First Draft of Report #26
Sexual Assault and Related Provisions

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
441 FOURTH STREET, NW, SUITE 1C001 SOUTH
WASHINGTON, DC 20001
PHONE: (202) 442-8715
www.ccrc.dc.gov

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. 26, *Sexual Assault and Related Provisions* is December 19, 2018 (twelve weeks from the date of issue). Oral comments and written comments received after December 19, 2018 may not be reflected in the Second Draft of Report # 26. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC Chapter 13. Sexual Assault and Related Provisions.

RCC § 22A-1301. SEXUAL OFFENSE DEFINITIONS.

For the purposes of this chapter, the term:

(1) "Actor" means a person accused of any offense proscribed under this chapter.

Explanatory Note. RCC Chapter 13 defines "actor" to refer to the accused. This avoids confusion that may arise from references to both the accused and the complainant simply as a "person."

"Actor" is currently defined in D.C. Code § 22-3001(1) for the sex offense statutes,[1] although the current sex offense statutes do not use the term consistently.[2] The RCC definition of "actor" replaces the current definition of "actor" in D.C. Code § 22-3001(1)[3] and is used consistently throughout the revised sex offenses to refer to the accused.

Relation to Current District Law. The RCC definition of "actor" is identical to the definition[4] provided in the current sex offense statutes and does not substantively change current District law.

(2) "Bodily injury" means significant physical pain, illness, or any impairment of physical condition.

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[1] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[2] Only three of the current sex offense statutes use the term "actor." First degree and second degree sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016) and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "actor," the other current sex offense statutes use terms like "a person," "the defendant," or by the specific position that the defendant has, e.g., "teacher."

[3] D.C. Code § 22-3001(1) ("'Actor' means a person accused of any offense proscribed under this chapter.").

[4] D.C. Code § 22-3001(1).

Explanatory Note. RCC Chapter 13 defines "bodily injury" to include physical harms that cause significant pain, as well as illnesses and impairments of physical condition that do not cause pain. "Illness" includes any viral, bacterial, or other physical sickness or physical disease.[5] "Any" impairment of physical condition is intended to be construed broadly and includes cuts, scratches, bruises, and abrasions.[6] The definition does not require a minimum threshold of impairment. Subject to causation requirements, the definition of "bodily injury" may include indirect causes of pain, illness, or impairment, such as exposing another individual to inclement weather or administration of a drug or narcotic that has a negative effect.

"Bodily injury" is currently defined in D.C. Code § 22-3001(2) for the sex offense statutes[7] and is used in the current sex offense definition of "serious bodily injury,"[8] as well as first degree,[9] second degree,[10] third degree,[11] and fourth degree sexual abuse.[12] The RCC definition of "bodily injury" replaces the current definition of "bodily injury" in D.C. Code § 22-3001(2).[13] The RCC definition is used in the definition of "serious bodily injury"[14] and first degree and third degree of the revised sexual assault statute.[15]

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[5] For example, "bodily injury" would include sexually transmitted diseases.

[6] *Compare State v. Jarvis*, 665 N.W.2d 518, 521-22 (Minn. 2003) (concluding that "any impairment of physical condition" in the definition of "bodily harm" means "any injury that weakens or damages an individual's physical condition" and finding the evidence sufficient for bodily harm when the complaining witness involuntarily ingested drugs), *and Hanic v. State*, 406 N.E.2d 335, 337-38 (Ind. Ct. App. 1980) (finding that red marks and bruises on a woman's arms and "minor scratches" on her breast area were sufficient evidence for "bodily injury."), *with Harris v. State*, 965 A.2d 691, 694 (Del. 2009) (holding that a red mark on complainant's skin from being elbowed to the forehead and scratches on the complainant's knee did not constitute impairment of physical condition as required by the definition of "physical injury" because they "did not reduce the [complainant's] ability to use the affected parts of his body."), *and State v. Higgins*, 165 Or.App. 442 (2000) (holding that "scratches and scrapes that go unnoticed by the victim, that are not accompanied by pain and that do not result in the reduction of one's ability to use the body or a bodily organ for any period of time, do not constitute an impairment of physical condition" as required by the definition of "physical injury.").

[7] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[8] D.C. Code § 22-3001(7).

[9] D.C. Code § 22-3002(a)(2).

[10] D.C. Code § 22-3003(1).

[11] D.C. Code § 22-3004 (2).

[12] D.C. Code § 22-3005(1).

[13] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[14] RCC § 22A-1301.

[15] RCC § 22A-1303.

Relation to Current District law. The revised definition of "bodily injury" makes one main substantive change to the current definition of "bodily injury."[16] The revised definition of "bodily injury" no longer includes impairment of a "mental faculty." It is unclear whether "mental *faculty*" (emphasis added) in the current definition refers to the physical condition of the brain or more generally to psychological distress. There is no DCCA case law interpreting the current definition of "bodily injury." To the extent that "mental faculty" refers to the brain, "mental faculty" is redundant with "organ" in the current and revised definitions of "bodily injury." To the extent that "mental faculty" refers generally to emotional or psychological distress, it may be hard to qualify. Deleting "mental faculty" from the revised definition of "bodily injury" improves the clarity and the consistency of the revised definition.

In addition, the revised definition of "bodily injury" makes one possible substantive change to the current definition.[17] The revised definition of "bodily injury" no longer requires the "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of severity is required to constitute "loss or impairment" or "physical disfigurement." The revised definition of "bodily injury" requires "any impairment of physical condition," which may be a lower standard. The revised definition of "bodily injury" is discussed further in the commentary to the revised sexual assault offenses in RCC § 22A-1303.

Finally, the revised definition of "bodily injury" makes two clarificatory changes that do not change current District law. First, the revised definition of "bodily injury" no longer refers to "injury" because the language is surplusage. Second, "disease" and "sickness" in the current definition are replaced with "illness."

National Legal Trends. The substantive revision to the current definition of "bodily injury," deleting impairment of a "mental faculty," is well-supported by the criminal codes of the reformed jurisdictions. At least 25 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[18] ("reformed jurisdictions") statutorily define "bodily injury" or a similar term.[19] Only four[20] of

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[16] D.C. Code § 22-3001(2).

[17] D.C. Code § 22-3001(2).

[18] *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.

[19] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily

these 25 reformed jurisdictions specifically include psychological distress or injury in the statutory definition of "bodily injury" or similar terms.

In addition, the possible substantive change of deleting "loss or impairment of the function of a bodily member [or] organ" and "physical disfigurement" from the current definition of "bodily injury" is well-supported by the criminal codes of reformed jurisdictions. None of the 25 reformed jurisdictions that statutorily define "bodily injury" or a similar term[21]

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injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[20] Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[21] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or

includes "loss or impairment of the function of a bodily member [or] organ," "physical disfigurement," or similar language that suggests a comparatively high threshold of physical harm. Like the RCC definition of "bodily injury," the 25 reformed jurisdictions generally require "impairment of physical condition."[22]

(3) "Coercion" means threatening that any person will do any one of, or a combination of, the following:

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duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); *Utah* Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

[22] Ala. Code § 13A-1-2(12) (defining "physical injury" as "[i]mpairment of physical condition or substantial pain."); Alaska Stat. Ann. § 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ariz. Rev. Stat. Ann. § 13-105(33) (defining "physical injury" as "the impairment of physical condition."); Ark. Code Ann. § 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Colo. Rev. Stat. Ann. § 18-1-901(3)(c) (defining "bodily injury" as "physical pain, illness, or any impairment of physical or mental condition."); Conn. Gen. Stat. Ann. § 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Del. Code Ann. tit. 11, § 222(23) (defining "physical injury" as "impairment of physical condition or substantial pain."); Haw. Rev. Stat. Ann. § 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Ind. Code Ann. § 35-31.5-2-29 (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ky. Rev. Stat. Ann. § 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Me. Rev. Stat. tit. 17-A, § 2(5) (defining "bodily injury" as physical pain, physical illness or any impairment of physical condition."); Mo. Ann. Stat. § 556.061(36) (defining "physical injury" as slight impairment of any function of the body or temporary loss of use of any part of the body."); Mont. Code Ann. § 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. § 609.02(7) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition."); N.J. Stat. Ann. § 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law § 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); N.D. Cent. Code Ann. § 12.1-01-04(4) (defining "bodily injury" as "any impairment of physical condition, including physical pain."); Ohio Rev. Code Ann. § 2901.01(A)(3) (defining "physical harm to persons" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."); Or. Rev. Stat. Ann. § 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); 18 Pa. Stat. and Cons. Stat. Ann. § 2301 (defining "bodily injury" as "[i]mpairment of physical condition or substantial pain."); Tex. Penal Code Ann. § 1.07(a)(8) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as " includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty."); Utah Code Ann. § 76-1-601(3) (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. § 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition."); Wis. Stat. Ann. § 939.22(4) (defining "bodily harm" as "physical pain or injury, illness, or any impairment of physical condition.").

(A) Engage in conduct constituting an offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A;
(B) Accuse another person of a criminal offense or failure to comply with an immigration law or regulation;
(C) Assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or repute;
(D) Take or withhold action as an official, or cause an official to take or withhold action;
(E) Inflict a wrongful economic injury;
(F) Limit a person's access to a controlled substance as defined in D.C. Code 48-901.02 or restrict a person's access to prescription medication; or
(G) Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply.

Explanatory Note. The RCC defines "coercion" as consisting of seven forms of threatened behavior. A person engaging in coercion may threaten to carry out the coercive conduct himself or herself, but that need not be the case.[23]

Subsection (2)(A) specifies that coercion includes threatening that any person will commit a criminal offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A. This form of coercion does not include threats to commit any other types of criminal offenses.[24]

Subsection (2)(B) specifies that coercion includes threatening to accuse another person of a crime or failure to comply with an immigration law or regulation. The immigration law or regulation need not be criminal.[25] The revised definition specifically references threats to accuse another of failure to comply with an immigration law or regulation because of the unique, often life-changing consequences stemming from such an accusation. This subsection requires only an accusation, regardless of whether there actually is a violation of an immigration law or regulation.

Subsection (2)(C) specifies that coercion includes threatening to assert a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or impair that person's credit or business repute. This subsection does not require that the asserted fact be true or false.

Subsection (2)(D) specifies that coercion includes threatening to take or withhold action as an official, or cause an official to take or withhold action. This form of coercion includes threats such as citing someone for violation of a regulation, making an arrest, or denying the award of a government contract or permit.

Subsection (2)(E) specifies that coercion includes threatening to cause a wrongful economic injury. This form of coercion is intended to include not only wrongful financial losses

[23] For example, a person may compel another person to perform labor by threatening that a third party will injure the laborer if he or she refuses to perform.
[24] For example, threatening to commit a controlled substance offense would not constitute coercion.
[25] For example, if a person enters the country legally but remains after his or her visa has expired, that person has committed a civil violation.

but also situations such as threatening labor strikes or consumer boycotts. While such labor activities are not inherently problematic, when threats of labor activity are issued in order to personally enrich a person, and not to benefit the workers as a whole, such threats may provide the basis for a criminal offense.

Subsection (2)(F) specifies that coercion includes threatening to limit a person's access to either a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication. Merely facilitating a person's access to a controlled substance does not constitute coercion under the revised definition. The revised definition requires that the defendant, whether explicitly or implicitly, threatens to limits or restrict another person's access to a controlled substance or prescription medication.

Subsection (2)(G) specifies that coercion includes threatening to cause any harm that is sufficiently serious under all the surrounding circumstances to compel a reasonable person of the same background and in the same circumstances to comply. This is a catch-all provision intended to capture potential harms that are not explicitly included in the RCC's coercion definition. In determining whether the harm was sufficiently serious, fact finders should consider the nature of the harm, the complainant's particular circumstances and background, and the conduct demanded by the defendant. A threat may be coercive to a particular complainant, but not another.[26] In addition, harms that may constitute coercion when used to compel certain conduct may not necessarily constitute coercion when used to compel different conduct.[27]

"Coercion" is currently defined in D.C. Code § 22-1831 for human trafficking statutes. The RCC definition of "coercion" replaces the current definition of "coercion" in D.C. Code § 22-1831 and is used in the offenses against persons subtitle for the RCC definition of "effective consent," and the many uses of that term,[28] the revised versions of the forced labor or services statute,[29] the forced commercial sex statute,[30] the trafficking in labor or services statute,[31] and the trafficking in commercial sex statute,[32] as well as second degree and fourth degree of the revised sexual assault statute.[33]

Relation to Current District Law. *The RCC's definition of "coercion" as used in the human trafficking chapter makes two main substantive changes to current District law that improve the proportionality of the revised code.*

First, the revised coercion definition excludes fraud, deception, or causing a person to believe he or she is property of another. The current D.C. Code coercion definition for human trafficking offenses includes "fraud or deception." [34] Similarly, the current D.C. Code states that coercion includes, "knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable

[26] For example, threatening to leave a small child alone in an unknown part of a city may constitute coercion, but would not if the same threat were made to an adult.

[27] For example, some harms that would compel a reasonable person to perform basic tasks may not necessarily be sufficient to compel a reasonable person to engage in sexual activity.

[28] RCC §§ 22A-1202 (assault); 22A-1203 (menace); 22A-1204 (threats); 22A-1205 (offensive physical contact); 22A-1303 (sexual assault); 22A-1309 (nonconsensual sexual conduct); 22A-1402 (kidnapping); 22A-1404 (criminal restraint); 22A-1503 (abuse of a vulnerable adult or elderly person); 22A-1504 (neglect of a vulnerable adult or elderly person).

[29] RCC § 22A-1603.

[30] RCC § 22A-1604.

[31] RCC § 22A-1605.

[32] RCC § 22A-1606.

[33] RCC § 22A-1303.

[34] D.C. Code § 22-1831 (3)(D).

person in that person's circumstance to believe that he or she is the property of a person or business."[35] There is no DCCA case law interpreting the meaning of these provisions. In contrast, the RCC definition of coercion is focused solely on various types of threatened conduct. Although deceiving another person for personal gain is wrongful and may be subject to criminal liability,[36] when it is the sole form of wrongdoing,[37] it is not equivalent to the coercive behavior listed in this subsection. Leading someone to believe that they are property of another appears to be merely a particular form of deception.[38] This change improves the clarity of the revised code and proportionality of the revised statute.

Second, the revised coercion definition includes threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication." The current D.C. Code definition of "coercion" for human trafficking offenses refers to "*facilitating or controlling*" a person's access to "an addictive or controlled substance" or "restricting a person's access to prescription medication." There is no DCCA case law interpreting the meaning of these terms. In contrast, the revised definition of coercion requires that the defendant *limits* another person's access to a controlled substance or prescription medication. The revised coercion definition generally does not include facilitating or controlling a person's access to controlled substances,[39] and does not include limiting a person's access to addictive but legal substances like alcohol and tobacco. Including facilitating access to any addictive substance as a form of coercion creates the possibility of criminalizing conduct that is comparatively less harmful than other forms of coercion included in the revised definition.[40] These changes improve the clarity and proportionality of the revised statute.

The current sexual abuse statutes do not use the term "coercion," but second degree and fourth degree sexual abuse broadly prohibit causing a complainant to engage in sexual activity "by threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[41] As discussed in the commentary to the revised sexual assault statute (RCC § 22A-1303), second degree and fourth degree of the revised sexual assault statute prohibit causing a complainant to engage in sexual activity by "coercion." The RCC definition of "coercion" captures the breadth of the plain language of the current statutes as well as limited DCCA case law interpreting the current second degree and fourth degree sexual abuse statutes.

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[35] D.C. Code § 22-1831 (3)(G).

[36] E.g., using deception to cause another person to provide labor is punishable under the RCC's revised fraud statute. RCC § 22A-2201.

[37] Deception may be a critical part of a human trafficking scheme involving other types of coercion that would trigger liability. For example, a person may deceive a person with the false promise of high wages to entice a person to begin providing labor, and then use threats of bodily harm to compel the person to continue providing labor.

[38] As a matter of practice, in most cases in which a reasonable person would believe that he or she was the property of another, that person may also be subject to threats of physical injury or other form of abuse that would satisfy other forms of coercion included in the revised definition.

[39] However, a person can satisfy this subsection by facilitating or controlling a person's access a controlled substance, when doing so constitutes an implicit threat that future access will be limited. For example, a person may behave coercively by giving heroin to a heroin addict if by doing so he or she implicitly threatens that access to heroin will be limited in the future.

[40] For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably may constitute forced labor, an offense punishable by up to 20 years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and is relatively easier to obtain. Limiting a person's access to alcohol is not as inherently coercive as limiting a person's access to a controlled substance, as it is relatively easy for a person to obtain alcohol by other means.

[41] D.C. Code §§ 22-3003(1), 22-3005(1).

The commentary to the revised sexual assault statute (RCC § 22A-1303) also discusses the use of the term "coercion" in the provision in first degree and third degree of the revised sexual assault statute that prohibits involuntarily intoxicating complainants.

In addition, the revised coercion definition makes five changes that may constitute substantive changes to current District law.

First, the revised coercion definition includes threatening to engage in "any criminal offense against persons as defined in subtitle II of Title 22A, or a property offense as defined in subtitle III of Title 22A" or any "harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." The current D.C. Code definition of "coercion" for human trafficking offenses includes "force, threats of force, physical restraint, or threats of physical restraint,"[42] conduct that generally would constitute the criminal offenses of assault or kidnapping. The current D.C. Code also references any scheme intended to cause a person to believe that someone would suffer "serious harm or physical restraint."[43] The current definition of "coercion" also includes "serious harm or threats of serious harm,"[44] and "serious harm" is defined, in relevant part, as "harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."[45] It is unclear under the current D.C. Code whether threatening to commit other offenses against persons or property offenses would constitute "serious harm." There is no DCCA case law interpreting the meaning of these terms. However, the revised definition clarifies that threats to commit a criminal offense against persons or a property offense suffices to establish coercion, while at the same time preserving an explicit catch-all provision for other sufficiently serious harms. These changes improve the clarity and consistency[46] of the revised statutes.

Second, the revised coercion definition does not specifically include "force," "physical restraint," or "serious harm." The revised coercion definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22A[.]" Although the use of force, physical restraint, and serious harm may constitute offenses against persons[47], the revised definition requires that the accused *threatens* that another person will commit a criminal offense against persons or to inflict serious harm. Committing an offense against persons without an implicit or explicit threat of further criminal activity would not constitute coercion under the revised definition. However, in almost any case in which a person coerces a person by using force or physical restraint, there is at least an implicit threat to commit an additional crime against persons. This change clarifies and improves the consistency of the revised statutes.

Third, the revised coercion definition specifically includes threatening to accuse "another person of a criminal offense or failure to comply with an immigration regulation[.]" The current D.C. Code coercion definition does not explicitly refer to threats to accuse another person of a crime or a violation of an immigration regulation. However, such conduct or threats may

[42] D.C. Code § 22-1831 (3)(A).
[43] D.C. Code § 22-1831 (3)(E).
[44] D.C. Code § 22-1831 (3)(B).
[45] D.C. Code § 22-1831 (7).
[46] *See*, sex offenses RCC §§ 22A-1301-1309; and extortion § 22A-2301.
[47] Force and physical restraint could constitute assault, kidnapping, or criminal restraint.

constitute "serious harm" as that term is used in the current human trafficking offenses,[48] or may constitute "[t]he abuse or threatened abuse of law or legal process" which is included in the current coercion definition.[49] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that any accusation or threat to accuse another person of a criminal offense or failure to comply with an immigration regulation constitutes coercion. This change clarifies and improves the consistency of the revised statutes.

Fourth, the revised definition includes threatening to assert "a fact about another person, including a deceased person, that would tend to subject that person to hatred, contempt, or ridicule, or to impair that person's credit or business repute[.]" The current D.C. Code coercion definition does not explicitly refer threats to such significant reputational harms. However, such conduct or threats may constitute "serious harm" as that term is used in the current human trafficking offenses.[50] There is no relevant case law interpreting what constitutes "serious harm." The revised definition clarifies that such severe reputational harms constitutes coercion. This change clarifies and improves the consistency of the revised statutes.

Fifth, the revised coercion definition does not specifically include "the abuse or threatened abuse of law or legal process." The current D.C. Code definition of "coercion" for human trafficking offenses includes "the abuse or threatened abuse of law or legal process."[51] There is no relevant case law, or legislative history that provides examples of what would constitute abuse of law or legal process. The RCC definition of coercion omits specific reference to the abuse of law or legal process, although such conduct may still constitute coercion if it involves threats to accuse a person of a crime, failure to comply with an immigration regulation, or other harm sufficiently serious to compel a reasonable person to comply. [52] This change improves the clarity of the revised offense.

The remaining changes to the revised coercion definition are clarificatory and are not intended to change current District law.

First, the revised coercion definition does not specifically include "threats of force" or "threats of physical restraint." This change is not intended to change current law. The revised coercion definition includes threatening that another person will "commit any criminal offense against persons as defined in subtitle II of Title 22A[.]" Threats of force and threats of physical restraint involve threatening to engage in a criminal offense against persons.[53]

Second, the revised coercion definition does not specifically include "threats of serious harm." Omitting this language is not intended to change current District law. The revised coercion definition includes "any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." The language in this catch-all provision in the revised coercion

[48] D.C. Code § 22-1831 (3)(B); D.C. Code § 22-1831 (7).
[49] D.C. Code § 22-1831 (3)(C).
[50] D.C. Code § 22-1831 (3)(B); D.C. Code § 22-1831 (7). Note that the current D.C. Code definition of "serious harm specifically includes certain sufficiently serious "reputational harm." D.C. Code § 22-1831 (7).
[51] D.C. Code § 22-1831 (3)(C).
[52] Whether threats to abuse law or legal process would satisfy the requirements of the catch-all provision would be determined on a case by case basis. It is possible that only certain abuses of law or legal process would be sufficiently harmful given the surrounding circumstances to constitute coercion. For example, a threat to file a suit in small claims court for very minor damages against a wealthy complainant may not necessarily be sufficiently harmful to satisfy the catch-all provision. Similarly, it is unclear whether threatening to file a civil noise complaint would be sufficiently coercive to satisfy the revised definition's catch-all provision.
[53] Force, threats of force, physical restraint, or threats of physical restraint could constitute assault, criminal threats, kidnapping, or criminal restraint.

definition is intended to include threats of all harms that constitute threats of "serious harm" under current law.[54]

Third, the revised coercion definition does not specifically include "any scheme, plan, or pattern intended to cause a person to believe that if that person did not perform labor or services, that person or another person would suffer serious harm or physical restraint[.]" Omitting this language is not intended to change current District law. The revised coercion definition includes threatening to commit a criminal offense against persons, or cause any harm sufficiently serious to compel a reasonable person to comply. An explicit or implicit threat may be established by a single act, or a scheme, plan, or pattern of behavior.[55]

Relation to National Legal Trends. *The above discussed changes to current District have mixed support in national legal trends.*

First, excluding fraud or deception or causing another to believe he or she is property of another from the definition of "coercion" has mixed support in state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[56] (reformed jurisdictions), only six define "coercion" for use in their respective human trafficking offenses.[57] Of the jurisdictions that define "coercion," half do not include fraud or deception.[58] None of the jurisdictions that define "coercion" include causing a person to believe that he or she is property of a person or business.

Second, revising the definition of "coercion" to include threatening to "limit a person's access to a controlled substance, as defined in D.C. Code § 48-901.02, or prescription medication" is not supported by state criminal codes. While only five reformed jurisdictions define "coercion" for use in their respective human trafficking offenses, all but one include controlling access to a controlled substance.[59] However, none of these jurisdictions define "coercion" to include facilitating or controlling a person's access to addictive substance generally.

