from abusing a vulnerable adult or elderly person, or criminalize endangerment but don't have a specific abuse offense.[365] Nineteen of the 29 reformed jurisdictions have provisions or offenses for failing to provide for a vulnerable adult or elderly person[366] like third degree in the revised neglect of a vulnerable adult or elderly person statute. In eight of these reformed jurisdictions, failing to provide is criminalized separately from abuse offenses[367] and in two of these jurisdictions it is graded differently than abuse.[368]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . .

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[361] The higher gradations of the current statute require either "serious bodily injury or severe mental distress," with a maximum term of imprisonment of ten years, D.C. Code §§ 22-934, 22-936(b), or "permanent bodily harm or death," with a maximum term of imprisonment of 20 years, D.C. Code §§ 22-934, 22-936(c).

[362] D.C. Code §§ 22-934, 22-936(a) (stating that "[a] person who commits the offense of . . . criminal neglect of a vulnerable adult or elderly person shall" receive a maximum term of imprisonment of 180 days.").

[363] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming–do not have general parts analogous to the Model Penal Code General Part). In addition, Tennessee reformed its criminal code after the publication of this article. For the purposes of the assault commentary, Washington was excluded because "assault" is not statutorily defined.

[364] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering of a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any.
Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[365] Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; Ind. Code Ann. § 35-46-1-4(a)(1); Me. Rev. Stat. tit. 17-A, § 555; N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07.

[366] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[367] Alaska Stat. Ann. § 11.51.210; Colo. Rev. Stat. Ann. § 18-6.5-103(f); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; 18 Pa Stat. Ann. § 2713; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[368] Ark. Code Ann. §§ 5-28-101, 5-28-103; Kan. Stat. Ann. § 21-5417(a)(3).

. dependent."[369] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

Second, criminal codes in reformed jurisdictions provide mixed support for requiring a reckless culpable mental state as to whether neglected items or care are essential for the well-being of the vulnerable adult or elderly person. Due to the varying rules of construction in the 29 reformed jurisdictions, it is difficult to determine the culpable mental state, if any, for the element that the items or care are essential to the well-being of the vulnerable adult or elderly person. However, of the 19 reformed jurisdictions with failure to provide offenses or provisions,[370] only three[371] jurisdictions clearly codify a reasonable person or negligence standard for this element. One reformed jurisdiction requires knowledge for this element[372] and another jurisdiction requires "knows or reasonably should know."[373]

Three of the remaining jurisdictions do not codify a culpable mental state for this element or for any element in the offense,[374] but it is possible that case law or rules of statutory construction would provide a culpable mental state. The other 11 jurisdictions codify a culpable mental state in the statute,[375] but it is unclear whether or how the culpable mental state applies to the element that the items or care are essential to the well-being of the vulnerable adult or elderly

[369] MPC § 230.5.

[370] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[371] Ark. Code Ann. §§ 5-28-101(11)(B), 5-28-103(c)(1), (c)(2) (prohibiting "neglect[ing]" an adult endangered person or an adult impaired person" and defining "neglect," in part, as "[a] purposeful act or omission by a caregiver responsible for the care and supervision of an adult endangered person or an adult impaired person that constitutes negligently failing to provide necessary treatment, rehabilitation, care, food, clothing, shelter, supervision, or medical services to an adult endangered person or an adult impaired person."); Colo. Rev. Stat. Ann. §§ 18-6.5-102(6)(a), 18-6.5-103(6) (prohibiting "caretaker neglect" and defining "caretaker neglect," in part, as "neglect that occurs when adequate food, clothing, shelter, psychological care, physical care, medical care, habilitation, supervision, or any other treatment necessary for the health or safety of an at-risk person is not secured for an at-risk person or is not provided by a caretaker in a timely manner and with the degree of care that a reasonable person in the same situation would exercise."); Utah Code Ann. § 76-5-111(n), (3) (prohibiting "neglect" and defining "neglect," in part, as "failure of a caretaker to provide care to a vulnerable adult in a timely manner and with the degree of care that a reasonable person in a like position would exercise.").

[372] N.D. Cent. Code Ann. § 12.1-37-07(2) ("caregiver who fails to perform acts that the caregiver knows are necessary to maintain or preserve the life or health of the eligible adult.");

[373] 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1)(B).

[374] Alaska Stat. Ann. § 11.51.210(a); N.J. Stat. Ann. § 2C:24-8(a); S.D. Codified Laws §§ 22-46-1, 22-46-2.

[375] Ala. Code §§ 38-9-2, 38-9-7; Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

person. Most of these 11 jurisdictions are limited to the culpable mental states of "intentionally" or "knowingly,"[376] but four include "recklessly"[377] and two include criminal negligence.[378]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . . . dependent."[379] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC.