Generally, several of the reformed jurisdictions prohibit sexual assault by coercion or a similarly broad provision prohibiting threats.[60]

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[54] The DCCA has never issued an opinion interpreting the definition of "serious harm" under current law. However, federal courts interpreting analogous provisions in federal human trafficking statutes have approved jury instructions defining "serious harm" as "any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labor or services." *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) *cert. granted, judgment vacated on other grounds*, 545 U.S. 1101, 125 S. Ct. 2543, 162 L. Ed. 2d 271 (2005).

[55] For example, if a person routinely beats laborers, causing other laborers to fear that they will face similar beatings if they refuse to work, that person would satisfy the requirements of coercion even without an explicit threatening language.

[56] *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). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

[57] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5, Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01, Wash. Rev. Code Ann. § 9A.40.010.

[58] Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

[59] Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; Ind. Code Ann. § 35-42-3.5-0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

[60] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent"

(4) "Complainant" means a person who is alleged to have been subjected to any offense proscribed under this chapter.

Explanatory Note. RCC Chapter 13 defines "complainant" to refer to the person who is alleged to have been subjected to any offense proscribed under this chapter. This avoids confusion that may arise from references to both the actor and the complainant simply as a "person."

"Complainant" is not currently defined for the sex offense statutes.[61] The current sex offense statutes define "victim,"[62] but use the term is used inconsistently.[63] The RCC definition of "complainant" replaces the current definition of "victim" in D.C. Code § 22-3001(11)[64] and is used consistently to refer to a person who is alleged to have been subjected to any of the revised sex offenses.

Relation to Current District Law. The RCC definition of "complainant" is identical to the definition of "victim"[65] provided in the current sex offense statutes and does not substantively change current District law.

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and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a sexual act or sexual contact when the actor "[c]ompels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting" and defining "coercion" as "to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."); Ohio Rev. Code Ann. § 2907.02(A)(1) (offense prohibiting sexual conduct when the actor "coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."); 18 Pa. Stat. Ann. § 3121(a)(1), 3101 (prohibiting sexual intercourse by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied."); S.D. Codified Laws § 22-22-1(1) (offense of rape prohibiting sexual penetration "through the use of coercion."); Tex. Penal Code Ann. §§ 22.011(a)(1), (b)(1) (prohibiting sexual activity without consent and stating that a sexual assault is "without the consent" of the complainant if "the actor compels the other person to submit or participate by the use of . . . coercion."), 1.07(9)(A) (defining "coercion" to include a "threat, however communicated to commit an offense.").

[61] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[62] D.C. Code § 22-3001(11).

[63] Only three of the current sex offense statutes use the term "victim." The consent defense for first degree through fourth degree and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020). Instead of "victim," the other current sex offense statutes use terms like "another person" or "child," "ward," etc.

[64] D.C. Code § 22-3001(11) ("'Victim' means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter.").

[65] D.C. Code § 22-3001(11).

(5) "Consent" means words or actions that indicate an agreement to particular conduct. Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances. In addition, for offenses against property in Subtitle III of this Title:

(A) Consent includes words or actions that indicate indifference towards particular conduct; and

(B) Consent may be given by one person on behalf of another person, if the person giving consent has been authorized by that other person to do so.

Explanatory Note. The RCC defines "consent" to mean a person has expressed (by word or act) an agreement to specified conduct. In the RCC, the closely-related term "effective consent" means consent obtained by means other than physical force, fraud, or coercion.

There are several important aspects of the RCC definition of "consent." First, "consent" is an expression or action that indicates agreement. Such expressions include words, such as saying, "Yes, I agree," or writing the same in an email. "Consent" also includes actions, such as nodding or gesturing positively. Actions that indicate preferences could also include well-recognized customs.[66] Inaction may also, depending on the circumstances, indicate agreement to a proposal.[67] On the other hand, the absence of any communication would indicate that no consent was given.[68]

Second, the agreement must be to some particular conduct. Typically, in the RCC's offenses against persons, the particular conduct is defined by the use of consent within an offense definition or within an affirmative defense.

Third, "consent" can be conditioned or unconditioned.[69] This means that "consent" can be the product of completely free decision making (unconditioned),[70] or it can be the product of

[66] For example, raising one's fists or assuming a fighting stance are commonly understood to indicate that the person has agreed to mutual combat, and handing a merchant currency or a method of payment is commonly understood to indicate that the person has agreed to the transaction.

[67] For example, the inaction of a coworker to say or do anything may constitute consent if, when taking one of several inexpensive pens from the worker's desk the coworker says "you don't mind if I borrow your pen?" Whether inaction constitutes consent may depend on the context of the parties' relationship and prior experiences with one another.

[68] For example, imagine a case of assault where a person is walking down a street late at night, and the defendant sees the person and strikes him from behind. There would be no evidence in this case that the victim consented to mutual combat, because the victim gave no words or actions that indicated consent to the defendant's strikes. Or, imagine a case of theft where a person leaves his laptop out on a table at a café while he goes to use the restroom. A thief sees the person step away from the laptop, and promptly takes it. The taking would be completely without consent, because the owner gave no words or actions that indicated consent to the taking.

[69] This characteristic of consent is important: often, the term "consent" used both casually and in the law can mean one of two things. It can mean "agreeing to something," and it can also mean, "agreeing to something with sufficient freedom and knowledge." Imagine, for example, a person who is tricked by a fraudster into giving over her life savings. It would be correct in one sense to say that she consented to giving the money, because she voluntarily handed over her fortune. On the other hand, it could also be correct to say that she did not consent to the transaction, because her consent was vitiated by the fraudster's deception.

Both descriptions are arguably correct: if one takes "consent" to mean "agreement," then the victim has consented because she has agreed. But if one takes "consent" to mean "agreement given pursuant to certain normative conditions, such as having sufficient knowledge about the nature of the transaction," then the victim has not given consent, because she did not have sufficient knowledge about the actual nature of the transaction. She had no idea, after all, that her money was getting put in a fraudulent scheme. Both descriptions of the hypothetical are equally valid depending on what the definition of "consent" in use.

decision making driven by external pressures placed on the person giving consent (conditioned).[71] Conditioned "consent" may be present even when there is an extreme or normatively disturbing condition inducing a person's agreement.[72] In the RCC, the degree to which "consent" may be subject to conditions is specified by the elements of particular offenses or the use of the phrase "effective consent."[73]

Fourth, for offenses against property in Subtitle III of this Title, "consent" includes those instances where an agent gives "consent" on behalf of a principal.[74] Thus, an employee may sell her employer's merchandise by giving "consent" on behalf of the employer to a transaction.

Fifth, for offenses against property in Subtitle III of this Title, "consent" also includes expressions of indifference. This is intended to cover situations when a person, does not agree to particular conduct, but signals their neutrality as to the conduct.[75]

"Consent" is statutorily defined in Title 22 of the current D.C. Code only for sexual abuse offenses,[76] although the undefined term is used in numerous other Title 22 statutes.[77] The term

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Unfortunately, having dual, competing, and equally valid meanings for a single term is a recipe for confusion. How can one know which sense of "consent" is being used at a given time? It is impossible to say. Therefore, rather than persist in confusing these two distinct but useful concepts by employing a single word to describe them, the Revised Criminal Code distinguishes them. "Consent" is employed to refer to mere agreement, while "effective consent" is employed to refer to consent given under sufficient conditions of knowledge and freedom (i.e., consent free from problematic coercion and deception).

[70] E.g., if a person went to a store and said, "I am going to buy the largest television in this store, no matter the cost!" This is an expression of an unconditional preference - the person has stated that he or she will purchase the property no matter what.

[71] E.g., if a person went to a store and said, "I would like to buy the largest television in this store - but because the largest television is too expensive, I'll settle for this smaller one." The person here has an unconditional preference for the largest television, just as the person in the previous footnote does; but here, the person's budget is an external condition that has pressured the person to choose something other than his or her unconditional preference.

[72] E.g., a defendant walks into the victim's store and says, "You better pay me some protection money, or you might find you suffer an unfortunate accident!" The victim's preference in this situation may well be to pay the protection money, rather than risk being murdered or assaulted -- therefore, the victim hands the cash over to the extortionist. In this case, the victim has given consent to the transaction. Admittedly, the victim's unconditioned preference is likely that he have to provide the money at all. But faced with either giving the money or suffering a physical harm, the person may well consent to giving the money. This is not to say that the extortionist in this hypothetical will avoid liability, of course: under the RCC, the extortionist would have obtained the victim's consent by means of coercion.

[73] E.g., RCC §§ 22A-1202(h), 1205(d) (affirmative defense of consent to assault and offensive physical contact).

[74] [The RCC at present does not address whether and under what circumstances a person may consent, on behalf of another person, to conduct constituting an offense against person. Generally, it would be improper for one person to give consent to conduct on behalf of another where that conduct harms the person. However, there may be categorical exceptions to this general rule for offenses against persons. For example, it may be that a parent or guardian may consent to an elective medical procedure, ear piercing, or participation in a karate lesson on behalf of their child or ward. The RCC does not, at present, address these issues.]

[75] E.g., Person A asks Person B, "May I borrow your car on Saturday?" and Person B responds, "Whatever, I don't care either way." If Person A then takes the car on Saturday, Person A would not have committed the offense of unlawful use of a motor because Person B has given "consent" by manifesting indifference to Person A's use of the car.

[76] D.C. Code § 22-3531 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[77] *See, e.g.*, Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another

"effective consent" is not used in the current D.C. Code. The RCC definition of "consent" is used in the offenses against persons subtitle for: the definition of "effective consent"[78] and the many uses of that term,[79] as well as kidnapping[80] and criminal restraint.[81] The RCC definition of "consent" also is used in the offenses against property subtitle for: theft,[82] unauthorized use of a motor vehicle,[83] fraud,[84] payment card fraud,[85] identity theft,[86] financial exploitation of a vulnerable adult,[87] and extortion,[88] as well as in uses of the term "effective consent."[89]

Relation to Current District Law. The D.C. Code has only one codified definition of the term "consent,"[90] that is referenced in the defenses[91] and procedural provisions[92] of the current sex offense statutes. The term "effective consent" is not used in the D.C. Code. DCCA case law regarding the term "consent" in the sex offense statutes is limited to interpreting the current consent defense and does not discuss in detail the substance of the current definition.[93] DCCA case law regarding the term "consent" in non-sex offenses generally holds that consent obtained by coercion or deception is not true consent—consistent with the revised definition of "effective consent."[94]

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identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[78] RCC § 22A-1204.

[79] RCC §§ 22A-1202 (assault); 22A-1203 (menace); 22A-1204 (threats); 22A-1205 (offensive physical contact); 22A-1303 (sexual assault); 22A-1309 (nonconsensual sexual conduct); 22A-1503 (abuse of a vulnerable adult or elderly person); 22A-1504 (neglect of a vulnerable adult or elderly person).

[80] RCC § 22A-1402.

[81] RCC § 22A-1404.

[82] RCC § 22A-2101.

[83] RCC § 22A-2103.

[84] RCC § 22A-2201.

[85] RCC § 22A-2202.

[86] RCC § 22A-2205.

[87] RCC § 22A-2208.

[88] RCC § 22A-2301.

[89] RCC §§ 22A-2102 (unauthorized use of property); 22A-2103 (unauthorized use of a motor vehicle); 22A-2105 (unlawful creation or possession of a recording); 22A-2202 (payment card fraud); 22A-2205 (identity theft); 22A-2503 (criminal damage to property); 22A-2504 (graffiti); 22A-2601 (trespass); 22A-2602 (trespass of a motor vehicle); 22A-2701 (burglary).

[90] D.C. Code § 22-3531 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[91] D.C. Code § 22-3007 (defense to sexual abuse); D.C. Code § 3011 (defenses to child sexual abuse and sexual abuse of a minor); and D.C. Code § 22-3017 (defenses to sexual abuse of a ward, patient, or client).

[92] D.C. Code § 22–3022 (admissibility of other evidence of victim's past sexual behavior).

[93] *See, e.g., Hatch v. United States*, 35 A.3d 1115, 1116 1122 (D.C. 2011) (stating that "if the government proves the sexual encounter was forcible, the defendant may attempt to prove that the victim effectively consented *despite* whatever force was involved" and that an "affirmative defense of consent to a charge of forcible sexual assault makes sense only in the unusual case in which there is evidence that the defendant's otherwise culpable use of force was excused—as where the complainant led the defendant to believe (if not correctly, then at least reasonably) that she engaged in sado-masochistic or "rough" sex willingly.") (emphasis in original); *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005) (holding that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense" because "[i]n such a case, the child's consent is not valid.").

[94] *See, e.g., Johnson v. United States*, 426 F.2d 651, 653 (D.C. Cir. 1970) ("acquiescence may be deemed nonconsensual in the absence of force if the victim is put in genuine apprehension of death or bodily harm."); *Guarro v. United States*, 237 F.2d at 581 n. 4 (citing Clark & Marshall, Crimes, § 212 (5th ed. 1952) for the proposition that, "In criminal law, an act does not constitute an assault, or an assault and battery, if the person on or

The RCC definition of "consent" differs significantly from the current D.C. Code definition of "consent" codified in the sex offense chapter. However, the closely-related RCC definition of "effective consent" is comparable to the current D.C. Code definition of "consent" and does not clearly change District law on "consent." The RCC effectively breaks the current D.C. Code definition of "consent" into two terms. The RCC definition of "consent" refers to the bare fact of an agreement between parties, while the RCC definition of "effective consent" is limited to agreements that are obtained by means other than the use of physical force, coercion, or deception, which appears to be the functional equivalent of "freely given" in the current definition of "consent." This division of the current D.C. Code definition of "consent" enables more precise drafting of criminal offenses. For example, an offense that prohibits taking property with consent obtained by deception[95] can be distinguished from a taking of property by coercion.[96] Meanwhile, the D.C. Code's current references to "consent" can be given a substantially identical meaning by using the RCC definition of "effective consent." This change clarifies and improves the consistency of the revised statutes.

However, the RCC definitions of "consent" and "effective consent" may be viewed as a substantive change of law to the current definition of "consent" in the current sex offense statutes in one way. The current definition of "consent" in the sex offense chapter merely requires that the agreement between the actor and the complainant to engage in sexual conduct be "freely given."[97] The meaning of "freely given" is ambiguous as to whether it includes agreements based on deception, and DCCA case law does not address the matter. However, the revised definition of "effective consent" resolves this ambiguity by stating that an agreement caused by deception is not "effective consent." "Deception," is a defined term in the D.C. Code[98] that explicitly excludes minor "puffery."[99] To the extent that a person agrees to conduct based on a

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against whom it is committed freely consents to the act, provided he or she is capable of consenting, and the act is one to which consent may be given, and the consent is not obtained by fraud."); *McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation.").

[95] RCC § 22A-2201 (fraud).

[96] RCC § 22A-2301 (extortion).

[97] D.C. Code § 22-3531.

[98] RCC § 22A-1001(6):

(A) "Deceive" and "deception" mean:

(i) Creating or reinforcing a false impression as to a material fact, including false impressions as to intention to perform future actions;

(ii) Preventing another person from acquiring material information;

(iii) Failing to correct a false impression as to a material fact, including false impressions as to intention, which the person previously created or reinforced, or which the deceiver knows to be influencing another to whom he or she stands in a fiduciary or confidential relationship; or

(iv) For offenses against property in Subtitle III of this Title, failing to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property which he or she transfers or encumbers in consideration for property, whether or not it is a matter of official record.

(B) The terms "deceive" and "deception" do not include puffing statements unlikely to deceive ordinary persons, and deception as to a person's intention to perform a future act shall not be inferred from the fact alone that he or she did not subsequently perform the act.

[99] In addition, the RCC nonconsensual sexual conduct offense (RCC § 22A-1309) limits liability for engaging in a sexual act or sexual contact by deception to instances where the actor used deception as to the nature of the sexual act or sexual contact. Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g.

deception, it is questionable whether there is an "agreement," let alone one that is "freely given" under current District law. This change clarifies and improves the consistency of the revised statutes.

Other changes to the current definition of "consent" in the revised definitions of "consent" and "effective consent" are clarificatory in nature and are not intended to substantively change District law. First, the word "overt" is omitted as redundant. The plain meaning of the current and revised definitions of consent is that there must be something external "indicating" that there is an "agreement," and covert actions[100] obviously cannot "indicate" agreement to the other party. Second, the sentence regarding "lack of verbal or physical resistance" is eliminated as unnecessary and potentially confusing. The sentence provides a specific example of when a "freely given agreement" is *not* reached—namely, when there is a "lack of verbal or physical resistance or submission by the victim resulting from the use of force, threats, or coercion…." However, the RCC definition of "effective consent" as "consent obtained by means other than physical force, coercion, or deception," more clearly and generally communicates this proposition in a manner applicable to all (including non-sexual) offenses. These changes improve the clarity and consistency of the revised statutes.

It should be noted, however, that the RCC definitions of "consent" and "effective consent" may result in changes of law as used in particular offenses where there is case law indicating "consent" (or lack thereof) is an element, but the meaning of such "consent" is unclear. For example, "consent" is not referenced in the District's current assault, robbery, or threats statutes. However, two DCCA rulings state that, in certain circumstances, "consent" is a defense to the District's the non-violent sexual touching form of simple assault [101] and is not a defense to the District's felony assault statute.[102] These rulings do not define the precise meaning of "consent," however. Regarding a consent defense to the non-violent sexual touching form of simple assault, case law has said the consent may be "actual or apparent"[103] without discussing the difference between these terms.[104] The RCC definition of "consent" and the definition of "effective consent" (which refers to "consent") for offenses against persons appears to be consistent with District case law for assault-type crimes and clarifies the meaning of the term.

Consent also is an explicit, if undefined, statutory element of several of the District's current property offenses and theft-type offenses. DCCA rulings have recognized the relevance

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use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease). See commentary to RCC § 22A-1309 for further discussion.

[100] Similarly, covert "words," though not addressed in the current D.C. Code definition of "consent" also would not, logically, indicate agreement to the other party.

[101] *Guarro v. United States*, 237 F.2d 578, 581 (D.C. Cir. 1956) ("Generally where there is consent, there is no assault.").

[102] *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2014) (declining to determine "whether and when consent is an affirmative defense to charges of simple assault" while rejecting consent as a defense to assault in a street fight resulting in significant bodily injury [i.e., felony assault]).

[103] *Guarro*, 237 F.2d at 581.

[104] The language, however, suggests that "actual consent" refers to the internal, subjective wishes of the person giving consent, whereas the "apparent consent" refers to the *expressed* wishes or desires of the person giving consent. *See Guarro*, 237 F.2d at 581 ("In a case like the present, to *let the suspect think there is consent* in order to encourage an act which furnishes an excuse for an arrest will defeat a prosecution for assault.") (emphasis added). To the extent that "apparent consent" refers to expressed consent, the RCC definition is consistent with current District case law.

of consent in proving theft[105] and other property offenses.[106] Additionally, DCCA case law has acknowledged that an agent's consent is relevant to determining whether a defendant has been given consent by the actual owner of the property,[107] and some current offense definitions explicitly include agents.[108] The RCC definition of "consent" and the definition of "effective consent" (which refers to "consent") for property offenses appears to be consistent with District case law for assault-type crimes and clarifies the meaning of the term.

Relation to National Legal Trends. The Model Penal Code (MPC) has no equivalent definition to "consent," although it does use the term in some provisions.[109] The American Law Institute (ALI) has recently undertaken a review of the MPC's sexual assault offenses, and has provided a draft definition of "consent"[110] that is generally consistent with the RCC definitions of "consent" and "effective consent" (which refers to "consent"), but includes some detailed clarificatory language that is omitted in the RCC definition as unnecessary.[111] Other states and commentators have definitions that are very similar to the RCC definition.[112]

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[105] D.C. Code § 22-3201. *See* D.C. Crim. Jur. Instr. § 5.300. According to the Redbook, theft requires proof of "taking . . . property against the will or interest of" the owner. The Redbook Committee "included 'against the will'" because "the [Judiciary] Committee report making clear that the concept of 'taking control' was supposed to cover common law larceny, which only could be committed by taking property against the will of the complainant." *Id*. Indeed, the Judiciary Committee report states that "the term 'wrongfully' [in theft] is used to indicate a wrongful intent to obtain or use the property without the consent of the owner or contrary to the owner's rights to the property." Committee on the Judiciary, Extend Comments on Bill 4-133, the D.C. Theft and White Collar Crime Act of 1982, at 16-17.

[106] *See McKinnon v. United States*, 644 A.2d 438, 442 (D.C. 1994) ("In this case, [the victim] acquiesced in the entry during which she was assaulted, but her acquiescence was obtained by ruse . . . ."); *Jeffcoat v. United States*, 551 A.2d 1301, 1304 n.5 (D.C. 1988) ("To be valid, consent must be informed, and not the product of trickery, fraud, or misrepresentation."); *United States v. Kearney*, 498 F.2d 61, 65 (D.C. Cir. 1974) ("They had both obtained consent to their entry into the premises under the pretext that they were looking for another person who was expected to arrive shortly."). All of these cases distinguish "consent" from the conditions used to obtain consent ("ruse" in *McKinnon*, "trickery, fraud, or misrepresentation" in *Jeffcoat*, and "pretext" in *Kearney*). See also, *Fussell v. United States*, 505 A.2d 72, 73 (D.C. 1986).

[107] *Russell v. United States*, 65 A.3d 1172, 1174 (D.C. 2013).

[108] E.g., D.C. Code § 22-3302. Trespass requires that entry into land be "against the will of the lawful occupant or of the person lawfully in charge thereof." *Id*.

[109] The clearest example is in the MPC's affirmative consent defense. Model Penal Code § 2.11.

[110] Model Penal Code: Sexual Assault and Related Offenses § 213.0(3) (Tentative Draft No. 9, September 14, 2018) "'Consent'

> (i) "Consent" for purposes of Article 213 means a person's willingness to engage in a specific act of sexual penetration, oral sex, or sexual contact.
>
> (ii) Consent may be express or it may be inferred from behavior—both action and inaction—in the context of all the circumstances.
>
> (iii) Neither verbal nor physical resistance is required to establish that consent is lacking, but their absence may be considered, in the context of all the circumstances, in determining whether there was consent.
>
> (iv) Notwithstanding subsection (d)(ii) of this Section, consent is ineffective when given by a person incompetent to consent or under circumstances precluding the free exercise of consent, as provided in the Sections of this Article applicable to such situations.
>
> (v) Consent may be revoked or withdrawn any time before or during the act of sexual penetration, oral sex, or sexual contact. A clear verbal refusal—such as "No," "Stop," or "Don't"—establishes the lack of consent or the revocation or withdrawal of previous consent. Lack of consent or revocation or withdrawal of consent may be overridden by subsequent consent."

[111] Specifically, subsections (iii) and (v) of the draft ALI definition of "consent" provide clarificatory language regarding the lack of physical or verbal resistance and the revocation or withdrawal of consent. Such clarifications are fully consistent with the RCC definition of "consent" and "effective consent" (which refers to "consent") but

Distinguishing offenses using the same principles of consent and "effective consent" is rare in other jurisdictions' statutes. Two states, Texas and Tennessee, codify a definition of "effective consent" for use in property offenses,[113] and a comparable distinction between consent and effective consent is made in Missouri,[114] and case law in one state has used the distinction in

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may be more confusing than helpful in clarifying the fundamental issue of whether there was effective consent at a given point in time during a sexual encounter.

[112] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-3-401(1.5) (defining "consent" as "cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4."); 720 Ill. Comp. Stat. Ann. 5/11-1.70 (defining "consent" as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent. The manner of dress of the victim at the time of the offense shall not constitute consent."); Minn. Stat. Ann. § 609.341(4) (defining "consent" as "(a) . . . words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean the existence of a prior or current social relationship between the actor and the complainant or that the complainant failed to resist a particular sexual act. (b) A person who is mentally incapacitated or physically helpless as defined by this section cannot consent to a sexual act. (c) Corroboration of the victim's testimony is not required to show lack of consent."); Wash. Rev. Code Ann. § 9A.44.010(7) ("Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact."). *See also* Stephen J. Schulhofer, *Consent: What it Means and Why It's Time To Require It*, 47 U. PAC. L. REV. 665, 669 (2016). Schulhofer offers a tripartite definition of consent specific to sexual assault. The first part of the definition contains similar language to the RCC definition of consent: "'Consent' means a person's behavior, including words and conduct -- both action and inaction -- that communicates the person's willingness to engage in a specific act of sexual penetration or sexual conduct."

[113] Texas defines "effective consent" as: "consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." Tex. Penal Code Ann. § 31.01(3). This definition of "effective consent" is specific to the property offenses; Texas also has a general "effective consent" definition that applies broadly to the entire penal code. Tex. Penal Code Ann. § 1.07(19). The only difference between the two definitions is that the property-specific definition does not include "force" subsection (3)(A), and subsection (3)(E) in the property-specific section above is not included in the general definition. Tennessee defines effective consent as "assent in fact, whether express or apparent, including assent by one legally authorized to act for another. Consent is not effective when: (A) Induced by deception or coercion; (B) Given by a person the defendant knows is not authorized to act as an agent; (C) Given by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter; or (D) Given solely to detect the commission of an offense." Tenn. Code Ann. § 39-11-106(9).

[114] Mo. Ann. Stat. § 556.061 ("consent or lack of consent may be expressed or implied. Assent does not constitute consent if: (a) It is given by a person who lacks the mental capacity to authorize the conduct charged to constitute the offense and such mental incapacity is manifest or known to the actor; or (b) It is given by a person who by reason of youth, mental disease or defect, intoxication, a drug-induced state, or any other reason is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) It is induced by force, duress or deception"). Unlike Tennessee and Texas, however, Missouri does not define force, duress, or deception. This gives very little guidance when attempting to ascertain what kinds of pressures may vitiate "consent" in Missouri. For example, will "assent" induced by any deception fail to constitute assent? Will the smallest amount of duress do the same? If not, then what degree of duress or deception is sufficient to meet the law's demand? Ultimately, while Missouri's definition of "consent" is useful, it is also inadequate. The RCC differs from Missouri in that it sets out not only the kinds of pressures render consent ineffective, but also the degree of pressure that must be brought to bear against the victim. The kinds of

the context of burglary.[115] The Texas and Tennessee statutes first identify "consent" as a basic foundation for finding effective consent (or in the case of Tennessee, "assent" and then "consent") then the statutes provide a list of circumstances that render consent ineffective. In addition, Texas and Tennessee both state that consent given by certain people (generally, people with disabilities or children) is ineffective.[116] Also, both Texas and Tennessee address the issue of consent given to detect the commission of an offense.[117] The RCC does not address the issue of incompetence or consent given to detect the commission of an offense, but otherwise closely resembles these jurisdictions' statutes.

The Model Penal Code (MPC) contains a definition of "ineffective consent" in its General Part, in its description of the affirmative consent defense.[118] But that definition of ineffective consent does not appear to be applied elsewhere in the MPC.

The relative lack statutory or case law use of the conceptual distinction between consent and "effective consent" may be due to the relatively recent origin of scholarly work on the topic.[119] However, in recent years, use of the conceptual distinction between "effective consent"

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pressures are identified other in the offense definitions (e.g., deception in fraud, RCC § 22A-2201), or by the definition of effective consent. The degree of pressure is identified in the definitions of force, coercion, and deception themselves.

[115] Minnesota's burglary offense distinguishes between entries *without consent* and entries made "by using artifice, trick, or misrepresentation to obtain consent to enter." See *State v. Zenanko*, 552 N.W.2d 541, 542 (Minn. 1996) (affirming conviction of defendant who "misrepresented his purpose for being [in the dwelling] and gained entry by ruse") (internal quotations omitted), citing *State v. Van Meveren*, 290 N.W.2d 631, 632 (Minn. 1980) (affirming conviction of defendant who gained entrance to a dwelling by telling the occupant he needed to use the occupant's bathroom, and after entering, immediately began to sexually assault the occupant). *See* Minn. Stat. Ann. § 609.581. By comparison, the RCC says that burglary can be committed without consent and with consent obtained by deception. The RCC also covers burglaries committed with consent obtained by coercion.

[116] Tex. Penal Code Ann. § 31.01(3)(C) and (3)(E); Tenn. Code Ann. § 39-11-106(9)(C).

[117] Tex. Penal Code Ann. § 31.01(3)(D); Tenn. Code Ann. § 39-11-106(9)(D). The effect of this provision, it would seem, is to provide complete liability for an offense when a police officer makes a transaction with a criminal in an undercover operation. For example, when attempting to catch a defendant engaged in fraud, a police officer might pose as an innocent and unsuspecting victim. When the defendant tries to deceive the officer into giving money, the officer would clearly be aware of the defendant's deception. If thereafter convicted, the defendant might argue that the officer's consent to the transaction was not "obtained by deception," and therefore, that the defendant is not guilty of fraud. Rather, the defendant would seemingly be at most guilty of attempted theft, because the defendant mistakenly believed the consent *was* induced by the defendant's deception. The definition of effective consent operating in Texas and Tennessee obviate this defense. *See Smith v. States*, 766 S.W.2d 544 (Tex. App. 1989). Similar facts are at work in *Fussell v. United States*, 505 A.2d 72 (D.C. 1986), and the DCCA reversed the defendant's conviction entirely. *Id*. at 73.

[118] Model Penal Code § 2.11(3) ("Ineffective Consent. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if: (a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or (b) it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or (c) it is given by a person whose improvident consent is sought to be prevented by the law defining the offense; or (d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.").

[119] In large part, the conceptual structure involved in thinking through consent and effective consent—as well as the attendant pressures of force, coercion, and deception—is based on the influential work of Peter Westen. *See* PETER WESTEN, THE LOGIC OF CONSENT (2004); Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Although Westen's work primarily focuses on the use of consent in the context of rape, his basic approach to understanding consent in criminal law has been adopted by other scholars in other areas of substantive criminal law. For the use of the Westen's theory of consent with respect to theft in particular, see STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE (2012).

and simple consent has become widespread among new proposals for substantive criminal law.[120]

(6) "Domestic partner" shall have the same meaning as provided in D.C. Code § 32-701(3).

Explanatory Note. RCC Chapter 13 defines "domestic partner" to incorporate the current definition in D.C. Code § 32-701(3).

"Domestic partner" is currently defined in D.C. Code § 22-3001(4A) for the sex offense statutes,[121] and is used in the current sex offense definition of "significant relationship."[122] The RCC definition of "domestic partner" replaces the current definition of "domestic partner" in D.C. Code § 22-3001(4A)[123] and is used in the definition of "position of trust with or authority over."[124]

Relation to Current District Law. The RCC definition of "domestic partner" is identical to the definition provided in the current sex offense statutes[125] and does not substantively change current District law.

(7) "Domestic partnership" shall have the same meaning as provided in D.C. Code § 32-701(4).

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[120] James Grimmelmann, *Consenting to Computer Use*, 84 GEO. WASH. L. REV. 1500, 1517 (2016) (applying conceptual distinctions in consent to offenses involving computers); Stuart P. Green, *Introduction: Symposium on Thirteen Ways to Steal A Bicycle*, 47 NEW ENG. L. REV. 795 (2013) (discussing the use of differences of consent within the context of property offenses); Michelle Madden Dempsey, *How to Argue About Prostitution*, 6 CRIM. L. & PHIL. 65, 70 (2012) (using Westen's consent framework to discuss the ethics of prostitution); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 402 (2016).

[121] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[122] D.C. Code Ann. § 22-3001(10).

[123] D.C. Code Ann. § 22-3001 (4A) ("'Domestic partner' shall have the same meaning as provided in § 32-701(3)."). The current definition of "domestic partner" in D.C. Code § 22-701 is ("'Domestic partner' means a person with whom an individual maintains a committed relationship as defined in paragraph (1) of this section and who has registered under § 32-702(a) or whose relationship is recognized under § 32-702(i). Each partner shall: (A) Be at least 18 years old and competent to contract; (B) Be the sole domestic partner of the other person; and (C) Not be married.").

[124] RCC § 22A-1301.

[125] D.C. Code Ann. § 22-3001 (4A) ("'Domestic partner' shall have the same meaning as provided in § 32-701(3)."). The current definition of "domestic partner" in D.C. Code § 22-701 is ("'Domestic partner' means a person with whom an individual maintains a committed relationship as defined in paragraph (1) of this section and who has registered under § 32-702(a) or whose relationship is recognized under § 32-702(i). Each partner shall: (A) Be at least 18 years old and competent to contract; (B) Be the sole domestic partner of the other person; and (C) Not be married.").

Explanatory Note. RCC Chapter 13 defines "domestic partnership" to incorporate the current definition in D.C. Code § 32-701(4).

"Domestic partnership" is currently defined in D.C. Code § 22-3001(4B) for the sex offense statutes[126] and is currently used in the definition of "significant relationship,"[127] as well as the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor[128] and the defense statute for sexual abuse of a ward and sexual abuse of a patient or client.[129] The RCC definition of "domestic partnership" replaces the current definition of "domestic partnership" in D.C. Code § 22-3001(4B)[130] and is used in the definition of "position of trust with or authority over"[131] as well as in the revised sexual abuse of a minor statute,[132] the revised sexual exploitation of an adult statute,[133] the revised sexually suggestive contact with a minor statute,[134] and the revised enticing a minor statute.[135]

Relation to Current District Law. The RCC definition of "domestic partnership" is identical to the definition provided in the current sex offense statutes[136] and does not substantively change current District law.

(8) "Effective consent" means consent obtained by means other than physical force, coercion, or deception.

Explanatory Note. The RCC defines "effective consent" to mean a person has expressed (by word or act) an agreement to specified conduct. In the RCC, the closely-related term

[126] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[127] D.C. Code Ann. § 22-3001(10).

[128] D.C. Code Ann. § 22-3011.

[129] D.C. Code Ann. § 22-3017.

[130] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 22-701 defines "domestic partnership" as "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)."). D.C. Code § 22-701(4).

[131] RCC § 22A-1301.

[132] RCC § 22A-1304.

[133] RCC § 22A-1305.

[134] RCC § 22A-1306.

[135] RCC § 22A-1310.

[136] D.C. Code § 22-3001(4B) ("'Domestic partnership' shall have the same meaning as provided in § 32-701(4)."). D.C. Code § 22-701 defines "domestic partnership" as "the relationship between 2 persons who become domestic partners by registering in accordance with § 32-702(a) or whose relationship is recognized under § 32-702(i)."). D.C. Code § 22-701(4).

"effective consent" means consent obtained by means other than physical force, fraud, or coercion.

"Effective consent" is not statutorily defined for, or used in, Title 22 of the current D.C. Code, although the related term "consent" is codified in the current D.C. Code for sexual abuse offenses,[137] and the undefined term is used in numerous other Title 22 statutes.[138] The RCC definition of "effective consent" is used in many District offenses against persons[139] and property offenses."[140]

Relation to Current District law. See, generally, the commentary to "consent," above, for more information.

Relation to National Legal Trends. See, generally, the commentary to "consent," above, for more information.

(9) "Person of authority in a secondary school" includes any teacher, counselor, principal, or coach in a secondary school.

Explanatory Note. RCC Chapter 13 defines "person of authority in a secondary school" as including specified individuals in a secondary school.

"Person of authority in a secondary school" is not currently defined for the sex offense statutes.[141] However, the current sexual abuse of a secondary education student statutes refer to "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school."[142] The RCC definition of "person of authority in a secondary school" replaces this

[137] D.C. Code § 22-3531 ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[138] *See, e.g.,* Voyeurism, D.C. Code § 22-3001(3) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…."); First degree and second degree unlawful publication, D.C. Code §§ 22-3053, 3054 ("It shall be unlawful in the District of Columbia for a person to knowingly publish one or more sexual images of another identified or identifiable person when . . . the person depicted did not consent to the disclosure or publication of the sexual image . . . .").

[139] RCC §§ 22A-1202 (assault); 22A-1203 (menace); 22A-1204 (threats); 22A-1205 (offensive physical contact); 22A-1303 (sexual assault); 22A-1309 (nonconsensual sexual conduct); 22A-1503 (abuse of a vulnerable adult or elderly person); 22A-1504 (neglect of a vulnerable adult or elderly person)

[140] RCC §§ 22A-2102 (unauthorized use of property); 22A-2103 (unauthorized use of a motor vehicle); 22A-2105 (unlawful creation or possession of a recording); 22A-2202 (payment card fraud); 22A-2205 (identity theft); 22A-2503 (criminal damage to property); 22A-2504 (graffiti); 22A-2601 (trespass); 22A-2602 (trespass of a motor vehicle); 22A-2701 (burglary).

[141] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[142] D.C. Code §§ 22-3009.03 and 22-3009.04.

language in the current sexual abuse of a secondary education student statutes.[143] The RCC definition is used in the revised sexual exploitation of an adult statute.[144]

Relation to Current District Law. The RCC definition of "person of authority in a secondary school" is identical to the language in the current sexual abuse of a secondary education student statutes which refers to "[a]ny teacher, counselor, principal, coach, or other person of authority in a secondary level school."[145] The RCC definition omits "level" for clarity without changing the substance of the definition. The RCC definition of "person of authority in a secondary school" does not change current District law.

(10) "Physical force" means the application of physical strength.

Explanatory Note. The RCC definition of "physical force" specifies the requirements for proving "physical force" in the revised offenses against persons. The definition of "physical force" includes any physical touching, however slight, and the application may be indirect (e.g., by means of a tool or weapon).

"Physical force" is not statutorily defined in Title 22 of the current D.C. Code, although the broader term "force" is defined for sexual abuse offenses[146] and the term "physical force" is currently used in two statutes[147] in Title 22. The RCC definition is used in the revised robbery,[148] assault,[149] criminal menace,[150] sexual assault statute[151] and [other revised offenses against persons statutes].

Relation to Current District Law. There is no D.C. Court of Appeals (DCCA) case law specifically discussing a definition of "physical force," nor is the term statutorily defined. However, the revised definition is consistent with the description of physical types of "force" in the District's statutes and case law for robbery[152] and sexual abuse.[153] Codifying a definition of "physical force" improves the clarity and consistency of District law.

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[143] D.C. Code §§ 22-3009.03 and 22-3009.04.

[144] RCC § 22A-1305.

[145] D.C. Code §§ 22-3009.03 and 22-3009.04.

[146] D.C. Code § 22-3001. ("'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim."). "Force" is used in "force" is used in first degree sexual abuse (D.C. Code § 22-3002(1), third degree sexual abuse (D.C. Code § 22-3004(1), and the sex offense definition of "consent" (D.C. Code § 22-3001.

[147] D.C. Code § 22-722 ("A person commits the offense of obstruction of justice if that person: (1) Knowingly uses intimidation or physical force…"); D.C. Code § 22-1931 (a) ("It shall be unlawful for a person to knowingly disconnect, damage, disable, temporarily or permanently remove, or use physical force or intimidation to block access…").

[148] RCC § 22A-1201.

[149] RCC § 22A-1202.

[150] RCC § 22A-1203.

[151] RCC § 22A-1303.

[152] There is DCCA case law broadly defining the element of "force" in the District's robbery statute as satisfied by any physical movement that constitutes a taking of an object. *See Leak v. United States*, 757 A.2d 739, 742 (D.C. 2000) ("In distinct contrast to most jurisdictions, the District of Columbia's statutory definition of robbery includes the stealthy snatching of an item, even if the victim is not actually holding, or otherwise attached to the object, or indeed is unaware of the taking. 'To satisfy the 'force' requirement in a charge of robbery by stealthy seizure, the government need only demonstrate the actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.'") *(quoting (Earl) Johnson v. United States*, 756 A.2d 458, 462 (D.C.2000)). See also D.C. Crim. Jur. Instr. § 4.300 commentary ("[Using actual force or physical violence against [name of complainant] so as to overcome or prevent [name of

It should be noted, however, that the definition of "physical force" may result in changes of law as used in particular offenses. For example, the RCC's robbery, assault, and criminal menace statutes all use the phrase "physical force that overpowers or restrains" another person.[154] Physical force that does not overpower or restrain is insufficient for liability, and may constitute a change to current District law for these offenses.[155] As another example, the RCC sexual assault statutes' uses of the term "physical force" do not include threats and do not specifically reference weapons, unlike the current definition of "force."[156] However, the revised sexual assault statute continues to provide liability for the use of threats and weapons, by directly referring to those bases of liability in the statute, rather than by doing so indirectly, through the definition "force." As a result, the revised sexual assault statute may have more delineation between the gradations of the offense than the current first degree through fourth degree sexual abuse statutes. The revised definition of "physical force" is discussed further in the respective commentaries of relevant revised offenses against persons.

Relation to National Legal Trends. The Model Penal Code (MPC) does not provide a definition for "physical force."

(11) "Position of trust with or authority over" includes a relationship with respect to a complainant of:

(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption;

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complainant]'s resistance satisfies the requirement of force or violence.]"). However, the definition of force is so broad under the District's robbery statute and case law as to be satisfied by non-physical interactions. *See Gray v. United States*, 155 A.3d 377, 382 (D.C. 2017) ("A defendant takes property by force or violence when he or she does so 'against resistance or by sudden or stealthy seizure or snatching, or by putting in fear.' D.C. Code § 22–2801.") See also D.C. Crim. Jur. Instr. § 4.300 commentary ("[Putting [name of complainant] in fear, without using actual force or physical violence, can satisfy the requirement of force or violence if the circumstances, such as threats by words or gestures, would in common experience, create a reasonable fear of danger and cause a person to give up his/her property in order to avoid physical harm.]").

[153] D.C. Code § 22-3001(5) ("'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim."). Because the RCC definition of physical force includes even the slightest physical contact, the revised definition appears to be broader than the physical form of "force" as defined in the District's current sexual abuse statutes. However, the revised sexual assault statute requires that the "physical force" cause the complainant to engage in or submit to the sexual act or sexual contact by "overcome[ing], restrain[ing], or caus[ing] bodily injury" to the complainant. This is similar to the causation requirement in the current definition of "force" and there is no actual change to current District law in this respect.

[154] RCC §§ 22A-1201 through 22A-1203.

[155] For example, the nonconsensual, reckless application of physical force to another, however slight, appears to constitute a simple assault under current District case law. *See Dunn v. United States*, 976 A.2d 217, 222 (D.C. 2009) (holding that a "shove was an assault even if it did not cause [the victim] any physical harm" and recognizing that there is no de minimis defense in the District). Also, the nonconsensual, intentional use of force, however slight, to take property from another may constitute robbery under current District case law. *See Ulmer v. United States*, 649 A.2d 295, 298 (D.C. 1994) ("To satisfy the 'force' requirement in a charge of robbery by stealthy seizure, the government need only demonstrate the 'actual physical taking of the property from the person of another, even though without his knowledge and consent, and though the property be unattached to his person.'").

[156] D.C. Code § 22-3001(5) ("'Force' means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

(B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the complainant;

(C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the complainant at the time of the act; and

(D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff.

Explanatory Note. RCC Chapter 13 defines "position of trust with or authority over" as including several relationships in regard to a complainant, such as an employee or a school or a parent.

"Position of trust with or authority over" is not defined in the current sex offenses statutes,[157] but the current sex offense statutes do define the term "significant relationship."[158] The term "significant relationship" is used in first degree sexual abuse of a minor,[159] second degree sexual abuse of a minor,[160] misdemeanor sexual abuse of a child or minor,[161] enticing a minor,[162] and the sex offense aggravators.[163] The RCC definition of "position of trust with or authority over" replaces the current definition of "significant relationship" in D.C. Code § 22-

[157] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[158] D.C. Code § 22-3001(10).

[159] D.C. Code § 22-3009.01 ("Whoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with that minor or causes that minor to engage in a sexual act shall be imprisoned for not more than 15 years and may be fined not more than the amount set forth in § 22-3571.01, or both.").

[160] D.C. Code § 22-3009.02 ("Whoever, being 18 years of age or older, is in a significant relationship with a minor and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact shall be imprisoned for not more than 7 1/2 years and may be fined not more than the amount set forth in § 22-3571.01, or both.").

[161] D.C. Code Ann. § 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child, or being 18 years of age or older and being in a significant relationship with a minor, engages in sexually suggestive conduct with that child or minor shall be imprisoned for not more than 180 days, or fined not more than the amount set forth in § 22-3571.01, or both.").

[162] D.C. Code § 22-3010.

[163] D.C. Code Ann. § 22-3020(a)(2) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim.").

3001(10)[164] and is used in the penalty enhancements for the revised sexual assault statute,[165] the revised sexual abuse of a minor statute,[166] the revised sexually suggestive contact with a minor statute,[167] and the revised enticing or arranging sexual conduct with a minor statute.[168]

Relation to Current District Law. The RCC definition "position of trust with or authority over" is substantively identical to the definition of "significant relationship"[169] provided in the current sex offense statutes, but makes a few clarificatory changes. The current definition of "significant relationship" includes "any other person in a position of trust with or authority over" the complainant.[170] Rather than include this language in the definition, the revised definition uses it as the defined term. "Position of trust with or authority over" is clearer than "significant relationship," and using the term does not substantively change current District law. The revised definition also substitutes "complainant" for "victim," consistent with the meaning of that term in the RCC.

(12) "Serious bodily injury" means bodily injury or significant bodily injury that involves:

(A) A substantial risk of death;

(B) Protracted and obvious disfigurement; or

(C) Protracted loss or impairment of the function of a bodily member or organ.

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[164] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[165] RCC § 22A-1303.

[166] RCC § 22A-1305.

[167] RCC § 22A-1306.

[168] RCC § 22A-1307.

[169] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[170] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

Explanatory Note. "Serious bodily injury" is the highest of the three levels of physical injury defined in the revised offenses against persons. The definition incorporates the definitions of both lower levels: "bodily injury" and "significant bodily injury" in RCC § 22A-1001(1) and (18). The injury must involve a substantial risk of death or result in protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member or organ.

"Serious bodily injury" is statutorily defined in Title 22 of the current D.C. Code only for animal cruelty[171] and sexual abuse offenses,[172] however there also are undefined references to "serious bodily injury" in the current aggravated assault,[173] terrorism,[174] criminal abuse or neglect of a vulnerable adult,[175] contributing to the delinquency of a minor,[176] and unauthorized use of motor vehicle[177] statutes. The RCC definition of "serious bodily injury" is used in the revised definition of "dangerous weapon,"[178] and the revised offenses of robbery,[179] assault,[180] sexual assault,[181] and [other revised offenses against persons statutes].

Relation to Current District Law. The term "serious bodily injury" is not defined in the current District code for all offenses, but is defined statutorily for the current animal cruelty[182] and sex offense statutes[183] in similar terms.[184] The DCCA has generally applied the sex offense definition of "serious bodily injury" to the offense of aggravated assault.[185]

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[171] D.C. Code § 22-1001 ("For the purposes of this section, 'serious bodily injury' means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, mutilation, or protracted loss or impairment of the function of a bodily member or organ. Serious bodily injury includes, but is not limited to, broken bones, burns, internal injuries, severe malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions.").

[172] D.C. Code § 22-3001(7) ("'Serious bodily injury' means 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.").

[173] D.C. Code § 22-404.01 ("A person commits the offense of aggravated assault if: (1) By any means, that person knowingly or purposely causes serious bodily injury to another person…."); D.C. Code § 22-404.03 ("A person commits the offense of aggravated assault on a public vehicle inspection officer if that person…causes serious bodily injury to the public vehicle inspection officer; or…engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.").

[174] D.C. Code § 22-3152 ("Weapon of mass destruction" means: (A) Any destructive device that is designed, intended, or otherwise used to cause death or serious bodily injury…."); D.C. Code § 22-22-3154 ("A person who manufactures or possesses a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries … or conspires to manufacture or possess a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries…."); D.C. Code § 22-3155 ("A person who uses, disseminates, or detonates a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries … or conspires to use, disseminate, or detonate a weapon of mass destruction capable of causing multiple deaths, serious bodily injuries….").