Third, criminal codes in reformed jurisdictions codify a defense to either endangering or failing to provide for a vulnerable adult or elderly person that extends beyond spiritual healing. One[380] of the 14 reformed jurisdictions with an endangering a vulnerable adult or elderly person statute[381] codifies a defense that extends to a patient refusing care. Three[382] of the 19 reformed

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[376] Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3) (defining "support" without a culpable mental state, but requiring "knowingly or intentionally deprives the dependent of necessary support."); Kan. Stat. Ann. § 21-5417(a)(3) ("knowingly committing . . . omission or deprivation of treatment, goods or services that are necessary to maintain physical or mental health of such dependent adult."); Minn. Stat. Ann. §§ 609.233(1), (2) (defining "neglect" without a culpable mental state, but requiring "intentionally neglects" in the gross misdemeanor gradation and requiring "intentionally deprives a vulnerable adult of necessary food, clothing, shelter, health care, or supervision" in the felony gradation); Mo. Ann. Stat. § 565.184(2) ("intentionally fails to provide care, goods or services to an elderly person, a person with a disability, or a vulnerable person."); Tenn. Code Ann. §§ 71-6-102, 71-6-117(a), 71-6-119(a) (defining "neglect" without a culpable mental state, but requiring "knowingly" in the offense);

[377] Ala. Code §§ 38-9-2(12), 38-9-7(b), (c), (d), (e) (codifying a definition of "neglect" with culpable mental state, but grading the neglect offense, in part, based on whether the culpable mental state is "intentionally" or "recklessly."); Ohio Rev. Code Ann § 2903.16(A), (B) (two gradations of the offense, one requiring "knowingly" and one requiring "recklessly" for "fail to provide . . . with any treatment, care, goods, or services that is necessary to maintain the health or safety."); 18 Pa Stat. Ann. § 2713(a)(1) "intentionally, knowingly, or recklessly causes bodily injury or serious bodily injury by failing to provide treatment, care, goods or services necessary to preserve the health, safety or welfare."); Wis. Stat. Ann. § 940.285(1)(ag)(6), (2)(a), (b) (defining "abuse" without a culpable mental state, but grading the offense, in part, based on whether the culpable mental state was intentionally, recklessly, or negligently).

[378] Or. Rev. Stat. Ann. §§ 163.205(1)(a), 163.200(1)(a) (two gradations of the offense, one requiring "intentionally or knowingly" and one requiring "with criminal negligence" for "with[holding] necessary and adequate food, physical care or medical attention."); Wash. Rev. Code Ann. §§ 9A.42.010(1), 9A.42.020(1), 9A.42.030(1), 9A.42.035(1), 9A.42.037(1)(a), (1)(b) (defining "basic necessities of life" without a culpable mental state, but requiring "with criminal negligence" for causing specified harms or risk of harm "by withholding any of the basic necessities of life.").

[379] MPC § 230.5.

[380] Ariz. Rev. Stat. Ann. § 13-3623(E)(1) ("This section does not apply to [a] health care provider as defined in § 36-3201 who permits a patient to die or the patient's condition to deteriorate by not providing health care if that patient refuses that care directly or indirectly through a health care directive as defined in § 36-3201, through a surrogate pursuant to § 36-3231 or through a court appointed guardian as provided for in title 14, chapter 5, article 3.").

[381] Reformed jurisdictions may have endangering a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the endangering a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, endangering a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ariz. Rev. Stat. Ann. § 13-3623; Ark. Code Ann. §§ 5-27-201, 5-27-202, 5-27-203; Colo. Rev. Stat. Ann. § 18-6.5-103(6); Haw. Rev. Stat. Ann. § 709-905; 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-4; Ky. Rev. Stat. Ann. §§ 508.100, 508.110, 508.120; Me. Rev. Stat. tit. 17-A, § 555; Mo. Ann. Stat. § 565.184(1)(2); N.H. Rev. Stat. Ann. § 639:3; N.Y. Penal Law §§ 260.24, 260.25; N.D. Cent. Code Ann. § 12.1-31-07; Utah Code Ann. § 76-5-111; Wis. Stat. Ann. § 940.285.

[382] Minn. Stat. Ann. § 609.233(2) ("A vulnerable adult is not neglected or deprived under subdivision 1 or 1a for the sole reason that: (1) the vulnerable adult or a person with authority to make health care decisions for the vulnerable

jurisdictions with failure to provide offenses[383] have defenses for a vulnerable adult refusing care. An additional reformed jurisdiction has an "informed consent" defense to the prong of "abuse" that prohibits "deprivation of life-saving treatment."[384]

The MPC does not have a general offense for neglecting a vulnerable adult or elderly person. However, it does have a persistent nonsupport offense for "persistently fail[ing] to provide support which he can provide and which he knows he is legally obliged to provide to a . .