[175] D.C. Code § 22-936 ("A person who commits the offense of criminal abuse or criminal neglect of a vulnerable adult or elderly person which causes serious bodily injury….").

[176] D.C. Code § 22-811(b)(4) ("A person convicted of violating subsection (a) of this section that results in serious bodily injury to the minor or any other person shall be fined not more than the amount set forth in § 22-3571.01 or imprisoned for not more than 5 years, or both.").

[177] D.C. Code § 22-3215(d)(2)(ii) ("If serious bodily injury results, imprisoned for not less than 5 years, consecutive to the penalty imposed for the crime of violence.").

[178] RCC § 22A-1001(5).

[179] RCC § 22A-1201.

[180] RCC § 22A-1202.

[181] RCC § 22A-1303.

[182] D.C. Code § 22-1001.

[183] D.C. Code § 22-3001(7).

[184] The animal cruelty statute definition of "serious bodily injury" includes a reference to "mutilation" that is lacking in the sex offense definition, and explicitly includes various harms: "broken bones, burns, internal injuries, severe

The RCC definition of "serious bodily injury" is identical to the definition for sexual abuse statutes that exists in current DCCA case law with three exceptions.

First, the revised definition does not include "unconsciousness," which is in the current definition of "serious bodily injury" for sexual abuse offenses. Notwithstanding the DCCA's general adoption of the "serious bodily injury" definition for sexual abuse crimes as applicable to assault crimes, the DCCA has specifically declined to hold that for assault, "unconsciousness" is categorically of the same severity as the other harms in the current definition of "serious bodily injury."[186] In the RCC offenses against persons, a temporary loss of consciousness constitutes "significant bodily injury" per RCC § 22A-1001(18). More lengthy losses of consciousness still may constitute serious bodily injury if the unconsciousness causes "a protracted loss or impairment of the function of a bodily member or organ," but unconsciousness is no longer categorically treated as a serious bodily injury. Deleting "unconsciousness" from the revised definition of "serious bodily injury" improves the clarity of District law and the proportionality of the revised offenses because "serious bodily injury" is reserved for the most severe injuries.

Second, the revised definition no longer includes "extreme physical pain," which is in the current definition of "serious bodily injury" for sexual abuse offenses. The DCCA has stated that the term "extreme physical pain" "is regrettably imprecise and subjective, and we cannot but be uncomfortable having to grade another human being's pain."[187] Deleting "extreme physical pain" from the revised definition of "serious bodily injury" improves the clarity and the proportionality of the revised definition because "serious bodily injury" is reserved for only the most severe, objective harms.

Third, the revised definition of "serious bodily injury" no longer includes "protracted loss or impairment of the function" of a "mental faculty." It is unclear whether "mental *faculty*" (emphasis added) refers to the physical condition of the brain or more generally to psychological distress. The DCCA has not interpreted this part of the current definition of "serious bodily injury." To the extent that "mental faculty" refers to the brain, "mental faculty" is redundant with "organ" in the current definition of "serious bodily injury." To the extent that "mental faculty" refers generally to emotional or psychological distress, it may be hard to qualify, similar to "unconsciousness" and "extreme physical pain" in the current definition. Deleting "mental faculty" from the revised definition of "serious bodily injury" improves the clarity and the

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malnutrition, severe lacerations or abrasions, and injuries resulting from untreated medical conditions." The sex offense definition includes a reference to protracted loss or impairment of the function of a "mental faculty" that is lacking in the animal cruelty definition.

[185] *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.).

[186] *In re D.P.*, 122 A.3d 903, 908 n. 10 (D.C. 2015) ("In light of our conclusion that [appellant] lacked the requisite mens rea for aggravated assault, we do not determine whether the complainant's brief loss of unconsciousness—from which she fully recovered without medical treatment and which did not amount to significant bodily injury . . . amounted to serious bodily injury."); *Vaughn v. United States*, 93 A.3d 1237, 1269 n. 39 (D.C. 2014) ("We question whether the government presented evidence that [the complainant] suffered serious bodily injury at all. The government presented evidence that [the complainant] briefly lost consciousness following the attack, that the head injuries he incurred did not cause substantial pain, and that, although he sought medical care, he fully recovered from these injuries without medical intervention. This appears to fall well below the "high threshold of injury" . . . we have set to prove aggravated assault.") (internal citations omitted).

[187] *Swinton v. United States*, 902 A.2d 772, 777 (D.C. 2006).

proportionality of the revised definition because "serious bodily injury" is reserved for only the most severe, objective harms.

Other than these changes, the revised definition does not change existing District law on the meaning of "serious bodily injury." The threshold for such an injury remains high.[188] The syntax of the revised definition clarifies that, as under current District case law interpreting the definition for the sexual abuse statutes,[189] the "substantial risk" applies only to the risk of death.

Relation to National Legal Trends. The Model Penal Code (MPC) defines "serious bodily injury" for offenses against persons as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[190] At least 27 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[191] ("reformed jurisdictions") have adopted the MPC definition or have a substantively similar definition.[192]

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[188] *Swinton v. United States*, 902 A.2d 772, 775 (D.C. 2006) ("Our decisions since *Nixon* have emphasized 'the high threshold of injury, that "the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Jenkins v. United States*, 877 A.2d 1062, 1069 (D.C.2005) (internal quotation marks and citations omitted). The cases in which we have found sufficient evidence of 'serious bodily injury' to support convictions for aggravated assault thus have involved grievous stab wounds, severe burnings, or broken bones, lacerations and actual or threatened loss of consciousness. The injuries in these cases usually were life-threatening or disabling. The victims typically required urgent and continuing medical treatment (and, often, surgery), carried visible and long-lasting (if not permanent) scars, and suffered other consequential damage, such as significant impairment of their faculties. In short, these cases have been horrific." (internal citations omitted)).

[189] *Scott v. United States*, 954 A.2d 1037, 1046 (D.C. 2008) ("[W]e readily conclude that the 'substantial risk' . . . is only a substantial risk of death, not a substantial risk of extreme pain, disfigurement, or any of the other conditions listed.").

[190] Model Penal Code § 210.0(3).

[191] *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.

[192] Ala. Code § 13A-1-2(14) (defining "serious physical injury as "[p]hysical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Alaska Stat. Ann. § 11.81.900(a)(57) (defining "serious physical injury" as "(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ark. Code Ann. § 5-1-102(21) ("'Serious physical injury' means physical injury that creates a substantial risk of death or that causes protracted disfigurement, protracted impairment of health, or loss or protracted impairment of the function of any bodily member or organ."); Ariz. Rev. Stat. Ann. § 13-105(39) (defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. § 18-1-901(3)(p) (defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. § 53a-3(4) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 222(26) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health or prolonged loss or impairment of the function of any bodily organ, or which causes the unlawful termination of a pregnancy without the consent of the pregnant female."); Haw. Rev. Stat. Ann. § 707-700

("'Serious bodily injury' means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Ind. Code Ann. § 35-31.5-2-292 (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Ky. Rev. Stat. Ann. § 500.080 (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ" and specifying injuries that constitute "serious physical injury" for a person under the age of 12 years); Me. Rev. Stat. tit. 17-A, § 2(23) (defining "serious bodily injury" as "a bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member organ, or extended convalescence necessary for recovery of physical health."); Minn. Stat. Ann. § 609.02(8) (defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); Mo. Ann. Stat. § 556.061 (defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); N.H. Rev. Stat. Ann. § 625:11(VI) (defining "serious bodily injury" as "any harm to the body which causes severe, permanent or protracted loss of or impairment to the health or of the function of any part of the body."); N.J. Stat. Ann. § 2C:11-1(b) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); N.Y. Penal Law § 10.00(10) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. § 12.1-01-04(27) (defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Or. Rev. Stat. Ann. § 161.015(8) (defining "serious physical injury" as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); 18 Pa. Stat. Stat. Ann. § 2301 (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); S.D. Codified Laws § 22-1-2(44A) (defining "serious bodily injury" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life, health, or limb."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less."); Tex. Penal Code Ann. § 1.07(46) ("'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."); Utah Code Ann. § 76-6-601(11) ("'Serious bodily injury' means bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); Wash. Rev. Code Ann. § 9A.04.110 (4)(c) (defining "great bodily harm" as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ."); Wis. Stat. Ann. § 939.22(14) (defining "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement,

The revised definition of "serious bodily injury" is substantially similar to the definitions in the MPC and reformed jurisdictions. In addition, the three substantive revisions to the definition of "serious bodily injury," deleting "unconsciousness," "extreme physical pain," and impairment of a "mental faculty" are well supported by the criminal codes of the 29 reformed jurisdictions. Of the 27 reformed jurisdictions with statutory definitions of "serious bodily injury" or a similar term, only three[193] include unconsciousness in the definition. Only four of these reformed jurisdictions[194] include extreme pain or similar language in the definition. Only three reformed jurisdictions include psychological distress in the definition,[195] and two of these jurisdictions require mental illness or impairment as opposed to impairment of a "mental faculty."[196] The third reformed jurisdiction refers to impairment of a "mental faculty."[197]

(13) "Sexual act" means:

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or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.").

[193] Ind. Code Ann. § 35-31.5-2-292(2) ("unconsciousness."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("unconsciousness."); Tenn. Code Ann. § 39-11-106(34)(B) ("protracted unconsciousness.").

[194] Ind. Code Ann. § 35-31.5-2-292(3) ("extreme pain."); N.D. Cent. Code Ann. § 12.1-01-04(27) ("extreme pain."); Ohio Rev. Code Ann. § 2901.01(5) ("any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34)(C) ("extreme physical pain.")

[195] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."); Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

[196] Mont. Code Ann. § 45-2-101(66) (defining "serious bodily injury" as "bodily injury that: (i) creates a substantial risk of death; (ii) causes serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ; or (iii) at the time of injury, can reasonably be expected to result in serious permanent disfigurement or protracted loss or impairment of the function or process of a bodily member or organ. (b) The term includes serious mental illness or impairment."); Ohio Rev. Code Ann. § 2901.01(5) (defining "serious physical harm to persons" as "(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment; (b) Any physical harm that carries a substantial risk of death; (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; (e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.").

[197] Tenn. Code Ann. § 39-11-106(34) (defining "serious bodily injury" as "bodily injury that involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty; or (F) A broken bone of a child who is twelve (12) years of age or less.").

(A) The penetration, however slight, of the anus or vulva of any person by an object or body part, with intent to sexually degrade, arouse, or gratify any person; or

(B) Contact between the mouth of any person and the penis of any person, the mouth of any person and the vulva of any person, or the mouth of any person and the anus of any person with intent to sexually degrade, arouse, or gratify any person.

Explanatory Note. RCC Chapter 13 defines "sexual act" to refer to specified types of sexual penetration or contact between the mouth and specified body parts. Both subsection (A) and subsection (B) of the RCC definition require "with intent to sexually degrade, arouse, or gratify any person,"[198] which is the same intent requirement in the RCC definition of "sexual contact" in RCC § 22-1300(16). This language excludes penetration done for legitimate medical, hygenic, or law-enforcement reasons.

"Sexual act" is currently defined in D.C. Code § 22-3001(8) for the sex offense statutes[199] and is used in many sex offenses.[200] The RCC definition of "sexual act" replaces the current definition of "sexual act" in D.C. Code § 22-3001(8)[201] and is used in many revised sex offenses.[202]

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[198] Subsection (c) of the current definition of "sexual act" requires conduct "with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(8). There is no DCCA case law interpreting this intent requirement, but it is identical to the intent requirement in the current definition of "sexual contact" (D.C. Code § 22-3001(9)) and the DCCA has referred to that intent requirement as "specific intent." *See, e.g.*, *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (citing *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)). There is no statutory definition of "with intent to" in the current D.C. Code and there is no DCCA case law interpreting the specific culpable mental state that must be proven for "with intent to" in the sexual abuse statutes. Proof of such "intent" in the RCC requires is satisfied if a person is "practically certain" the result will occur, similar to a "knowledge" requirement. See RCC § 22A-206.

[199] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[200] D.C. Code §§ 22-3002 and 22-3003 (first degree and second degree sexual abuse); 22-3006 (misdemeanor sexual abuse); 22-3008 (first degree child sexual abuse); 22-3009.01 (first degree sexual abuse of a minor); 22-3010 (enticing a minor); 22-3010.02 (arranging for a sexual contact with a real or fictitious child); 22-3013 (first degree sexual abuse of a ward); 22-3015 (first degree sexual abuse of a patient or client).

[201] D.C. Code § 22-3001(8) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.").

[202] RCC §§ 22A-1303 (sexual assault); 22A-1304 (sexual abuse of a minor); 22A-1305 (sexual exploitation of an adult); 22A-1307 (enticing a minor); 22A-1308 (nonconsensual sexual conduct).

Relation to Current District Law. The revised definition of "sexual act" makes three substantive changes to the current definition of "sexual act."[203]

First, both subsection (A) and subsection (B) of the revised definition require the conduct to be done with an "intent to sexually degrade, arouse, or gratify any person." Subsection (C) of the current definition of "sexual act," regarding penetration of the anus or vulva by a hand, a finger, or any object, requires "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[204] However, the current definition of "sexual act" does not require such an intent requirement for penetration by a penis (Subsection (A)), or for contact between a mouth and a penis, vulva, or anus (Subsection (B)). There is no DCCA case law interpreting this intent requirement. In contrast, the RCC definition of "sexual act" requires the same intent requirement for all subsections and means of committing a sexual act. It may reasonably be assumed that either penetration by a penis, or contact between a mouth and a penis, vulva, or anus only occurs when a person has a sexual (as opposed to a legitimate medical, hygenic, or law enforcement) purpose. However, explicitly including an identical intent requirement for any means of committing a "sexual act" has the benefit of ensuring that second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault, which is an unresolved issued in current DCCA case law.[205]

Second, the revised definition of "sexual act" requires only an intent "to sexually degrade, arouse, or gratify any person." Subsection (C) of the current definition of "sexual act," regarding penetration of the anus or vulva by a hand, a finger, or any object, requires "an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[206] This language is identical to the intent required for the current definition of "sexual contact."[207] There is no DCCA case law interpreting this intent requirement. In contrast, the RCC definition of "sexual act" is limited to conduct with an intent "to sexually degrade, arouse, or gratify any person." The RCC definition of "sexual contact" similarly eliminates references to an intent to

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[203] D.C. Code § 22-3001(8).

[204] D.C. Code § 22-3001(8)(C).

[205] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22A-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[206] D.C. Code § 22-3001(8)(C).

[207] D.C. Code § 22-3001(9).

abuse, humiliate, or harass to avoid including touching that is not sexual in nature,[208] and is better addressed by the revised assault statute (RCC § 22A-1201) or offensive physical contact statute (RCC § 22A-1205). The revised definition of "sexual act," mirrors this change in the revised definition of "sexual contact." This change improves the consistency of the revised offenses.

Third, the revised definition of "sexual act" includes touching "with intent to sexually degrade." Subsection (C) of the current definition of "sexual act" requires, in part, "with intent to . . . degrade." This language is identical to the intent required for the current definition of "sexual contact." There is no DCCA case law interpreting the phrase. In contrast, the RCC "sexual act" definition refers to an intent to "sexually degrade." An intent to sexually degrade is specified in the RCC definition of "sexual contact" because otherwise a complainant may not be adequately covered by the revised assault statute (RCC § 22A-1201) or the offensive physical contact statute (RCC § 22A-1205) for sexual touching.[209] The revised definition of "sexual act," mirrors this change in the revised definition of "sexual contact." This change improves the consistency of the revised offenses.

Subsection (A) of the revised definition of "sexual act" also makes one revision that may change current District law. Subsection (A) of the current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis.[210] Subsection (A) of the revised definition of "sexual act," in contrast, requires the penetration of the anus or vulva of "any person." The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in a "sexual act" with the complainant and liability for the involvement of a third party.[211] Deleting "of another" and requiring "any person" improves the clarity and consistency of the revised sexual abuse statutes.

The revised definition of "sexual act" also makes three clarificatory changes to the current definition that do not substantively change District law.

First, subsection (B) of the revised definition clarifies that the contact can be between the specified body parts of "any person." Subsection (B) of the current definition does not specify "any person" or "another person," requiring only "[c]ontact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[212] This omission creates ambiguities in the

[208] For example, throwing a snowball that hits a person's clothed breast or buttocks with intent to "abuse, humiliate [or] harass" them may satisfy the requirement of a "sexual contact."

[209] The commentary to the 2017 American Law Institute (ALI) draft of revised definitions for sexual offenses notes that "[t]he murky, multifaceted nature of sexual interests and desires suggest that an effort to drawn a line between a purpose of sexual arousal and one of sexual humiliation is futile" in the draft revised definition of "sexual contact." ALI 2017 Draft Commentary at 22. The ALI draft revised definition of "sexual contact" includes "with the purpose . . . of sexual gratification." ALI Draft § 213.0.

[210] D.C. Code § 22-3001(8)(A).

[211] When subsection (A) of the current definition of "sexual act" is inserted into first degree and second degree sexual abuse (D.C. Code §§ 22-3002 and 22-3003), the plain language reading is "engages in the penetration, however slight, of the anus or vulva of another, by a penis," "causes another person to engage in the penetration, however slight, of the anus or vulva of another, by a penis," or "causes another person to submit to the penetration, however slight of the anus or vulva of another, by a penis." The plain language readings create liability for the actor penetrating the complainant, but it is unclear if there is liability for the actor causing the complainant to penetrate a third person or for the actor causing a third person to penetrate the complainant.

[212] D.C. Code § 22-3001(8)(B).

current sexual abuse offenses regarding liability for the actor engaging in "sexual contact" with the complainant and liability for the involvement of a third party.[213]

Second, the revised definition of "sexual act" no longer states that "the emission of semen is not required," as is the case in subsection (D) of the current definition of "sexual act."[214] Nothing in the remaining subsections of the current definition[215] or in the revised definition of "sexual act" suggests that emission of semen is required. The language is surplusage and potentially confusing. Consequently, the revised definition of "sexual act" omits this language to improve the clarity of the definition.

Third, the revised definition of "sexual act" contains only one provision regarding penetration of the anus or vulva. Subsection (A) of the current definition is limited to penetration of the anus or vulva by a penis,[216] while subsection (C) addresses penetration of the anus or vulva by "a hand or finger or any object."[217] No offense in the current sex offenses or the RCC sex offenses relies upon the difference in what causes the penetration, however. This distinction in the current definition is unnecessary and potentially confusing as to the intent requirement.[218] The revised definition more clearly and consistently describes the proscribed conduct.

Relation to National Legal Trends: The American Law Institute (ALI) has recently undertaken a review of the Model Penal Code's (MPC) sexual assault offenses, and has provided draft definitions of "sexual penetration"[219] and "oral sex."[220] Neither definition has an intent requirement like subsection (C) of the District's current definition of "sexual act" or the revised definition of "sexual act," but the ALI definition of "sexual penetration" does exclude penetration "except when done for legitimate medical, hygienic, or law enforcement purposes."

There is mixed support in the criminal codes of reformed jurisdictions for requiring an intent "to sexually degrade, arouse, or gratify any person" for all types of penetration in the

[213] For example, when subsection (B) of the current definition of "sexual act" is inserted into the current second degree child sexual abuse statute (D.C. Code § 22-3009), the plain language reading is "engages in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus with that child" and "causes that child to engage in contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." It is unclear whether the specified body parts must belong to the complainant, the actor, or a third party.

[214] D.C. Code § 22-3001(8)(D).

[215] D.C. Code § 22-3001(8)(A) – (C) ("'Sexual act' means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[216] D.C. Code § 22-3001(8)(A).

[217] D.C. Code § 22-3001(8)(C).

[218] E.g., it is unclear if "any object" in subsection (C) of the current definition of "sexual act" includes any body part, or if body parts are limited to those specified in subsection (C)– a hand or a finger. Construing "any object" in subsection (C) to include body parts other than a hand or a finger seems to render moot the distinction in body parts between subsection (A), which requires penetration by a penis, and subsection (C). However, if subsection (C) is limited to penetration of the specified body parts, this would mean that there is no intent requirement as to penetration by a penis as there is for penetration by a finger or object.

[219] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(a) (Tentative Draft No. 9, September 14, 2018) (defining "sexual penetration" as "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygenic, or law-enforcement purposes.").

[220] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(b) (Tentative Draft No. 9, September 14, 2018) (defining "oral sex" as "a touching of the anus or genitalia of one person by the mouth or tongue of another person.").

revised definition of "sexual act," in part because the reformed jurisdictions take a variety of approaches in defining what is required for an act of sexual penetration.

At least 13 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[221] (reformed jurisdictions) define "sexual act" or a similar term that encompasses all types of sexual penetration and oral sex,[222] but at least 12 other reformed jurisdictions[223] separately define different types of sexual penetration, such as sexual intercourse and oral sex. Only two of these reformed jurisdictions specify a "purpose" or "intent to" gratify, arouse, etc., like subsection (C) of the current definition of "sexual act" and these reformed jurisdictions limit the "intent to" requirement to the equivalent of subsection (C) in the current definition of "sexual act."[224] However, several of the reformed jurisdictions exclude from the definitions penetration for medical purposes[225] or medical and law-enforcement purposes.[226]

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[221] *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.

[222] Conn. Gen. Stat. Ann. § 53a-65(2) (defining "sexual intercourse."); Haw. Rev. Stat. Ann. § 707-730 (defining "sexual penetration."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual penetration."); Me. Rev. Stat. Ann. tit. 17-A, § 251(1)(C) (defining "sexual act."); Minn. Stat. Ann. § 609.341(1)(12) (defining "sexual penetration."); N.J. Stat. Ann. § 2C:14-1(c) (defining "sexual penetration."); N.D. Cent. Code Ann. § 12.1-20-02(4) (defining "sexual act."); N.H. Rev. Stat. Ann. § 632-A:1(V) (defining "sexual penetration."); Ohio Rev. Code Ann. § 2907.01(A) (defining "sexual conduct."); S.D. Codified Laws § 22-22-2 (defining "sexual penetration."); Tenn. Code Ann. § 39-13-501(7) (defining "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1) (defining "sexual intercourse."); Wis. Stat. Ann. § 940.225(5)(c) (defining "sexual intercourse.")

[223] Ala. Code Ann. § 13A-6-60(1), (2) (defining "sexual intercourse" and "deviate sexual intercourse."); Ariz. Rev. Stat. Ann. § 13-1401(A)(1), (A)(4) (defining "oral sexual contact" and "sexual intercourse."); Ark. Code Ann. § 5-14-101(1), (12) (defining "deviate sexual activity" and "sexual intercourse."); Colo. Rev. Stat. Ann. § 18-3-401(5), (6) (defining "sexual intrusion" and "sexual penetration."); Del. Code Ann. tit. 11, § 761(b), (c), (g), (i) (defining "cunnilingus," "fellatio," "sexual intercourse," and "sexual penetration."); Ky. Rev. Stat. Ann. § 510.010(1), (8) (defining "deviate sexual intercourse" and "sexual intercourse."); Kan. Stat. Ann. § 21-5501(a), (b) (defining "sexual intercourse" and "sodomy."); Mo. Ann. Stat. § 566.010(3), (7) (defining "deviate sexual intercourse" and "sexual intercourse."); N.Y. Penal Law § 130.00(1), (2)(a), (2)(b) (defining "sexual intercourse," "oral sexual conduct," and "anal sexual conduct."); Or. Rev. Stat. Ann. § 163.305(4), (7) (defining "oral or anal sexual intercourse" and "sexual intercourse."); 18 Pa. Stat. Ann. § 3101 (defining "deviate sexual intercourse" and "sexual intercourse."); Tex. Penal Code Ann. § 21.01(1), (3) (defining "deviate sexual intercourse" and "sexual intercourse.").