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adult under sections 144.651, 144A.44, 253B.03, or 524.5-101 to 524.5-502, or chapter 145B, 145C, or 252A, refuses consent or withdraws consent, consistent with that authority and within the boundary of reasonable medical practice, to any therapeutic conduct, including any care, service, or procedure to diagnose, maintain, or treat the physical or mental condition of the vulnerable adult or, where permitted under law, to provide nutrition and hydration parenterally or through intubation; this paragraph does not enlarge or diminish rights otherwise held under law by: (i) a vulnerable adult or a person acting on behalf of a vulnerable adult, including an involved family member, to consent to or refuse consent for therapeutic conduct; or (ii) a caregiver to offer or provide or refuse to offer or provide therapeutic conduct."); Or. Rev. Stat. Ann. § 163.206(3) (exempting "(1) . . . a person acting pursuant to a court order, an advance directive or a power of attorney for health care pursuant to ORS 127.505 to 127.660 or a POLST, as defined in ORS 127.663; (2) . . . a person withholding or withdrawing life-sustaining procedures or artificially administered nutrition and hydration pursuant to ORS 127.505 to 127.660; (3) When a competent person refuses food, physical care or medical care."); 18 Pa. Stat. and Cons. Stat. Ann. § 2713**(e) (**"A caretaker or any other individual or facility may offer an affirmative defense to charges filed pursuant to this section if the caretaker, individual or facility can demonstrate through a preponderance of the evidence that the alleged violations result directly from: (1) the caretaker's, individual's or facility's lawful compliance with a care-dependent person's living will as provided in 20 Pa.C.S. Ch. 54 (relating to health care); (2) the caretaker's, individual's or facility's lawful compliance with the care-dependent person's written, signed and witnessed instructions, executed when the care-dependent person is competent as to the treatment he wishes to receive; (3) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's: (i) agent acting pursuant to a lawful durable power of attorney under 20 Pa.C.S. Ch. 56 (relating to powers of attorney), within the scope of that power; or (ii) health care agent acting pursuant to a health care power of attorney under 20 Pa.C.S. Ch. 54 Subch. C (relating to health care agents and representatives), within the scope of that power; (4) the caretaker's, individual's or facility's lawful compliance with a "Do Not Resuscitate" order written and signed by the care-dependent person's attending physician; or (5) the caretaker's, individual's or facility's lawful compliance with the direction of the care-dependent person's health care representative under 20 Pa.C.S. § 5461 (relating to decisions by health care representative), provided the care-dependent person has an end-stage medical condition or is permanently unconscious as these terms are defined in 20 Pa.C.S. § 5422 (relating to definitions) as determined and documented in the person's medical record by the person's attending physician."); S.D. Codified Laws § 22-46-1.1 ("For the purposes of this chapter, the term, neglect, does not include a decision that is made to not seek medical care for an elder or disabled adult upon the expressed desire of the elder or disabled adult; a decision to not seek medical care for an elder or disabled adult based upon a previously executed declaration, do-not-resuscitate order, or a power of attorney for health care; a decision to not seek medical care for an elder or disabled adult if otherwise authorized by law; or the failure to provide goods and services outside the means available for the elder or disabled adult.");

[383] Reformed jurisdictions may have failure to support a vulnerable adult or elderly person offenses in both their criminal codes and civil statutes. This survey uses the failure to support a vulnerable adult or elderly person laws found in the jurisdictions' criminal codes, unless there were no such statutes in the criminal codes. In that case, the failure to support a vulnerable adult or elderly person offenses were taken from the civil statutes, if there were any. Ala. Code §§ 38-9-2, 38-9-7; Alaska Stat. Ann. § 11.51.210; Ark. Code Ann. §§ 5-28-101, 5-28-103; Colo. Rev. Stat. Ann. § 18-6.5-103(f); 720 Ill. Comp. Stat. Ann. 5/12-4.4a(b)(1), (d)(2); Ind. Code Ann. §§ 35-46-1-1, 35-46-1-1, 35-46-1-4(a)(3); Kan. Stat. Ann. § 21-5417(a)(3); Minn. Stat. Ann. §§ 609.233; Mo. Ann. Stat. § 565.184(2); N.J. Stat. Ann. § 2C:24-8; N.D. Cent. Code Ann. § 12.1-31-07; Ohio Rev. Code Ann § 2903.16; Or. Rev. Stat. Ann. §§ 163.205, 163.200; 18 Pa Stat. Ann. § 2713; S.D. Codified Laws §§ 22-46-1, 22-46-2; Tenn. Code Ann. §§ 71-6-102, 71-6-117, 71-6-119; Utah. Code Ann. §§ 76-5-111; Wash. Rev. Code Ann. §§ 9A.42.010, 9A.42.020, 9A.42.030, 9A.42.035, 9A.42.037; Wis. Stat. Ann. § 940.285.

[384] Utah Code Ann. § 76-5-111(b)(iv)(B) (including in the definition of "abuse" "deprivation of life-sustaining treatment, except "when informed consent, as defined in this section, has been obtained.").

. dependent."[385] "Dependent" is not defined, but may extend to individuals that are vulnerable adults or elderly persons as defined in the RCC. The MPC also has a general consent defense that provides the "consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."[386] The MPC has additional requirements for the consent defense when the conduct "causes or threatens bodily injury."[387]

[385] MPC § 230.5.
[386] MPC § 2.11.
[387] MPC § 2.11(2) ("When conduct is charged to constitute an offense because it causes or threatens bodily injury, consent to such conduct or to the infliction of such injury is a defense if: (a) the bodily injury consented to or threatened by the conduct consented to is not serious; or (b) the conduct and the injury are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport or other concerted activity not forbidden by law; or (c) the consent establishes a justification for the conduct under Article 3 of the Code.").