[224] Me. Rev. Stat. tit. 17-A, § 251(1)(C) (defining "sexual act" to include "[a]ny act involving direct physical contact between the genitals or anus of one and an instrument or device manipulated by another person when that act is done for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(3) (defining "deviate sexual intercourse" as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the anus by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any purpose or for the purpose of terrorizing the victim.").

[225] Ky. Rev. Stat. Ann. § 510.010(1), (8) (stating "deviate sexual intercourse" does not include "penetration of the anus by any body part or a foreign object in the course of the performance of generally recognized health-care practices" and "'sexual intercourse' does not include penetration of the sex organ by any body part or a foreign object in the course of the performance of generally recognized health-care practices."); S.D. Codified Laws § 22-22-2 (stating that "[p]ractitioners of the healing arts lawfully practicing within the scope of their practice . . . are not included within the provisions" of the definition of "sexual penetration."); Wash. Rev. Code Ann. § 9A.44.010(1)(b) (stating that "sexual intercourse" includes "any penetration of the vagina or anus however slight, by an object, when

(14) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to sexually degrade, arouse, or gratify any person.

Explanatory Note. RCC Chapter 13 defines "sexual contact" as touching, directly or indirectly, with any clothed or any unclothed body part or object, specified body parts with intent to sexually degrade, arouse, or gratify any person.[227]

"Sexual contact" is currently defined in D.C. Code § 22-3001(9) for the current sex offense statutes[228] and is used in all the sex offenses that require a "sexual contact."[229] The RCC definition of "sexual contact" replaces the current definition of "sexual contact" in D.C. Code § 22-3001(9).[230] The RCC definition is used in all the revised sex offenses that require "sexual contact."[231]

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committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.").

[226] Kan. Stat. Ann. § 21-5501(a), (b) (stating that "sexual intercourse" does not include "penetration of the female sex organ by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto" and that "sodomy" does not include "penetration of the anal opening by a finger or object in the course of the performance of: (1) Generally recognized health care practices; or (2) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto."); 18 Pa. Stat. Ann. § 3101 (stating that "deviate sexual intercourse" includes "penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.");

[227] The DCCA has referred to the language "with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" in the current statutory definition of "sexual contact" as a kind of "specific intent." *See, e.g.*, *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (citing *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)). There is no statutory definition of "with intent to" in the current D.C. Code and there is no DCCA case law interpreting the specific culpable mental state that must be proven for "with intent to" in the sexual abuse statutes. Proof of such "intent" in the RCC requires is satisfied if a person is "practically certain" the result will occur, similar to a "knowledge" requirement. See RCC §22A-206.

[228] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[229] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse); 22-3006 (misdemeanor sexual abuse); 22-3009 (second degree child sexual abuse); 22-3009.02 (second degree sexual abuse of a minor); 22-3010 (enticing a minor); 22-3010.02 (arranging for a sexual contact with a real or fictitious child); 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client).

[230] D.C. Code § 22-3001(9) ("'Sexual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[231] RCC §§ 22A-1303 (sexual assault); 22A-1304 (sexual abuse of a minor); 22A-1305 (sexual exploitation of an adult); 22A-1307 (enticing a minor); 22A-1308 (nonconsensual sexual conduct).

Relation to Current District Law. The revised definition of "sexual contact" is identical to the current definition of "sexual contact"[232] except for two substantive changes.

First, the revised definition of "sexual contact" does not include touching with "intent to abuse, humiliate, [or] harass." The current definition of "sexual contact" refers to touching with "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[233] There is no DCCA case law interpreting the phrase "with intent to abuse, humiliate [or] harass."[234] An intent to abuse, humiliate, or harass appears to broaden the definition of "sexual contact" to include touching that is not sexual in nature,[235] and is better addressed by the revised assault statute (RCC § 22A-1201) or offensive physical contact statute (RCC § 22A-1205). The revised definition of "sexual contact" excludes touching "with intent to abuse, humiliate, [or] harass." This change improves the consistency and proportionality of the revised assault and sex offenses.

Second, the revised definition of "sexual contact" includes touching "with intent to sexually degrade." The current definition of "sexual contact" requires, in part, "with intent to . . . degrade." There is no DCCA case law interpreting this phrase. Unlike an intent to abuse, humiliate, or harass, an intent to sexually degrade a complainant may not be adequately covered by the revised assault statute (RCC § 22A-1201) or the offensive physical contact statute (RCC § 22A-1205).[236] This change improves the consistency and proportionality of the revised sexual offenses.

Relation to National Legal Trends: There is strong support in the criminal codes of reformed jurisdictions for limiting the additional intent requirement in the revised definition of "sexual contact" to an intent to "sexually degrade, arouse, or gratify any person" and deleting an intent to "abuse, humiliate, [or] harass" from the current definition. At least 24 of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[237] (reformed jurisdictions) define "sexual contact" or a similar term that encompasses sexual touching.[238] Twenty-one of these reformed jurisdictions

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[232] D.C. Code § 22-3001(9) ("'Sexual contact' means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[233] D.C. Code § 22-3001(9).

[234] However, the DCCA has stated generally that the "element of intent may be shown by virtue of touching or attempting to touch a complainant's private area. *Nkop v. United States*, 945 A.2d 617, 619, 620 (D.C. 2008) (interpreting "sexual contact" in the context of a misdemeanor sexual abuse case).

[235] For example, throwing a snowball that hits a person's clothed breast or buttocks with intent to "abuse, humiliate [or] harass" them may satisfy the requirement of a "sexual contact."

[236] The commentary to the 2017 American Law Institute (ALI) draft of revised definitions for sexual offenses notes that "[t]he murky, multifaceted nature of sexual interests and desires suggest that an effort to drawn a line between a purpose of sexual arousal and one of sexual humiliation is futile" in the draft revised definition of "sexual contact." ALI 2017 Draft Commentary at 22. The ALI draft revised definition of "sexual contact" includes "with the purpose . . . of sexual gratification." ALI Draft § 213.0.

[237] *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.

[238] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Ariz. Rev. Stat. Ann. § 13-1401(A)(3) (defining "sexual contact" as "any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to

engage in such conduct."); Ark. Code Ann. § 5-14-102(11) (defining "sexual contact" as "any act of sexual gratification involving the touching, directly or through clothing, of the sex organs, buttocks, or anus of a person or the breast of a female."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); Del. Code Ann. tit. 11, § 761(f) (defining "sexual contact" as (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing."); Haw. Rev. Stat. Ann. § 707-700 (defining "sexual contact" as "any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of another, or of the sexual or other intimate parts of the actor by another, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.); Ky. Rev. Stat. Ann. § 510.010(7) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."); Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires."); N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."); Ohio Rev. Code Ann. § 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."); Or. Rev. Stat. Ann. § 135.305(6) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimidate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (defining "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."); S.D. Codified Laws § 22-22-7.1 (defining "sexual contact" as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party. Practitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be

specify an additional intent or purpose requirement[239] or require that the contact can be reasonably construed for a specified intent or purpose.[240] Of these 21 reformed jurisdictions, two

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made by the court prior to trial, are not included within the provisions of this section. In any pretrial proceeding under this section, the prosecution has the burden of establishing probable cause."); Tex. Penal Code Ann. § 21.01(2) (defining "sexual contact" as "except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."); Tenn. Code Ann. § 39-13-501(6) (defining "sexual contact" as "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification."); Wash. Rev. Code Ann. § 9A.44.010(2) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[239] Ala. Code § 13A-6-60(3) (defining "sexual contact" as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party."); Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused.); Ky. Rev. Stat. Ann. § 510.010(7) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact."); Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."); Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires."); Ohio Rev. Code Ann. § 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."); Or. Rev. Stat. Ann. § 135.305(6) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimidate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."); 18 Pa. Stat. and Cons. Stat. Ann. § 3101 (defining "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in any person."); S.D. Codified Laws § 22-22-7.1 (defining "sexual contact" as "any touching, not amounting to rape, whether or not through clothing or other covering, of the breasts of a female

jurisdictions include an intent or purpose to abuse[241] and three jurisdictions include an intent or purpose to humiliate.[242] None of the 21 reformed jurisdictions specifically include an intent or purpose to "harass," but one of the jurisdictions requires an intent to "terrorize"[243] and two additional reformed jurisdictions require an "aggressive" intent or the purpose of arousing or satisfying "aggressive desires."[244]

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or the genitalia or anus of any person with the intent to arouse or gratify the sexual desire of either party. Practitioners of the healing arts lawfully practicing within the scope of their practice, which determination shall be conclusive as against the state and shall be made by the court prior to trial, are not included within the provisions of this section. In any pretrial proceeding under this section, the prosecution has the burden of establishing probable cause."); Tex. Penal Code Ann. § 21.01(2) (defining "sexual contact" as "except as provided by Section 21.11, any touching of the anus, breast, or any part of the genitals of another person with intent to arouse or gratify the sexual desire of any person."); Wash. Rev. Code Ann. § 9A.44.010(2) (defining "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[240] Del. Code Ann. tit. 11, § 761(f) (defining "sexual contact" as (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia; or (3) Intentionally causing or allowing another person to touch the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. "Sexual contact" shall also include touching when covered by clothing."); N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as "the intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including emissions, tongue, anus, breasts, and buttocks. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."); Tenn. Code Ann. § 39-13-501(6) (defining "sexual contact" as "includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's, the defendant's, or any other person's intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[241] Colo. Rev. Stat. Ann. § 18-3-401(4) (defining "sexual contact" as "the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."); Me. Rev. Stat. tit. 17-A, § 251(1)(D) (defining "sexual contact" as "any touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.").

[242] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

[243] Mo. Ann. Stat. § 566.010(6) (defining "sexual contact" as "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim.").

[244] Minn. Stat. Ann. § 609.341(11) (specifying various kinds of touching that constitute "sexual contact" for different offenses, but consistently requiring "with sexual or aggressive intent."); N.J. Stat. Ann. § 2C:14-1(d) (defining "sexual contact" as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."); N.Y. Penal Law § 130.00(3) (defining "sexual contact" as any touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of

The 21 reformed jurisdictions generally require an intent or purpose to sexually arouse or gratify, but two jurisdictions do include an intent or purpose to degrade[245] or sexually degrade.[246]

the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed."); N.D. Cent. Code Ann. § 12.1-20-02(5) (defining "sexual contact" as any touching, whether or not through the clothing or other covering, of the sexual or other intimate parts of the person, or the penile ejaculation or ejaculate or emission of urine or feces upon any part of the person, for the purpose of arousing or satisfying sexual or aggressive desires.").

[245] Conn. Gen. Stat. Ann. § 53a-65(3) (defining "sexual contact" as any contact with the intimate parts of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person.").

[246] Wis. Stat. Ann. § 939.22(34) (defining "sexual contact" as various types of touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification.").

RCC § 22A-1302. LIMITATIONS ON LIABILITY AND SENTENCING FOR RCC CHAPTER 13 OFFENSES.

(a) *Age of Liability.* Notwithstanding any other provision of law, a person under the age of 12 is not subject to liability for offenses in this subchapter other than:
  (1) RCC § 22A-1303(a) first degree sexual assault; or
  (2) RCC § 22A-1303(c) third degree sexual assault.

(b) *Merger of Related Sex Offenses.* Multiple convictions for two or more offenses in this Chapter arising from the same course of conduct shall merge in accordance with the rules and procedures established in RCC § 212(d)-(e).

Commentary

Explanatory Note. *RCC § 22A-1302 establishes two limitations on liability and sentencing for all sex offenses in RCC Chapter 13. First, for specified offenses in RCC Chapter 13, a person under the age of 12 is not subject to liability. Second, multiple convictions for two or more sex offenses in RCC Chapter 13 shall merge in accordance with rules and procedures established elsewhere in the RCC.*

RCC § 22A-1302(a) establishes that persons under the age of 12 years are not subject to liability for any offense in RCC Chapter 13 except for RCC § 22A-1303(a), first degree sexual assault, and RCC § 22A-1303(c), third degree sexual assault.

RCC § 22A-1302(b) creates a statutory requirement of merger for all Chapter 13 offenses. This requirement is categorical, barring multiple convictions for any combination of offenses in Chapter 13: (1) whenever they arise from the same course of conduct[247]; and (2) without regard to whether they satisfy one or more of the substantive merger principles set forth by RCC § 212(a).[248] That said, the merger provided for in this section is subject to the rules and procedures established in RCC § 212(d)-(e). For example, whenever two or more convictions for Chapter 13 offenses merge under this section, the offense that remains shall—pursuant to RCC § 212(d)—be: (1) the most serious offense among the offenses in question; or (2) if the offenses are of equal seriousness, any offense that the court deems appropriate.[249] Additionally, RCC § 22A-1302 only limits—in accordance with RCC § 212(e)—the entry of a final judgment of liability. This means that a person may be found guilty of two or more Chapter 13 offenses that merge under this section.[250] However, no person may be subject to a conviction for more than one of those offenses after: (1) the time for appeal has expired; or (2) the judgment appealed from has been affirmed.[251]

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[247] As a general rule, two offenses arise from the same course of conduct when—at minimum—a single act or omission by the defendant satisfies the requirements of liability for each. However, multiple charges may be based on a series of related acts or omissions yet still arise from the same course of conduct.

[248] *See also* RCC § 212(b) (establishing that merger is ultimately a matter of legislative intent).

[249] The most serious offense will typically be the offense that is subject to the highest offense classification; however, if two or more offenses are both subject to the same classification, but one offense is subject to a higher statutory maximum, then that higher penalized offense is "most serious" for purposes of subsection (d).

[250] That is, RCC § 22A-1302 should not be construed as in any way constraining the number of Chapter 13 offenses over which the fact finder may deliberate.

[251] *See* Commentary on RCC § 212(e) ("This clarification is intended to provide D.C. Superior Court judges with sufficient leeway to continue their current practice of entering judgment on all counts for which the defendant has been convicted, thereby leaving merger issues to the D.C. Court of Appeals for resolution on direct review, should they so choose.")

Relation to Current District Law. *The limitations on liability and sentencing for RCC Chapter 13 offenses statute changes existing District law in two main ways that reduce unnecessary overlap with other offenses and improve the proportionality of penalties.*

First, the limitations on liability and sentencing for RCC Chapter 13 offenses statute (limitations on liability and sentencing statute) prohibits liability for RCC Chapter 13 sex offenses except for first degree sexual assault and third degree sexual assault. The current District sex offense statutes[252] do not have a general statutory provision that addresses the age at which a person is liable for the sexual abuse offenses, and the DCCA has not discussed an age limit for liability. In contrast, the RCC prohibits a person under the age of 12 years from being convicted of RCC sex offenses except for RCC § 22A-1303(a), first degree sexual assault, and RCC § 22A-1303(c), third degree sexual assault.[253] Limiting liability for a person under 12 years of age to first degree and third degree sexual assault ensures that the RCC sex offenses are reserved for predatory behavior targeting young complainants.[254] First degree sexual assault and third degree sexual assault involve the use of physical force, weapons, serious threats, or involuntary intoxication of the complainant.

Second, the limitations on liability and sentencing statute prohibits multiple convictions for RCC Chapter 13 sex offenses when they arise from the same course of conduct, in accordance with the rules and procedures established in RCC § 212(d)-(e). The current District sex offense statutes also do not have a general statutory provision that addresses merger of related sex offenses. However, the current enticing a minor statute has a related provision that prohibits consecutive sentences for enticing and engaging in the sexual act or sexual contact.[255]

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[252] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01), the attempt statute (D.C. Code § 22-3018), the consent defense statute for first degree through fourth degree sexual abuse and misdemeanor sexual abuse (D.C. Code § 22-3007), the defense statute for child sexual abuse, sexual abuse of a minor, sexual abuse of a secondary education student, and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3011), the defense statute for sexual abuse of a ward and sexual abuse of a patient or client (D.C. Code § 22-3017), and the aggravating circumstances statute (D.C. Code § 22-3020).

[253] The RCC sex offenses from which a person under the age of 12 years is exempt when there would otherwise be liability are: second degree sexual assault (RCC § 22A-1303(b)), fourth degree sexual assault (RCC § 22A-1303(d), sexual abuse of a minor (RCC § 22A-1304), and nonconsensual sexual conduct (RCC § 22A-1309). The remaining sex offenses require that the actor be at least 18 year of age (RCC §§ 22A-1306 (sexually suggestive conduct with a minor); 22A-1307 (enticing a minor); 22A-1308 (arranging for sexual conduct with a minor) or typically involve adult actors.

[254] The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and exempts persons under the age of 12 years for liability for sex offenses other than those that involve the use of aggravated force or restraint, a deadly weapon, or infliction of serious bodily injury. Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018). The commentary notes that the "revised Code rests this judgment on the concern that 'physical force' . . . could too easily be read to include the kind of tussling among very young children that is far removed from the force appropriately associated with the offense of rape." Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) cmt. at 51.

[255] D.C. Code § 22-3010(c) ("No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact under subsection (a)(2) of this section and engaging in that sexual act or sexual contact

There is limited District of Columbia Court of Appeals (DCCA) case law on the merger of the current sex offenses.[256] For example, it is an unresolved issued in current DCCA case law whether second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault which would merge when charges are based on the same conduct.[257] In contrast, the revised statute categorically prohibits sentencing for multiple convictions of charges in RCC Chapter 13 arising from the same course of conduct. For example, an adult actor that uses force to cause an incarcerated complainant to engage in a "sexual act" could be charged with and found guilty of both first degree sexual assault and first degree sexual exploitation of an adult, but a judgment of conviction could only be entered for the "most serious offense," first degree sexual assault. This change improves the consistency and proportionality of the revised sex offenses.

Relation to National Legal Trends: It is difficult to discuss merger of sex offenses in other jurisdictions due to the wide variety of statutory organization and penalties. However,

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with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.").

[256] There is little DCCA case law on the merger of offenses based upon a lesser included relationship. *See In re M.S.*, 171 A.3d 155, 157, 162, 165-66, 167 (D.C. 2017) (holding that misdemeanor sexual abuse and fourth degree sexual abuse are lesser included offenses of second degree child sexual abuse and merge with second degree child sexual abuse, but that third degree sexual abuse is not a lesser included offense of second degree child sexual abuse and does not merge with second degree child sexual abuse). There is a wider body of DCCA case law regarding whether multiple convictions of a single offense should merge based upon whether the actor was acting upon a "fresh impulse." *See, e.g., Barber v. United States*, 179 A.3d 883, 895-96 (D.C. 2018) (holding that appellant's three convictions for third degree sexual abuse did not merge because his actions "demonstrate an attempt to satisfy a different kind of sexual gratification and a fresh impulse" when he slapped complainant's buttocks and then flipped complainant over to touch her breast and the "subsequent use of a handgun in touching [complainant's] thighs and buttocks constitutes a fresh impulse that makes merger inappropriate."); *Cullen v. United States*, 886 A.2d 870, 874-75 (D.C. 2005) (holding that appellant's two counts of misdemeanor sexual abuse constituted one continuous course of conduct and ordering one of the convictions vacated when appellant's mouth made contact with complainant's inner thigh and then complainant's breast because the two actions were separated by a "brief interval" that "did not terminate appellant's original intent" to engage in sexual contact without complainant's consent) (internal quotations omitted).

[257] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22A-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

there is limited supported in the criminal codes of other jurisdictions for limiting liability for young persons for certain sex offenses. The American Law Institute has recently undertaken a review of the MPC's sexual assault offenses, and exempts persons under the age of 12 years for liability for sex offenses other than those that involve the use of aggravated force or restraint, a deadly weapon, or infliction of serious bodily injury.[258] The ALI commentary notes that the "revised Code rests this judgment on the concern that 'physical force' . . . could too easily be read to include the kind of tussling among very young children that is far removed from the force appropriately associated with the offense of rape."[259]

In addition, several of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[260] ("reformed jurisdictions") limit the liability of young complainants for some or all of the jurisdictions' sex offenses. At least two of the 29 reformed jurisdictions statutorily exclude actors younger than 16 years of age or 17 years of age from liability for all age-based sex offenses.[261] Three additional reformed jurisdictions exclude young actors from all gradations of age-based sexual assault except for the most serious gradation for the youngest complainants.[262] Finally, two more reformed jurisdictions reserve the most serious penalty for age-based sex offenses for actors that are 18 years of age or older.

[258] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.").

[259] Model Penal Code: Sexual Assault and Related Offenses § 213.0(6)(h) (Tentative Draft No. 9, September 14, 2018) (defining "actor.") cmt. at 51.

[260] *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.

[261] Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1) (requiring that the actor be 16 years of age or older for sexual intercourse with a complainant who is less than 12 years of age, or less than 16 years but more than 12 years of age when the actor is at least 2 years older); Alaska Stat. Ann. §§ 11.41.434(a)(1), 11.41.41.436(a)(1) (requiring that the actor be 16 years of age or older for sexual penetration with a complainant under 13 years of age and the actor be 17 years of age or older for sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger).

[262] Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b) (first degree rape offense prohibiting any actor from engaging in sexual intercourse with a complainant that is less than 12 years old, but requiring that the actor be 18 years of age or more for second degree rape [sexual intercourse with a complainant less than 14 years old] and requiring that the actor be 21 years of age or more for third degree rape [sexual intercourse with a complainant less than 16 years of age]); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4) (offense of third degree rape prohibiting an actor 21 years of age or older from engaging in sexual intercourse with a person less than 17 years of age and second degree rape prohibiting an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 15 years of age, but first degree rape prohibiting any actor from engaging in sexual intercourse with a complainant less than 11 years old or an actor 18 years of age or more from engaging in sexual intercourse with a complainant less than 13 years of age), 130.96 (offense of predatory sexual assault against a child prohibiting an actor 18 years of age or more from committing first degree rape when the complainant is less than 13 years old); Utah Code Ann. §§ 76-5-401(1), (2)(a), 76-5-402.1(1) (offense of unlawful sexual activity with a minor prohibiting an actor 18 years of age or older from engaging in sexual intercourse with a complainant who is 14 years of age or older but less than 16 years of age, but the offense of rape of a child prohibiting any actor from engaging in sexual intercourse with a complainant under the age of 14 years).

RCC § 22A-1303. SEXUAL ASSAULT.

(a) *First Degree Sexual Assault.* An actor commits the offense of first degree sexual assault when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act;
  (2) In one or more of the following ways:
    (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant;
    (B) By threatening:
      (i) To kill or kidnap any person;
      (ii) To commit an unwanted sexual act or cause significant bodily injury to any person; or
    (C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:
      (i) With intent to impair the complainant's ability to express unwillingness; and
      (ii) In fact, the drug, intoxicant, or other substance renders the complainant:
        (I) Asleep, unconscious, or passing in and out of consciousness;
        (II) Substantially incapable, mentally or physically, of appraising the nature of the sexual act; or
        (III) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual act.

(b) *Second Degree Sexual Assault.* An actor commits the offense of second degree sexual assault when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act;
  (2) In one or more of the following ways:
    (A) By coercion; or
    (B) When the complainant is:
      (i) Asleep, unconscious, or passing in and out of consciousness;
      (ii) Mentally or physically incapable of appraising the nature of the sexual act; or
      (iii) Mentally or physically incapable of communicating unwillingness to engage in the sexual act.

(c) *Third Degree Sexual Assault.* An actor commits the offense of third degree sexual assault when that actor:
  (1) Knowingly causes the complainant to engage in or submit to sexual contact;
  (2) In one or more of the following ways:
    (A) By using a weapon or physical force that overcomes, restrains, or causes bodily injury to the complainant;
    (B) By threatening:
      (i) To kill or kidnap any person;

(ii) To commit an unwanted sexual act or cause significant bodily injury to any person; or

(C) By administering or causing to be administered to the complainant, without the complainant's effective consent, a drug, intoxicant, or other substance:

(i) With intent to impair the complainant's ability to express unwillingness; and

(ii) In fact, the drug, intoxicant, or other substance renders the complainant:

(I) Asleep, unconscious, or passing in and out of consciousness;

(II) Substantially incapable, mentally or physically, of appraising the nature of the sexual contact; or

(III) Substantially incapable, mentally or physically, of communicating unwillingness to engage in the sexual contact.

(d) *Fourth Degree Sexual Assault.* An actor commits the offense of fourth degree sexual assault when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact;

(2) In one or more of the following ways:

(A) By coercion; or

(B) When the complainant is:

(i) Asleep, unconscious, or passing in and out of consciousness;

(ii) Mentally or physically incapable of appraising the nature of the sexual contact; or

(iii) Mentally or physically incapable of communicating unwillingness to engage in the sexual contact.

(e) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancements in subsection (i) of this section:

(1) First degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(3) Third degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(4) Fourth degree sexual assault is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Offense Penalty Enhancements.* The penalty classification for any gradation of this offense may be increased in severity by one class when, in addition to the elements of the offense gradation, one or more of the following is proven:

(1) The actor recklessly caused the sexual conduct by displaying or using what, in fact, was a dangerous weapon or imitation dangerous weapon;

(2) The actor knowingly acted with one or more accomplices that were present at the time of the offense;

(3) The actor recklessly caused serious bodily injury to the complainant during the sexual conduct; or

(4) At the time of the offense:

(A) The complainant, in fact, was under 12 years of age and the actor was, in fact, at least four years older than the complainant;

(B) The actor recklessly disregarded that the complainant was under 16 years of age and the actor was, in fact, at least four years older than the complainant;

(C) The actor recklessly disregarded that the complainant was under 18 years of age, that the actor was in a position of trust with or authority over the complainant, and that the actor, in fact, was at least four years older than the complainant;

(D) The actor recklessly disregarded that the complainant was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 2 years older than the complainant;

(E) The actor recklessly disregarded that the complainant was 65 years of age or older and the actor was, in fact, under 65 years old; or

(F) The actor recklessly disregarded that the complainant was a vulnerable adult.

(g) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "serious bodily injury," "significant bodily injury," "dangerous weapon," "imitation dangerous weapon," "bodily injury," "physical force," "effective consent," "coercion," "sexual act," "sexual contact," "position of trust with or authority over," and "vulnerable adult" have the meanings specified in § 22A-1301.

(h) *Effective Consent Defense.* In addition to any defenses otherwise applicable to the actor'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, provided that:

(1) The conduct does not inflict significant bodily injury or serious bodily injury, or involve the use of a dangerous weapon; or

(2) At the time of the conduct, none of the following is true:

(A) The complainant is under 16 years of age and the actor is more than four years older than the complainant;

(B) The complainant is under 18 years of age and the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least four years older than the complainant;

(C) The complainant is legally incompetent; or

(D) The complainant is substantially incapable, mentally or physically, of appraising the nature of the proposed sexual act or sexual contact.

(3) If evidence is present at trial of the complainant's effective consent or the actor's reasonable belief that the complainant gave effective consent to the actor's conduct, the government must prove the absence of such circumstances beyond a reasonable doubt.

Commentary

Explanatory Note. *The RCC sexual assault offense prohibits causing a complainant to engage in or submit to specified acts of sexual penetration or sexual touching by means of physical force, threats, nonconsensual intoxication of the complainant, or when the complainant is physically or mentally impaired. The penalty gradations are based on the nature of the sexual conduct, as well as the means by which the actor causes the complainant to engage in or submit to the sexual conduct. The revised sexual assault offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse,[263] second degree sexual abuse,[264] third degree sexual abuse,[265] and fourth degree sexual abuse.[266] The revised sexual assault offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,[267] the attempt statute,[268] and the aggravating sentencing factors.[269] Insofar as they are applicable to first degree through fourth degree sexual abuse, the revised sexual assault offense also replaces three penalty enhancements: the "while armed" penalty enhancement,[270] the enhancement for minors,[271] and the enhancement for senior citizens.[272]*

Subsection (a) specifies the various types of prohibited conduct in first degree sexual assault, the highest gradation of the revised sexual assault offense. Subsection (a)(1) specifies part of the prohibited conduct—causing the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person. Subsection (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22A-206 that means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a sexual act. Subsection (a)(2) specifies the prohibited means by which the actor must cause the complainant to engage in or submit to the sexual act. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(1) applies to each type of prohibited conduct in subsection (a)(2).

For subsection (a)(2)(A), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to a sexual act by using a weapon or "physical force" that overcomes, restrains, or causes "bodily injury" to the complainant. "Physical force" is defined in RCC § 22A-1301 as "the application of physical strength." "Bodily injury" is defined in RCC § 22A-1301 as "significant physical pain, illness, or any impairment of physical condition." For subsection (a)(2)(B), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to the sexual act by threatening to kill or kidnap any person or threatening to commit any unwanted sexual act or cause "significant bodily injury" to any person. "Significant bodily injury" is a defined term in RCC § 22A-1001 that means an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such

[263] D.C. Code § 22-3002.
[264] D.C. Code § 22-3003.
[265] D.C. Code § 22-3004.
[266] D.C. Code § 22-3005.
[267] D.C. Code § 22-3007.
[268] D.C. Code § 22-3018.
[269] D.C. Code § 22-3020.
[270] D.C. Code § 22-4502.
[271] D.C. Code § 22-3611.
[272] D.C. Code § 22-3601.

as a fracture of a bone. For subsection (a)(3)(C), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to a sexual act by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception. In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness (subsection (a)(2)(C)(i)). The intoxicant or other substance must render the complainant asleep, unconscious, or passing in and out of consciousness (subsection (a)(2)(C)(ii)(I)) or "substantially incapable," mentally or physically, of either appraising the nature of the sexual act (subsection (a)(2)(C)(ii)(II)) or communicating unwillingness to engage in the sexual act (subsection (a)(2)(C)(ii)(III)). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the required effect of the intoxicant or other substance.

Subsection (b) specifies the various types of prohibited conduct in second degree sexual assault. Like first degree sexual assault, second degree sexual assault requires the actor to "knowingly" cause the complainant to engage in or submit to a "sexual act," but the prohibited means of doing so differ. Subsection (b)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22A-206 that means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a sexual act. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (b)(1) applies to each of the prohibited means of causing the complainant to engage or submit to the "sexual act." For subsection (b)(2)(A), the actor must be practically certain that he or she caused the complainant to engage in or submit to the sexual act by "coercion," a defined term in RCC § 22A-1001 that prohibits specific threats such as accusing someone of a criminal offense, as well as sufficiently serious threats that would cause a reasonable person to comply. For subsection (b)(2)(B), the actor be "practically certain" that the complainant is asleep, unconscious, or passing in and out of consciousness (subsection (b)(2)(B)(i)) or "incapable," mentally or physically of either appraising the nature of the sexual act (subsection (b)(2)(B)(ii)) or communicating unwillingness to engage in the sexual act (subsection (b)(2)(B)(iii)).

Subsection (c) specifies the various types of prohibited conduct in third degree sexual assault. Subsection (c)(1) specifies part of the prohibited conduct—causing the complainant to engage in or submit to "sexual contact." "Sexual contact" is a defined term in RCC § 22A-1301 that means touching specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. Subsection (c)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22A-206 that means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to sexual contact. Subsection (c)(2) specifies the prohibited the means by which the actor must cause the complainant to engage in or submit to the sexual contact. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (c)(1) applies to each type of prohibited conduct in subsection (c)(2).

The prohibited means of causing the sexual act for third degree sexual assault are the same as they are for first degree sexual assault. For subsection (c)(2)(A), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to sexual contact by using a weapon or "physical force" that overcomes, restrains, or causes "bodily injury" to the complainant. "Physical force" is defined in RCC § 22A-1301 as "the application of physical strength." "Bodily injury" is a defined term in RCC § 22A-1301 as "significant

physical pain, illness, or ay impairment of physical condition." For subsection (c)(2)(B), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to the sexual contact by threatening to kill or kidnap any person or threatening to commit any unwanted sexual act or cause "significant bodily injury" to any person. "Significant bodily injury" is a defined term in RCC § 22A-1001 that means an injury that requires hospitalization or immediate medical treatment, or is a specific type of injury, such as a fracture of a bone. For subsection (c)(2)(C), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to sexual contact by administering or causing to be administered to the complainant an intoxicant or other substance without the complainant's "effective consent." "Effective consent" is a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception. In addition, the actor must administer the intoxicant or other substance "with intent" to impair the complainant's ability to express unwillingness (subsection (a)(2)(C)(i)). The intoxicant or other substance must render the complainant asleep, unconscious, or passing in and out of consciousness (subsection (c)(2)(C)(ii)(I)) or "substantially incapable," mentally or physically, of either appraising the nature of the sexual act (subsection (c)(2)(C)(ii)(II)) or communicating unwillingness to engage in the sexual act (subsection (c)(2)(C)(ii)(III)). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to the required effect of the intoxicant or other substance.

Subsection (d) specifies the various types of prohibited conduct in fourth degree sexual assault. Like third degree sexual assault, fourth degree sexual assault requires the actor to "knowingly" cause the complainant to engage in or submit to "sexual contact," but the prohibited means of doing so differ. Subsection (d)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22A-206 that means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to sexual contact. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (d)(1) applies to each of the prohibited means of causing the complainant to engage or submit to the "sexual contact."

The prohibited means of causing the sexual contact for fourth degree sexual assault are the same as they are for second degree sexual assault. For subsection (d)(2)(A), the actor must be "practically certain" that he or she caused the complainant to engage in or submit to sexual contact by "coercion," a defined term in RCC § 22A-1001 that prohibits specific threats such as accusing someone of a criminal offense, as well as sufficiently serious threats that would cause a reasonable person to comply. Subsection (d)(2)(B) requires that the actor be "practically certain" that the complainant is asleep, unconscious, or passing in and out of consciousness (subsection (d)(2)(B)(i)) or "incapable," mentally or physically of either appraising the nature of the sexual act (subsection (d)(2)(B)(ii)) or communicating unwillingness to engage in the sexual contact (subsection (d)(2)(B)(iii)). The prohibited means of conduct for fourth degree sexual assault are the same as they are for second degree sexual assault. These gradations of the revised offense differ only in whether they require a "sexual act" or "sexual contact."

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

Subsection (f) codifies several penalty enhancements for the revised sexual assault offense. If one or more of the penalty enhancements in subsection (f)(1) through subsection (f)(4) is proven, the penalty for the offense "may" be increased by one class. Subsection (f)(1) codifies a penalty enhancement for recklessly causing the sexual conduct by displaying or using what, in fact, is a "dangerous weapon" or "imitation dangerous weapon." "Recklessly" is a

defined term in RCC § 22A-206 to mean that the actor is aware of a substantial risk that he or she caused the sexual conduct by displaying or using the object. "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the object is a "dangerous weapon" or "imitation dangerous weapon" as those terms are defined in RCC § 22A-1001. Subsection (f)(2) codifies a penalty enhancement if the actor "knowingly" acted with one or more accomplices that were present at the time of the offense. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be "practically certain" that he or she acted with an accomplice that was present or accomplices that were present. Subsection (f)(3) codifies a penalty enhancement if the actor "recklessly" caused "serious bodily injury" to the complainant during the sexual conduct. The actor must be aware of a substantial risk that his or her conduct caused "serious bodily injury" to the complainant. "Serious bodily injury" is a defined term in RCC § 22A-1301 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 or organ.

Subsection (f)(4)(A), subsection (f)(4)(B), subsection (f)(4)(C), and subsection (f)(4)(D) codify additional penalty enhancements for when a complainant is under the age of 18 years. These penalty enhancements use the phrase "in fact," a defined term that indicates there is no culpable mental state for a given element, and the culpable mental state of "recklessly." "Recklessly" is a defined term in RCC § 22A-206 that means the actor must be aware of a substantial risk of a given element. For the penalty enhancement in subsection (f)(4)(A), the complainant must be "in fact" under the age of 12 years and the actor must be "in fact" at least four years older the complainant. There is no culpable mental state requirement for either the age of the complainant or the required age gap. For the penalty enhancement in subsection (f)(4)(B), the actor must "recklessly disregard" that the complainant was under 16 years of age and the actor must be, in fact, at least four years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 16 years, but there is no mental state requirement for the age gap. For the penalty enhancement in subsection (f)(4)(C), the actor must "recklessly disregard" that the complainant was under 18 years of age and that the actor was in a "position of trust with or authority over" the complainant, and the actor must be, in fact, at least four years older than the complainant. "Position of trust with or authority over" is a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. The actor must be aware of a substantial risk that the complainant is under the age of 18 years and the actor is in a "position of trust with or authority over" the complainant, but there is no mental state requirement for the age gap. The final penalty enhancement for complainants under the age of 18 years is in subsection (f)(4)(D). The actor must "recklessly disregard" that the complainant was under 18 years of age and the actor must be, in fact, 18 years of age or older and at least two years older than the complainant. The actor must be aware of a substantial risk that the complainant was under the age of 18 years, but there is no culpable mental state requirement for the age of the actor or the age gap.

The penalty enhancement in subsection (f)(4)(E) requires that the actor "recklessly disregard" that the complainant was 65 years of age or older and the actor was, in fact, under the age of 65 years of age. The actor must be aware of a substantial risk that the complainant was 65 years of age or older, but there is no culpable mental state requirement for the age of the actor. Finally, the penalty enhancement in subsection (f)(4)(F) requires that the actor "recklessly disregard" that the complainant was a "vulnerable adult." The actor must be aware of a

substantial risk that the complainant was a "vulnerable adult" as that term is defined in RCC § 22A-1001.

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

Subsection (h) codifies an effective consent to the sexual assault offense, and a limitation on certain justification and excuse defenses for sexual assault. Subsection (h) specifies that the effective consent defense is in addition to any defenses otherwise applicable to the actor's conduct under District law. The effective consent requires either the complainant's "effective consent" or the actor's reasonable belief that the complainant gave "effective consent." "Effective consent" is a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception. Subsection (h) codifies several limits to the effective consent defense. First, the conduct cannot inflict "significant bodily injury" or "serious bodily injury" as those terms are defined in RCC § 22A-1001 (subsection (h)(1)). Second, certain categories of complainants are excluded from the effective consent defense: a complainant that is under 16 years of age when the actor is at least four years older than the complainant (subsection (h)(2)(A)), a complainant under 18 years of age when the actor is in a position of trust with or authority over the complainant, at least 18 years of age, and at least four years older than the complainant (subsection (h)(2)(B)), the complainant is legally incompetent (subsection (h)(2)(C)), or the complainant is "substantially incapable, mentally or physically, of appraising the nature" of the proposed sexual act or sexual contact. Subsection (h)(3) 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 the 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 sexual assault statute changes existing District law in eleven 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, first degree and third degree of the revised sexual assault statute prohibit threats of "significant bodily injury," as well as threats of an "unwanted sexual act." The current first degree[273] and third degree[274] sexual abuse statutes prohibit threatening to subject any person to "bodily injury,"[275] a defined term that differs from the levels of bodily injury codified in the District's current assault statutes. There is no DCCA case law specifically comparing the meaning of "bodily injury" in the sexual abuse offenses to the level of physical harm required for the current assault statutes.[276] In contrast, first degree and third degree of the revised sexual

[273] D.C. Code § 22-3002(a)(2).

[274] D.C. Code § 22-3004(2).

[275] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[276] The District's current simple assault statute does not specify a required level of physical harm, D.C. Code § 22-404(a), but case law has established that any non-consensual touching, even without pain, is sufficient for simple assault. *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)). The current assault with significant bodily injury statute requires and defines "significant bodily injury." D.C. Code § 22-404(a)(2) ("'significant bodily injury' means an injury that requires hospitalization or immediate medical attention."). The current aggravated assault statute requires "serious bodily injury," which is not statutorily defined in D.C. Code § 22-404.01, although DCCA

assault statute prohibit threats "to commit an unwanted sexual act or cause significant bodily injury to any person." "Significant bodily injury" is defined in RCC § 22A-3001 as injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer.[277] Per the RCC definition of "significant bodily injury," threats of impairment of a "mental faculty" are excluded from first degree and third degree of the revised sexual assault statute.[278] The RCC threats statute, RCC § 22A-1204 similarly grades the offense on whether the threatened harm constitutes at least "significant bodily injury," or some lesser injury.[279] Threats to commit an unwanted sexual act are included because an unwanted sexual act is a serious harm that may fall outside the definition "significant bodily injury." This change improves the consistency of the revised statutes.

Second, as applied to first degree and third degree of the revised sexual assault statute, the general culpability principles for self-induced intoxication in RCC § 22A-209 allow an actor to claim that he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication. The current first degree and third degree sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[280] and similarly logic would appear to apply to third degree sexual abuse. This case law precludes preclude an actor from receiving a jury instruction on whether intoxication prevented the actor from forming the necessary culpable mental state requirement for the crime.[281] This DCCA case law would also likely mean that an actor would be precluded from directly raising—though not necessarily

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case law has adopted the sex offense statutory definition of "serious bodily injury." *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999).

[277] The RCC definition of "significant bodily injury" also clarifies certain injuries are within the scope of the term: "a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation." RCC § 22A-3001

[278] The current definition of "bodily injury" includes "injury involving loss or impairment of the function of a . . . mental faculty." D.C. Code § 22-3001(2). By extension, the current first degree and third degree sexual abuse statutes extend to threats that any person will be subjected to such an injury of a "mental faculty." There is no DCCA case law discussing the meaning of impairment of a "mental faculty" in the current definition of "bodily injury." The RCC definition of "significant bodily injury" is limited to physical harm and threats of injury of a "mental faculty" are not sufficient for first degree and third degree of the revised sexual assault statute. The current definition of "bodily injury" also includes "loss or impairment of the function of a bodily member [or] organ" or "physical disfigurement." It is unclear what level of physical harm is required for this part of the current definition and there is no DCCA case law on this issue. Thus, it is unclear how this language differs, if at all, from the level of physical harm required for the RCC definition of "significant bodily injury."

[279] First degree of the RCC threats statute (RCC § 22A-1204) prohibits threats to commit sexual assault, as defined in RCC § 22A-1303, and threats to commit the gradations of the RCC assault statute that prohibit permanent disfigurement or disablement, "serious bodily injury," and "significant bodily injury" (RCC § 22A-1202(a)-(d)). Second degree of the RCC threats statute includes the lower gradations of the revised assault statute.

[280] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[281] *See* D.C. Crim. Jur. Instr. § 9.404 ("If evidence of intoxication gives you a reasonable doubt about whether [name of defendant] could or did form the intent to [^] , then you must find him/her not guilty of the offense of [^] . On the other hand, if the government has proved beyond a reasonable doubt that [name of defendant] could and did form the intent to [^], along with every other element of the offense, then you must find him/her guilty of the offense of [^] .").

presenting evidence in support of[282]—the claim that, due to his or her self-induced intoxicated state, the actor did not possess any knowledge or intent required for any element of first degree or third degree sexual abuse.[283] In contrast, under the revised sexual assault statute, an actor would both have a basis for, and would be able to raise and present relevant and admissible evidence in support of, a claim that voluntary intoxication prevented the actor from forming the knowledge or intent required to prove the offense. Likewise, where appropriate, the actor would be entitled to an instruction which clarifies that a not guilty verdict is necessary if the actor's intoxicated state precludes the government from meeting its burden of proof with respect to the culpable mental state of knowledge or intent at issue the revised sexual assault statute.[284] This change improves the clarity, consistency, and proportionality of the offense.

Third, the revised sexual assault statute specifies one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Some or all of the current sex offenses[285] are subject to general penalty enhancements based on the age of the complainant,[286] a general "while armed" penalty enhancement in D.C. Code § 22-4502,[287] and the enhancements

[282] Whether intoxication evidence may be presented when it cannot negate intent is less clear. *Compare Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) *with Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *Parker v. United States*, 359 F.2d 1009, 1012–13 (D.C. Cir. 1966)); *see also Buchanan*, 32 A.3d at 996 (Ruiz, J., concurring) (discussing *Parker*).

[283] This is so, moreover, notwithstanding the fact that the defendant, due to his or her self-induced intoxicated state, may not have actually possessed the knowledge required for any element of offensive physical context.

[284] These results are a product of the logical relevance principle set forth in RCC § 22A-209(a) and the fact that knowledge and intent is a mental state susceptible to negation by self-induced intoxication. *See* RCC § 22A-209(b).

[285] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[286] Current District law has two general penalty enhancements for committing specified crimes against complainants under the age of 18 years and complainants that are 65 years of age or older. The penalty enhancement for crimes committed against complainants under the age of 18 years applies to child sexual abuse and first degree, second degree, or third degree sexual abuse, and authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized. D.C. Code §§ 22-3611(a), (c). The penalty enhancement for crimes committed against complainants that are 65 years of age or older authorizes a possible term of imprisonment of 1 ½ times the maximum term of imprisonment otherwise authorized and applies to first degree, second degree, and third degree sexual abuse. D.C. Code § 22-3601(a), (c).

[287] The current "while armed" enhancement prohibits committing, attempting, soliciting, or conspiring to commit specified offenses, including child sexual abuse and first degree, second degree, and third degree sexual abuse, "while armed" with or "having readily available" any "pistol, or other firearm (or imitation thereof) or other dangerous or deadly weapon." 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). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as

in the current sex offense aggravators in D.C. Code § 22-3020.[288] The D.C. Code is silent as to whether or how these different penalty enhancements can be stacked, although case law suggests stacking of at least some penalty enhancements is permitted.[289] In contrast, the revised sexual assault statute specifies a single set of enhancements, including age-based and weapon enhancements, that is capped at a penalty increase of one class.[290] Because the revised statute incorporates multiple enhancements in the offense, the statute clarifies that it is not possible to enhance a sexual assault with, for example, both a weapon enhancement and an enhancement based on the identity of the complainant, or to double-stack different weapon penalties[291] and offenses. The scope of the revised weapons aggravator is slightly narrower than the current "while armed" enhancement as it pertains to mere possession[292] and objects the complainant incorrectly perceives as being a dangerous weapon.[293] Consolidating the multiple penalty enhancements improves the consistency and proportionality of the revised sexual assault offense.

Fourth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and the complainant when the complainant is under the age of 12 years, and, by the use of the phrase "in fact," require strict liability for the age gap. The current sex

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other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[288] The current sexual abuse aggravators apply to all the sex offenses. D.C. Code § 22-3020(a) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense; (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim; (3) The victim sustained serious bodily injury as a result of the offense; (4) The defendant was aided or abetted by 1 or more accomplices; (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[289] For example, the facts as discussed in several DCCA cases on offenses against persons other than sexual abuse 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).

[290] Note, however, that subtitle I of the RCC specifies certain penalty enhancements (e.g. hate crime) that may apply *in addition to* the penalty enhancements specified in the revised sexual assault offenses.

[291] In addition to the "while armed" enhancement in D.C. Code § 22-4502(a) applicable to child sexual abuse and first degree, second degree, and third degree sexual abuse, the current sex offense aggravators include an aggravator if "the defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon." D.C. D.C. Code § 22-3020(a)(6).

[292] The current "while armed" enhancement applies if the actor merely has "readily available" a dangerous weapon. D.C. Code § 22-4502(a). Having a dangerous weapon "readily available" is insufficient for the revised weapon aggravator in the sexual assault statute. However, possessing a dangerous weapon or a firearm during sexual assault, without using or displaying it, is still subject to liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[293] The current "while armed" enhancement in D.C. Code § 22-4502 includes the use of objects that the complaining witness incorrectly perceives to be a dangerous or deadly weapon. *See, e.g.*, *Paris v. United States*, 515 A.2d 199, 204 (D.C. 1986) ("In this jurisdiction, any object which the victim perceives to have the apparent ability to produce great bodily harm can be considered a dangerous weapon."). The definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22A-1001 exclude these objects.

offense aggravators include an aggravator for when the "victim was under the age of 12 at the time of the offense."[294] The aggravator does not require an age gap between the complainant and the actor, unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and a person under the age of 16.[295] In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and a complainant under the age of 12 years. A four year age gap ensures that the enhancement is reserved for predatory behavior targeting very young complainants. An actor with less than a four year age gap that commits a sexual assault against a complainant under the age of 12 years continues to face criminal liability, but the penalty would not be enhanced. The revised enhancement also uses the phrase "in fact" to require strict liability for the age gap, which is consistent with strict liability for the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22A-1305). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Fifth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding that the complainant was under the age of 16 years when the actor, in fact, was at least four years older. The current sex offense aggravators include a penalty aggravator for when "the victim was under the age of 12 years"[296] and when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[297] There is no aggravator for a complainant under the age of 16 years. However, the current first degree and second degree sexual abuse of a child statutes punish sexual acts and sexual contacts when the complainant was under the age of 16 years and the actor was at least four years older.[298] In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor recklessly disregarding that the complainant is under the age of 16 years when the actor is at least four years older than the complainant.[299] A four year age gap ensures that the enhancement is reserved for predatory behavior targeting young complainants. An actor with less than a four year age gap that commits sexual assault against a complainant under the age of 16 years continues to face criminal liability, but the penalty would not be enhanced. The "recklessly" culpable mental state for the complainant's age is consistent with this element in the other revised age-based penalty enhancements. Using "in fact" to require strict liability for the age gap is consistent with the age gap in the other revised age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22A-1305). These changes improve the clarity, consistency, and proportionality of the revised sex assault offense.

Sixth, the revised sexual assault penalty enhancements require at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of

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[294] D.C. Code § 22-3020(a)(1).

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

[296] D.C. Code § 22-3020(a)(1).

[297] D.C. Code § 22-3020(a)(2).

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

[299] It is technically unnecessary to codify this enhancement because it overlaps with the enhancement in subsection (f)(4)(D) for complainants under the age of 18 years when the actor is at least 18 years of age and there is at least a two year age gap. An actor that is at least four years older than a complainant under 16 years of age in subsection (f)(4)(B) could also be at least 18 years of age and have more than a two year age gap with the complainant. However, codifying the enhancement in subsection (f)(4)(B) makes it clear that the penalty enhancements include complainants under the age of 16 years when there is at least a four year age gap with the actor and mirrors the gradations in the revised sexual abuse of a minor statute (RCC § 22A-1304).

trust with our authority over the complainant, and, by use of the phrase "in fact," require strict liability for the age gap. The current sex offense aggravators include an aggravator for when the "victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[300] The current aggravator does not specify any culpable mental states and there is no DCCA case law on this issue. In contrast, the revised penalty enhancement requires at least a four year age gap between the actor and the complainant and, by use of the phrase "in fact," specifies that there is no culpable mental state for this element. A four year age gap ensures that the revised enhancement is reserved for predatory behavior targeting complainants under the age of 18 years. Strict liability for the age gap is consistent with the age gap in the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22A-1305). The consistency and proportionality of the revised sexual assault offense improve if the penalty enhancement for a complainant under the age of 18 years requires at least a four year age gap and applies strict liability to this element.

Seventh, the revised sexual assault statute applies a penalty enhancement to all gradations for an actor that is 18 years of age or older and at least two years older than a complainant under 18 years of age and requires a "recklessly" culpable mental state. Current D.C. Code § 22-3611 codifies a general penalty enhancement for specified crimes, including first degree, second degree, and third degree sexual abuse, when the actor is 18 years of age or older, the complainant is under 18 years of age, and the actor is at least two years older than the complainant.[301] The current enhancement does not specify any culpable mental states, although there is an affirmative defense if the actor "reasonably believed that the victim was not [under the age of 18 years]."[302] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute incorporates this penalty enhancement into the offense and applies it to all gradations, including fourth degree sexual assault.[303] The revised penalty enhancement requires that the actor "recklessly disregard" that the complainant is under the age of 18 years, which preserves the substance of the current affirmative defense[304] and is consistent with several of the other age-based penalty enhancements. This change improves the consistency and proportionality of the revised offense.

Eighth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding that the complainant is 65 years of age or older when the actor is, in fact, under 65 years of age. Current D.C. Code § 22-3601 provides a general penalty enhancement for any actor, regardless of age, committing specified crimes against complainants 65 years of age or older, including first degree, second degree, or third degree sexual abuse.[305] The penalty

[300] D.C. Code § 22-3020(a)(2).

[301] D.C. Code §§ 22-3611(a), (c).

[302] D.C. Code §§ 22-3611(b). The current minors penalty enhancement uses the terms "adult" and "minor," and defines "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." D.C. Code § 22-3611(c)(1), (c)(2).

[303] This penalty enhancement differs from the other penalty enhancement for complainants under the age of 18 years in subsection (f)(4)(C) in two ways. First, this penalty enhancement does not require that the actor be in a "position of trust with or authority over" the complainant. Second, for this penalty enhancement, the actor must be at least 18 years of age, whereas the penalty enhancement in subsection (f)(4)(C) extends liability to persons under the age of 18 years.

[304] If an accused reasonably believed that the complaining witness was not a minor, as is required in the current affirmative defense, 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.

[305] D.C. Code § 22-3601(a), (b).

enhancement does not specify any culpable mental states, but there is an affirmative defense if the actor "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."[306] There is no DCCA case law on this issue. In contrast, the revised sexual assault statute codifies a penalty enhancement for an actor that recklessly disregards that the complainant was 65 years of age or older when the actor, in fact, was under 65 years of age. The revised penalty enhancement applies to all gradations of the revised sexual assault statute, including fourth degree sexual assault. The "recklessly" culpable mental state preserves the substance of the current affirmative defense for the senior citizen enhancement[307] and is consistent with the culpable mental states in several of the other revised age-based penalty enhancements. Requiring that the actor be under the age of 65 years reserves the enhancement for predatory behavior targeting the elderly, rather than violence between elderly persons. Strict liability for the age of the actor is consistent with several of the other age-based penalty enhancements and the revised sexual abuse of a minor statute (RCC § 22A-1305). The revised penalty enhancement for complainants under the age of 65 years improves the consistency and proportionality of the revised offense.

Ninth, the revised sexual assault statute codifies a penalty enhancement for the actor recklessly disregarding that the complainant is a "vulnerable adult." The current sex offense statutes do not have specific offenses or enhanced penalties for complainants that are "vulnerable adult[s]," as that term is defined in RCC § 22A-1001, although some current District statutes prohibit the abuse[308] or neglect[309] of a "vulnerable adult" without specifically addressing sexual violence against these complainants. In contrast, the revised sexual assault statutes codify a penalty enhancement for an actor recklessly disregarding that the complainant was a vulnerable adult, as that term is defined in RCC § 22A-1001. The "recklessly" culpable mental state matches the culpable mental state required for several of the other sexual assault penalty enhancements. This change improves the consistency and proportionality of the revised statute.

Tenth, the revised sexual assault penalty enhancement for weapons requires that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[310] No culpable mental state is specified, and. there is no DCCA case law interpreting the current weapons aggravator.[311] Current D.C. Code § 22-4502 provides severe, additional penalties for

[306] D.C. Code § 22-3601(c).

[307] In the RCC, an actor that knew or reasonably believed that the complainant was not 65 years or older or an actor that could not have known or determined the age of the complainant, as is required in the current affirmative defense, 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.

[308] D.C. Code Ann. § 22-933. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code Ann. § 22-936.

[309] D.C. Code Ann. § 22-934. The offense has a misdemeanor gradation and felony gradations that require "serious bodily injury or severe mental distress" or "permanent bodily harm or death." D.C. Code Ann. § 22-936.

[310] D.C. Code § 22-3020(a)(6).

[311] However, there is DCCA case law interpreting the repealed armed rape offense that may inform how the DCCA would interpret the current armed aggravator. The previous armed rape offense required that the defendant commit rape "when armed with or [when] having readily available any . . . dangerous or deadly weapon," which is the same language in the current armed aggravator. *Johnson v. United States*, 613 A.2d 888, 897 (D.C. 1992) (quoting D.C.

committing, attempting, soliciting, or conspiring to commit first degree, second degree, and third degree sexual abuse[312] "while armed" or "having readily available" a dangerous weapon.[313] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" a dangerous weapon or imitation weapon.[314] The revised enhancement is narrower than the current aggravator because it requires the use or display of the weapon, and also requires that the use or display of the weapon caused the sexual activity. An actor that is merely "armed with" or "had readily available" a dangerous weapon or imitation dangerous weapon may still face liability under the RCC weapons offenses as well as liability for second degree or fifth degree of the revised sexual assault statute. The "recklessly" culpable mental state is consistent with weapons gradations in other RCC offenses against persons. The revised enhancement includes imitation dangerous weapons because in the context of sexual assault, an imitation dangerous weapon can be as coercive as a real dangerous weapon. This change improves the proportionality of the revised sexual assault statute.

Eleventh, the revised sexual assault penalty enhancement for causing serious bodily injury, due to the revised definition of "serious bodily injury," no longer includes rendering a complainant "unconscious," causing "extreme physical pain," or impairment of a "mental faculty." The current sex offense aggravator for causing serious bodily injury[315] incorporates the current definition of "serious bodily injury" for the sex offenses, which includes "unconsciousness, extreme physical pain . . . or protracted loss or impairment of the function of a

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Code § 22-3202(a) (1989 & 1991 Suppl.)). In *Johnson v. United States*, the appellant did not actually use the dangerous weapon during the sexual assault, but used the dangerous weapon prior to the sexual assault to injure the complainant and the weapon was present in the room at the time of the sexual assault. *Johnson v. United States*, 613 A.2d 888, 891, 898 (D.C. 1992). The DCCA held that "the government satisfied its burden of proving the 'armed' element by demonstrating that the coercive element of the sexual assault arose directly from appellant's use of a dangerous weapon." *Johnson*, 613 A.2d at 898. Although the armed rape offense has been repealed, *Johnson* may support requiring a causation element in the current armed aggravator for the sexual abuse statutes because of the identical "while armed" language.

[312] D.C. Code §§ 22-4501(1); 22-4502(a).

[313] 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). First degree murder, second degree murder, first degree sexual abuse, and first degree child sexual abuse "shall" receive the same minimum and mandatory minimum sentences as other crimes of violence committed "while armed with or having readily available" a dangerous weapon, except that the maximum term of imprisonment "shall" be life without parole as authorized elsewhere in the current District code. D.C. Code § 22-4502(a)(3).

[314] The current sexual abuse weapons aggravators refers to "a pistol or any other firearm (or imitation thereof). D.C. Code § 22-3020(a)(6). The revised enhancement does not, however, because the revised definitions of "dangerous weapon" and "imitation dangerous weapon" in RCC § 22A-1001 specifically include firearms and imitation firearms.

[315] D.C. Code § 22-3020(a)(3).

. . . mental faculty."[316] As is discussed in the commentary to the revised definition of "serious bodily injury" in RCC § 22A-1001, these provisions in the current definition are difficult to measure and may include within the definition physical harms that otherwise fall short of the high standard the definition requires. In contrast, the revised definition of "serious bodily injury," and the revised penalty enhancement using that term, are limited to a substantial risk of death, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ. This change improves the consistency and proportionality of the revised sex offenses. The revised definition of "serious bodily injury" is discussed further in the commentary to RCC § 22A-1001.

Beyond these eleven substantive changes to current District law, sixteen other aspects of the revised assault statute may be viewed as a substantive change of law.

First, the revised sexual assault statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant or "submit to" the sexual conduct.[317] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[318] In addition to case law, District practice does not appear to follow the variations in statutory language.[319] Instead of these variations in language,

[316] D.C. Code § 22-3001(7).

[317] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[318] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[319] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. This change improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, first and third degree of the revised sexual assault statute prohibit causing the complainant to engage in or submit to sexual activity "by" causing the nonconsensual intoxication of the complainant. The current first degree[320] and third degree[321] sexual abuse statutes prohibit a sexual act or sexual contact "after" the actor involuntarily intoxicates the complainant. There is no DCCA case law interpreting the current intoxication provision. It is unclear whether a causal connection is required between the sexual conduct and the involuntary intoxication of the complainant, although the legislative history suggests that such a causation requirement may have been intended.[322] Instead of this ambiguity, the revised sexual assault statute clarifies that involuntary intoxication of the complainant must be causally related (a "but for" condition) to the sexual conduct. The causation requirement, in addition to the culpable mental states in the revised intoxication provision discussed elsewhere in this commentary, ensures that the intoxication provision applies only to actors that knowingly cause a sexual act or sexual contact by administering an intoxicant or causing an intoxicant to be administered.[323] This change improves the clarity and consistency of the revised sexual assault offense.

Third, first degree and third degree of the revised sexual assault offense require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by a specified use of physical force, use of a weapon, or specified threats. The current first degree[324] and third degree[325] sexual abuse statutes do not specify any culpable mental states. DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[326] and similarly logic would appear to apply to third degree sexual abuse.

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[320] D.C. Code § 22-3002(a)(4).

[321] D.C. Code §§ 22-3004(4).

[322] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[323] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[324] D.C. Code § 22-3002.

[325] D.C. Code § 22-3004.

[326] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

However, it is unclear what general intent means in terms of required culpable mental states.[327] Instead of this ambiguity, first degree and third degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by the specified use of physical force, use of a weapon, or specified threats. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[328] A "knowingly" culpable mental state is consistent with current District law for threats[329] and the RCC threats statute (RCC § 22A-1204) and also may clarify that second degree and fourth degree sexual assault are lesser included offenses, which is an unresolved issued in current DCCA case law.[330] This change improves the clarity and consistency of the revised offense.

Fourth, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state as to the sexual act or sexual contact being accomplished by "coercion" or with a physically or mentally impaired complainant. The current second degree[331] and fourth degree[332] sexual abuse statutes do not specify any culpable mental states. However, DCCA case law appears to have required specific intent for second degree sexual abuse in one recent case,[333] and the DCCA also has been clear that the statutory definition of "sexual contact"

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[327] The DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'" *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

[328] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[329] While the District's threats statutes are silent as to required culpable mental states, knowledge or as least some subjective intent is required by case law interpreting the threats statutes. See commentary to RCC § 22A-1204.

[330] In *In re E.H.*, the DCCA declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but noted that"[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child]). *In re E.H.*, 967 A.2d 1270, 1275 n.9 (D.C. 2009). The DCCA compared subsections (A) and (B) of the current definition of "sexual act" in D.C. Code § 22-3001(8) and noted that they do not require a specific intent "to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" like the current definition of "sexual contact" in D.C. Code § 22-3001(9) does. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense," but "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state and the revised definition of "sexual act" in RCC § 22A-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[331] D.C. Code § 22-3003.

[332] D.C. Code §§ 22-3006.

[333] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) ("There was also evidence from which a reasonable fact-finder could conclude that appellant had the specific intent to obtain sex by placing [the complainant] in fear of arrest."). Older District case law predating the 1994 Anti-Sexual Abuse Act that enacted first degree through fourth

requires specific intent.[334] Instead of this ambiguity, second degree and fourth degree of the revised sexual assault statute require a "knowingly" culpable mental state. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[335] A "knowingly" culpable mental state is consistent with current District law for threats[336] and the RCC threats statute (RCC § 22A-1204) and may also clarify that second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree, which is an unresolved issue in current DCCA case law.[337] This change improves the clarity and consistency of the revised offense.

Fifth, the revised first degree and third degree sexual assault statutes no longer include "use of a threat of harm sufficient to coerce or compel submission by the victim." The current first degree[338] and third degree[339] sexual abuse offenses prohibit the use of "force" against the complainant, and the current definition of "force" includes "the use of a threat of harm sufficient to coerce or compel submission by the victim."[340] The DCCA has never interpreted the threats part of the current definition of "force." However, inclusion of any type of threat in the first and

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degree sexual abuse, characterized rape as a general intent offense. *See, e.g., United States v. Thornton*, 498 F.2d 749, 753 (D.C. Cir. 1974) (internal quotations omitted).

[334] *See, e.g., In re E.H.*, 967 A.2d 1270, 1271, 1275 n.9 (D.C. 2009) ("[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree [sexual abuse of a child]) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree [sexual abuse of a child])."").

[335] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

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Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue―the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes second degree and fourth degree sexual abuse from being lesser included offenses of first degree and third degree sexual abuse in some instances. In the revised sexual assault statute, all gradations require a "knowingly" culpable mental state, and the revised definition of "sexual act" in RCC § 22A-1301 requires the same "intent to sexually degrade, arouse, or gratify any person" that the revised definition of "sexual contact" does. Second degree and fourth degree sexual assault are lesser included offenses of first degree and third degree sexual assault in the RCC.

[338] D.C. Code § 22-3002(a)(1).

[339] D.C. Code §§ 22-300(1).

[340] D.C. Code § 22-3001(5).

third degree statutes appears to render moot the overall statutory framework in the current felony sexual abuse statutes that purports to differentiate threats by the severity of harm involved.[341] To ensure that the revised statute effectively grades on the severity of threats, the revised definition of "physical force" in RCC § 22A-1001 is limited to "the application of physical strength," with no provision for threats. This change improves the consistency and proportionality of the revised statutes.

Sixth, first degree and third degree of the revised sexual assault statute include liability for a use of "physical force" that "causes bodily injury to the complainant." The current first degree[342] and third degree[343] sexual abuse statutes prohibit the use of "force" against the complainant. The current definition of "force" requires, in relevant part, "the use of such physical strength or violence as is sufficient to . . . injure a person." However, it is unclear whether the injury referenced in the definition of force is the same as "bodily injury,"[344] a defined term in the current sex offenses. There is no DCCA case law interpreting the definition of "force." Instead of referring generally to an injury, first degree and third degree of the revised sexual assault statute prohibiting causing "bodily injury," a defined term in RCC § 22A-1301. This change improves the clarity and consistency of the revised sexual assault statute.

Seventh, first degree and third degree of the revised sexual assault statute recognize the use of a "weapon" as a basis for liability. The current first degree[345] and third degree[346] sexual abuse statutes prohibit the use of "force" against the complainant. "Force" is currently defined to include "the use or threatened use of a weapon."[347] The sexual abuse statutes do not define "weapon"[348] and there is no DCCA case law on this issue. Instead of this ambiguity, the revised sexual assault statute codifies the use of a "weapon" that "overcomes, restrains, or causes bodily injury to the complainant" as a distinct basis for liability in first degree and third degree. This provision recognizes that a weapon that does not satisfy the RCC definition of "dangerous weapon"[349] may still cause a complainant to engage in or submit to sexual activity.[350] The revised penalty enhancement in subsection (f)(1) is reserved for a "dangerous weapon" or

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[341] The current first degree and third degree sexual abuse statutes prohibit threats to subject any person to "death, bodily injury, or kidnapping." D.C. Code §§ 22-3002(a)(2); 22-3004(2). The current second degree and fourth degree sexual abuse statutes prohibit threats "other than" threats of death, bodily injury, or kidnapping. D.C. Code §§ 22-3003(1); 22-3005(1).

[342] D.C. Code § 22-3002(a)(1).

[343] D.C. Code §§ 22-300(1).

[344] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[345] D.C. Code § 22-3002(a)(1).

[346] D.C. Code § 22-3004(1).

[347] D.C. Code § 22-3001(5).

[348] In addition, it is unclear if "weapon" in the current definition of "force" is different from "dangerous or deadly weapon" in the current sexual abuse aggravators in D.C. Code § 22-3020. D.C. Code § 22-3020(a)(6).

[349] RCC § 22A-1001 defines "dangerous weapon" as "(A) A firearm as defined at D.C. Code § 22-4501(2A), regardless of whether the firearm is loaded; (B) A prohibited weapon as defined at § 22A-1001(14); (C) A sword, razor, or a knife with a blade over three inches in length; (D) A billy club; (E) A stun gun; or (F) Any object or substance, other than a body part, that in the manner of its actual, attempted, or threatened use is likely to cause death or serious bodily injury."

[350] The American Law Institute Commentary to the revised draft Model Penal Code offense of Forcible Rape notes that "certain weapons (for example a sling shot, paddle, or not stick, can be coercive without necessarily being used in a way that arouses fear of serious bodily injury or other overwhelming intimidation" as required by the Model Penal Code definition of "dangerous weapon."

"imitation dangerous weapon." This change improves the clarity and consistency of the revised offense.

Eighth, the intoxication provision in first degree and third degree of the revised sexual assault statute specifies several culpable mental states. The current intoxication provision does not specify any culpable mental states,[351] although the legislative history references a specific intent to engage in the sexual activity.[352] DCCA case law has determined that first degree sexual abuse is a "general intent" crime for purposes of an intoxication defense,[353] and similarly logic would appear to apply to third degree sexual abuse. It is unclear what general intent means in terms of required culpable mental states, but the DCCA has defined "general intent" in different ways, including that a "defendant cannot possess the requisite general intent to commit a crime without 'be[ing] aware of all those facts which make his or her conduct criminal.'"[354] Instead of this ambiguity, the revised intoxication provision specifies several culpable mental states. First, a "knowingly" culpable mental state applies to administering or causing to be administered an intoxicant, doing so without the complainant's "effective consent," and the fact that the substance is an intoxicant. The "knowingly" culpable mental state also applies to the required causation between administering the intoxicant and the sexual conduct. Second, the actor must act "with intent to impair the complainant's ability to express unwillingness." Finally, the revised intoxication provision, by the use of "in fact," requires strict liability for the effects of the intoxicant because administering an intoxicant without the complainant's "effective consent" is an assault. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[355] However, an actor may be held strictly liable for elements of an offense that aggravate what is already illegal conduct.[356] If an actor fails to satisfy any of the culpable mental states in the revised intoxication provision, there may still be liability for sexual activity with a physically or mentally impaired person in second degree or fourth degree of the revised sexual assault statute. This change improves the clarity and consistency of the revised sexual assault statute.[357]

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[351] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[352] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 10-87, The "Anti-Sexual Abuse Act of 1994" at 14-15 ("Where the offender covertly administers drugs or intoxicants to the victim with the specific intent to engage in the sexual act . . . the use of force element under the existing rape statute cannot be established because there is no proof that the act was 'against the will' of the victim.").

[353] *Kyle v. United States*, 759 A.2d 192, 199 (D.CD. 2000) ("Voluntary intoxication, however, is not a defense to a general intent crime such as first degree sexual abuse.").

[354] *Campos v. United States*, 617 A.2d 185, 199 (D.C. 1992) (quoting *Hearn v. District of Columbia*, 178 A.2d 434, 437 (D.C. 1962)).

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

[356] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464)."). In this instance, administering an intoxicant without consent and with the specified intent is already sufficient to impose assault or attempted assault liability.

[357] The revised intoxication provision ensures the proper scope of liability when the actor does not directly administer the intoxicant to the complainant, such as when the actor sets out a generally available bowl of punch that is spiked with alcohol. In such a situation, the actor may be "practically certain" that the complainant will consume the punch, satisfying the "knowingly" culpable mental state for administering or causing to be administered an intoxicant to the complainant without the complainant's consent. However, there is only liability for first degree or third degree sexual assault if the actor is "practically certain" that the sexual activity occurs as a result of administering the intoxicant. In addition, there can be no liability for first degree or third degree sexual assault

Ninth, second degree and fourth degree of the revised sexual assault statute prohibit sexual assault by coercion, as that term is defined in RCC § 22A-1301. The current second degree and fourth degree sexual abuse statutes prohibit a sexual act or sexual contact by "threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping)."[358] There is no apparent statutory limit to the type of threats or fear, and the legislative history generally notes that the offenses "encompass other types of coercion."[359] The DCCA has sustained convictions for second degree sexual abuse for placing a complainant in reasonable fear of arrest[360] and reasonable fear of being fired from employment.[361] Instead of a general reference to threats, second degree and fourth degree of the revised sexual assault statute prohibit "coercion," a defined term in RCC § 22A-1301 that is used consistently in the RCC. The RCC definition specifies certain common types of coercive threats, but also has a broad catch-all provision for threats that are "sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to comply." This change improves the clarity and consistency of the revised offense.

Tenth, the revised sexual assault statute details the meaning, burden of proof, and limitations of an effective consent defense to the sexual abuse statutes. The current consent defense to the general sexual abuse statutes simply states that "[c]onsent by the victim is a defense to a prosecution" for first degree through fourth degree sexual abuse, as well as misdemeanor sexual abuse, without discussion as to any limitations on the defense.[362] The statutory definition of "consent"[363] further specifies that such consent must be "freely given," a critical limitation, but the meaning of this language is unclear in the statute. DCCA case law recognizes two situations where consent is an appropriate defense to the use of force in a sexual encounter—when the complainant gave consent despite the use of force[364] or the defendant

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unless the actor set out the punch bowl "with intent to impair the complainant's ability to express unwillingness." If an actor fails to satisfy the requirements of the revised intoxication provision, there may still be liability under second degree or fourth degree of the revised sexual assault statute for engaging in sexual activity with an impaired complainant.

[358] D.C. Code §§ 22-3003; 22-3005. First degree and third degree sexual abuse prohibit "threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping."). D.C. Code §§ 22-3002; 22-3004.

[359] Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15 ("The first degree offense would encompass any type of physical force, as well as coercion through threats that any person will be subjected to death, bodily injury, or kidnapping. . . The second degree offense would encompass other types of coercion."). The legislative history refers to "the second degree offense," but also applies to what is now fourth degree sexual abuse. In the legislation as introduced, what is now fourth degree sexual abuse was a lower gradation for a sexual contact. *Id.* at 7.

[360] *Way v. United States*, 982 A.2d 1135, 1135, 1137 (D.C. 2009) ("The evidence was sufficient [for second degree sexual abuse] to show that [the complainant] engaged in sexual acts with appellant only because she had a reasonable fear of being arrested.").

[361] *Hughes v. United States*, 150 A.3d 289, 306 (D.C. 2016) (stating that the government's evidence was sufficient for second degree sexual abuse that the complainant "was in reasonable fear of being fired.").

[362] D.C. Code § 22-3007 ("Consent by the victim is a defense to a prosecution under §§ 22-3002 to 22-3006, prosecuted alone or in conjunction with charges under § 22-3018 or §§ 22-401 and 22-403.").

[363] D.C. Code § 22-3001(4).

[364] *Hatch v. United States*, 35 A.3d 1115, 1116 (D.C. 2011) ("[I]f the government proves the sexual encounter was forcible, the defendant then may attempt to prove that the victim effectively consented *despite* whatever force was involved. Such consent is rare; mere submission by the victim to the use of force is not the equivalent of consent.") (emphasis in original). The DCCA has stated generally that "it is both constitutionally impermissible and logically

reasonably believed that the complainant consented.[365] Under current case law, if the actor raises a consent defense, "evidence of consent may be relevant to the issue of whether the defendant did in fact use force to engage the complainant in sexual activity."[366] However, the DCCA has not discussed the government's burden of disproving the consent defense under the current consent defense statute.[367] With respect to limitations on the consent defense, the DCCA, relying on various indications of legislative intent, has held that persons under 16 years of age categorically cannot consent to the use of force by an adult that is at least four years older in a sexual encounter.[368] Although no case law is on point, case law on the District's assault statute[369] and dicta in one sexual abuse case[370] suggest that a person may not be able to consent to more severe harms and threats of harm.

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incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[365] *Hatch*, 35 A.3d at 1122. ("An affirmative defense of consent to a charge of forcible sexual assault makes sense only in the unusual case in which there is evidence that the defendant's otherwise culpable use of force was excused—as where the complainant led the defendant to believe (if not correctly, then at least reasonably) that she engaged in sado-masochistic or "rough" sex willingly."). The DCCA has stated generally that "it is both constitutionally impermissible and logically incoherent to place the burden of persuasion with respect to consent on the defendant if the claim of consensual participation is nothing more than a denial of the use of force, an element of the offense that the government has the burden of proving." *Id.* at 1121-22.

[366] *Hatch*, 35 A.3d at 1116. DCCA case law makes clear that "at least when the legislature has not expressed otherwise, [the] jury should be expressly instructed that it may consider whether the government has met its burden to prove all the elements of the offense beyond a reasonable doubt." *Russell v. United States*, 698 A.2d 1007, 1015-16 (D.C. 1997).

[367] The original consent defense in the Anti-Sexual Abuse Act of 1994 required that the actor establish the complainant's consent by a preponderance of the evidence. CITE. In 2009, due to concerns that the preponderance requirement was creating confusion allowing impermissible burden shifting, the preponderance requirement was deleted. In 1997, in *Russell v. United States*, the DCCA discussed in dicta the government's burden after the actor proved consent by a preponderance of the evidence. In *Russell*, the trial court instructed the jury that if the defendant proved consent by a preponderance of the evidence, the government must prove beyond a reasonable doubt that the complainant's consent was voluntary. *Russell v. United States*, 698 A.2d 1007, 1011 (D.C. 1997). The DCCA noted in dicta that the trial court misstated the law because voluntariness is not the standard for consent. *Russell*, 698 A.2d 1016 n.12. The court stated that the "correct standard under the new statute is whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or sexual contact in question.'" *Id.* The court did not discuss the source of the reasonable person standard.

[368] The DCCA has held that in a prosecution under the current general sexual abuse statutes, if the complainant is a "child" under the age of 16 years "an adult defendant who is at least four years older than the complainant may not assert a "consent" defense. In such a case, the child's consent is not valid." *Davis v. United States*, 873 A.2d 1101, 1106 (D.C. 2005). "Child" is defined in D.C. Code § 22-3001 as "a person who has not yet attained the age of 16 years." D.C. Code Ann. § 22-3001(3). "Adult" is not statutorily defined in the current sex offenses, and the DCCA does not provide a definition in *Davis*. The DCCA further noted that the four-year age gap requirement in the current child sexual abuse statutes "appears [to] modify the traditional rule [that a child is legally incapable of consenting to sexual conduct with an adult] so as to allow *bona fide* consent of a child victim to be a potential defense where the defendant is less than four years older than the child." *Id.* at 1105 n.8.

Since the revised sexual abuse of a minor statute applies to complainants under the age of 16 years when the actor is at least four years older, and the effective consent defense excludes these complainants from a consent defense.

[369] The DCCA recently 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. *Woods v. U.S.*, 65 A.3d 667, 672 (D.C. 2013).

[370] *Hatch*, 35 A.3d at 1120 (noting that "consenting at gunpoint is "an absurd proposition").

The revised sexual assault offense' effective consent defense is generally consistent with the current consent defense and existing case law. The RCC definition of "effective consent" clarifies the meaning of the phrase "freely given" in the current definition of "consent" to mean agreement other than by physical force, fraud, or coercion.[371] The effective consent defense is limited to the two situations recognized in DCCA case law—when the complainant gave consent despite the use of force or the defendant reasonably believed that the complainant consented. The effective consent defense follows existing case law as to when evidence of effective consent may be relevant, but goes beyond current case law to clarify that if there is evidence present at trial of the complainant's effective consent or the defendant's reasonable belief that the complainant gave effective consent, the government must prove the absence of such circumstances beyond a reasonable doubt—either that the complainant did not give effective consent or the actor's belief was not reasonable. With respect to limitations on the defense, the RCC effective consent defense does not apply if the conduct inflicts "significant bodily injury" or "serious bodily injury," as those terms are defined in RCC § 22A-1001, or if the conduct involved the use of a "dangerous weapon" as that term is defined in RCC § 22A-1001. The effective consent defense does not apply when the complainant is incapable of consenting due to age, like current law, or when the complainant is legally incompetent or substantially incapable of appraising the nature of the sexual act or sexual contact. Lastly, the RCC effective consent defense deletes now unnecessary language "prosecuted alone or in conjunction with charges under § 22-3018 [attempt statute for sex offenses] or §§ 22-401 [assault with intent to commit specified offenses] and 22-403 [assault with intent to commit specified offenses]."[372] This change improves the clarity and consistency of the revised sexual assault statute.

Eleventh, the revised sexual assault penalty enhancements require that accomplices be "present" at the time of the sexual conduct. The current accomplice aggravator for the sex offense statutes requires that the "defendant was aided or abetted by 1 or more accomplices."[373] There is no DCCA case law interpreting this aggravator,[374] and it is unclear whether the aggravator would apply if an accomplice was not present at the offense. However, for the revised sexual assault penalty enhancement, the accomplices must be "present" at the time of the offense. Accomplices that are present at the time of the offense potentially increase the danger and effects of the offense in a way that other, physically absent accomplices do not. Limiting the enhancement to accomplices that are present at the time of the offense improves the proportionality of the revised offense.

Twelfth, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for the actor acting with one or more accomplices. The current accomplice aggravator for the sex offenses requires that the "defendant was aided or abetted by 1 or more

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[371] "Consent" is currently defined, in part, as "words or overt actions indicating a freely given agreement to the sexual act or contact in question." D.C. Code § 22-3001(4). "Effective consent" is defined in RCC § 22A-1001 as "consent obtained by means other than the use of physical force, coercion, or deception." Although there is no explicit requirement that consent be "freely given," the RCC definition of "effective consent" conveys this requirement by requiring the lack of physical force, coercion, or deception.

[372] D.C. Code § 22-3007. The RCC sex offenses no longer have their own assault statute and liability for the conduct criminalized by the AWI offenses is provided through application of the general attempt statute in RCC § 22A-301 to the completed offenses. See Commentary to RCC § 22A-1202 (revised assault statute).

[373] D.C. Code § 22-3020(a)(4).

[374] However, current District law generally extends aider and abettor liability to accomplices who are not present at the time of the offense. *See, e.g., Kelly v. United States*, 639 A.2d 86, 91 (D.C. 1994) (upholding aider and abettor liability where "the jury could reasonably have found that appellant had participated in planning the robbery," and served as getaway driver, but was not physically present during the robbery) (collecting District case law).

accomplices."[375] The current statute does not specify any culpable mental states and there is no DCCA case law for this issue. Instead of this ambiguity, the revised sexual assault penalty enhancement requires a "knowingly" culpable mental state for acting with "one or more accomplices present at the time of the offense."[376] The "knowingly" culpable mental state improves the clarity and consistency of the revised sexual assault statute.

Thirteenth, the revised sexual assault statute is subject to the RCC general provision enhancement for repeat offenders. The current sex offense aggravators include an aggravator if the "defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories."[377] The plain language of the enhancement is unclear[378] and there is no case law clarifying the issue. In addition, current District law has general recidivist penalty enhancements applicable to sex offenses.[379] It is unclear how the multiple recidivist enhancements apply to the sex offenses, and there is no case law. Instead of overlapping recidivist enhancements, the revised sexual assault statute is subject to the RCC general recidivist penalty enhancement (RCC § 22A-806). By eliminating overlapping recidivist penalty enhancements, the RCC improves the consistency and proportionality of the revised sexual assault statutes.

Fourteenth, by use of the phrase "in fact," the revised sexual assault penalty enhancements apply strict liability to the age of a complainant when the complainant is under 12 years or age, and to an actor being 18 years of age or older and at least two years older than the complainant. The current sex offense aggravators include when the "victim was under the age of 12 at the time of the offense."[380] The statute does not specify any culpable mental states and there is no DCCA case law on this issue. Current D.C. Code § 22-3611 also codifies a general penalty enhancement when an actor 18 years of age or older commits specified crimes against persons under 18 years of age when the actor is at least two years older than the complainant.[381] The current enhancement does not specify any culpable mental states for the age of the actor or the required age gap,[382] and there is no DCCA case law. Instead of these ambiguities as to the required culpable mental state, the revised penalty enhancement, by use of the phrase "in fact," applies strict liability to the age of a complainant under the age of 12 years and, for an actor being 18 years of age or older and at least two years older than the complainant. Strict liability

[375] D.C. Code § 22-3020(a)(4).

[376] The revised penalty enhancement no longer uses the words "aided or abetted" that are in the current enhancement because they are surplusage. The revised penalty enhancement also no longer specifies that "[i]t is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply" as the current penalty enhancement specifies in D.C. Code § 22-3020(a)(6).

[377] D.C. Code § 22-3020(a)(5). In addition to the specific sexual abuse aggravator, current District law has general penalty enhancements for prior convictions. D.C. Code §§ 22-1805; 22-1805a. It is unclear how the multiple recidivist penalty enhancements apply to the sex offenses, and there is no DCCA case law.

[378] One possible interpretation is that priors will only be counted if they are against different complainants. Another interpretation, not precluded by the plain language, is that for a prior to count, it must involve two or more victims—although this interpretation would exclude many prior sex offenses.

[379] D.C. Code §§ 22-1805; 22-1805a.

[380] D.C. Code § 22-3020(a)(1).

[381] D.C. Code §§ 22-3611(a), (c).

[382] The enhancement does have an affirmative defense for reasonable mistake of the complainant's age. D.C. Code Ann. § 22-3611(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not [under the age of 18 years] at the time of the offense. This defense shall be established by a preponderance of the evidence.").

for these ages and age gaps is consistent with the strict liability requirement in first degree and third degree of the revised sexual abuse of a minor statute (RCC § 22A-1305).[383] These changes improve the consistency and proportionality of the revised statutes.

Fifteenth, the revised sexual assault penalty enhancements require that the actor "recklessly disregard" that the complainant was under the age of 18 and that the actor was in a position of trust with or authority over the complainant. One of the current sex offense aggravators applies when "the victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim."[384] The current sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law on this issue. Instead of this ambiguity, the revised penalty enhancement requires that the actor recklessly disregard that the complainant was under the age of 18 years, and the fact that the actor is in a "position of trust with or authority over" the complainant. Given that the RCC definition of a "position of trust with or authority over" the complainant includes positions where the actor may not have any prior knowledge or interaction with the complainant,[385] and that sixteen and seventeen year olds generally are able to consent to sexual encounters under current law and the RCC, requiring some degree of subjective awareness as to the special relationship is appropriate. An actor who is not at least reckless as to being in a position of trust with or authority over the complainant would still be subject to liability for sexual assault, but not this penalty enhancement. These changes improve the consistency and proportionality of the revised statutes.

Sixteenth, the revised serious bodily injury penalty enhancement requires a "recklessly" culpable mental state. The current sex offense aggravators include when the "victim sustained serious bodily injury as a result of the offense."[386] The current sex offense aggravators statute does not specify any culpable mental states and there is no DCCA case law for this issue. Instead of this ambiguity, the revised penalty enhancement requires a "recklessly" culpable mental state for causing serious bodily injury during the sexual assault, which is consistent with several gradations of the revised assault statute (RCC § 22A-1202). An actor who is not at least reckless as to causing serious bodily injury would still be subject to liability for sexual assault, but not this penalty enhancement. This change improves the consistency and proportionality of the revised offense.

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

First, rendering the complainant unconscious is not a distinct form of liability in the revised sexual assault statute. The current first degree and third degree sexual abuse statutes prohibit sexual conduct "after" the actor "render[s] that other person unconscious."[387] This provision is surplusage because the current first degree and third degree sexual abuse statutes separately prohibit both causing "injury," which would include rendering the complainant

[383] The revised sexual abuse of a minor statute does not have an affirmative defense for mistake of age for complainants under the age of 12 years, unlike the remaining gradations for complainants under the age of 16 years and under the age of 18 years. RCC § 22A-1305.
[384] D.C. Code § 22-3020(a)(2).
[385] For example, a nineteen year old youth leader may be in a "position of trust with or authority over" the complainant, a participant in a large youth program, even though the youth leader and complainant have not met and are not aware of the other's involvement in the program.
[386] D.C. Code § 22-3020(a)(3).
[387] D.C. Code §§ 22-3002(a)(3); 22-3004(3).

unconscious,[388] and the nonconsensual administration of an intoxicant. For clarification, the revised sexual assault statute omits an overlapping provision on sexual conduct after rendering a person unconscious. This change improves the clarity of the revised statutes.

Second, the revised sexual assault statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses. Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[389] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[390] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[391] In the revised sexual assault statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence, as in current D.C. Code § 22-3018. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of revised statutes.

Third, the revised sexual assault offenses prohibit "threatening." Current first degree through fourth degree sexual abuse prohibit "threatening or placing the other person in reasonable fear."[392] DCCA case law has interpreted "placing the other person in reasonable fear" as covering implicit threats.[393] For consistency with other provisions in the RCC that prohibit threats, the revised sexual assault statute omits "reasonable fear" and prohibits threats

[388] D.C. Code § 22-3001(5) (defining "force" to include "the use of such physical strength or violence as is sufficient to overcome, restrain, or injure" the complainant).

[389] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[390] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[391] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse, second degree sexual abuse, and third degree sexual abuse are "crimes of violence" and would have a maximum term of imprisonment of five years. Fourth degree sexual abuse is not "crime of violence," however, and would have a maximum term of imprisonment of 180 days.

[392] D.C. Code §§ 22-3002(a)(2); 22-3003(1); 22-3004(2); 22-3005(1).

[393] *Way v. United States*, 982 A.2d 1135, 1137 (D.C. 2009) (finding the evidence sufficient for second degree sexual abuse that the complainant "engaged in sexual acts with appellant only because she had a reasonable fear of being arrested" and that "the jury could reasonably conclude that appellant intentionally obtained sex from [the complainant] by intimidating her with the unspoken threat of arrest.").

generally. In the RCC, threats include both explicit and implicit threats. The revised language improves the clarity and consistency of revised statutes.

Fourth, the revised intoxication provision in first degree and fourth degree sexual assault specifically includes "causes [an intoxicant] to be administered." The current intoxication provision in the first degree and third degree sexual abuse statutes prohibits "administering" an intoxicant.[394] It is unclear from the statute whether the defendant has to personally administer the intoxicant and there is no DCCA case law on point. For clarification, the revised intoxication provision includes the actor personally administering or causing the intoxicant to be administered. This change clarifies the revised statutes.

Fifth, by the use of the phrase "in fact," the revised weapons enhancement for the sexual assault statute applies strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." The sex offense aggravators include that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[395] The sex offense aggravators statute does not specify any culpable mental states. There is no DCCA case law regarding the aggravator, but DCCA case law for assault with a dangerous weapon[396] and the "while armed" enhancement in D.C. Code § 22-4502[397] support applying strict liability to the fact that the object is a "dangerous weapon" or "imitation dangerous weapon." For clarification, the revised weapons enhancement uses the phrase "in fact" to establish that strict liability applies to this element. Strict liability for this element is also consistent with the weapons gradations in other RCC offenses against persons. This change clarifies the revised statutes.

Sixth, first degree and third degree of the revised sexual assault statute provide liability for sexual conduct caused by administering an intoxicant without effective consent. The current intoxication prong in first degree and third degree sexual abuse prohibits administering an intoxicant to the complainant by "force or threat of force, or without the knowledge or permission" of the complainant.[398] "Force" is statutorily defined in the current sex offenses,[399] but the other terms in the current intoxication provision are not. There is no DCCA case law on the intoxication provision. For clarification, the revised intoxication provision in first degree and third degree of the revised sexual assault statute requires the intoxicant to be administered

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[394] The intoxication provision in the current first degree sexual abuse and third degree sexual abuse statutes is "After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct." D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[395] D.C. Code § 22-3020(a)(6) (authorizing a possible "penalty up to 1 ½ times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse if" the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.").

[396] *See, e.g., Perry v. United States*, 36 A.3d 799, 812 (D.C. 2011) ("[Whether the actor used the object in a dangerous manner] is an objective test, and has nothing to do with the actor's subjective intent to use the weapon dangerously."); *Powell v. United States*, 485 A.2d 596, 601 (D.C. 1984) (rejecting appellant's argument that "unless one is possessed with the specific intent to use an object offensively, it is not a dangerous weapon.").

[397] *See, e.g., Arthur v. United States*, 602 A.2d 174, 177 (D.C. 1992) (stating "[t]his court has traditionally looked to the use to which an object was put during an assault in determining whether that object was a dangerous weapon" and citing the objective tests used to determine if an object is a dangerous weapon in ADW).

[398] D.C. Code §§ 22-3002(a)(4); 22-3004(4).

[399] D.C. Code § 22-3001(5) ("'Force' means "the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.").

"without the complainant's effective consent." The definition of "effective consent" in RCC § 22A-1301 appears to include conduct that constitutes "force or threat of force"[400] or "without the knowledge or permission"[401] in the current intoxication provision and is a term that is used consistently throughout the RCC. This change clarifies the revised statutes.

Seventh, the revised sexual assault statutes clarify when the complainant's incapacitation is a basis for liability. The current second degree and fourth degree sexual abuse statutes contain multiple provisions detailing circumstances in which a person's incapacitation is a basis for liability,[402] and the current first and third degree sexual abuse statutes also describe how there may be liability for the nonconsensual administration of an intoxicant that renders a complainant incapacitated.[403] The language used in these varied descriptions of incapacity is not defined by statute, and there is no DCCA case law on point. However, in discussing fourth degree sexual abuse, the DCCA suggested that if a child complainant "does not understand what is happening during sexual contact, then he/she is also 'incapable of appraising the nature of the [sexual conduct] with an older person."[404] For clarification, second degree and fourth degree of the revised sexual assault statute make several changes to the current statutory language. First, the revised offenses consistently refer to the complainant's inability to appraise the nature of the "sexual act" or "sexual contact" instead of "the conduct." Second, the offenses clarify that the complainant may be "mentally or physically" incapacitated and that the offenses include a complainant that is "[a]sleep, unconscious, or passing in and out of consciousness." Finally, the offenses no longer specifically require that the complainant be "[i]ncapable of communicating unwillingness to engage"[405] in the sexual act or sexual contact because this language would be surplusage. For clarification, the revised intoxication provision in first and third degree sexual assault then mirrors the incapacitation requirements in second degree and fourth degree sexual assault, except that, as under current law, the intoxication provision in first and third degree sexual assault requires *substantial* impairment. These changes clarify the revised statutes.

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[400] "Effective consent" is defined in RCC § 22A-1301 as "consent obtained by means other than the use of physical force, coercion or deception." "Physical force" is defined in RCC § 22A-1301 as "the application of physical strength" and covers the prohibition in the current intoxication provision on the use of "force." The RCC definition of "coercion" in RCC § 22A-1301 covers "a threat of force."

[401] "Effective consent" is defined in RCC § 22A-1301 as "consent obtained by means other than the use of physical force, coercion or deception." If an actor obtains a complainant's consent to consume an intoxicant by lying about the presence of an intoxicant or without telling the complainant that an intoxicant is present, this would not be "effective consent" because it was obtained by "deception," as defined in RCC § 22A-1301.

[402] D.C. Code §§ 22-3003(2) (prohibiting a "sexual act" when the actor "knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual act; or (C) Incapable of communicating unwillingness to engage in that sexual act."); 22-3005(2) (prohibiting a "sexual contact" when the actor "knows or has reason to know that the other person is: (A) Incapable of appraising the nature of the conduct; (B) Incapable of declining participation in that sexual contact; or (C) Incapable of communicating unwillingness to engage in that sexual contact.").

[403] D.C. Code §§ 22-3002(a)(4); 22-3004(a)(4) ("After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct.").

[404] *In re M.S.*, 171 A.3d 155, 164 (D.C. 2017). The DCCA held that "once the government proves in a sexual assault case that the defendant was four or more years older than the child victim, there is a conclusive presumption that the defendant knew or should have known that the child was incapable of appraising the nature of the sexual conduct." *Id.* at 165.

[405] D.C. Code §§ 22-3003(2)(C); 22-3005(2)(C).

Relation to National Legal Trends. *The revised sexual assault offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[406]

First, there is strong support in the criminal codes of reformed jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury," as well as threats of an "unwanted sexual act." The current first degree[407] and third degree[408] sexual abuse statutes prohibit threatening to subject any person to "bodily injury,"[409] a defined term that differs from the levels of bodily injury codified in the District's current assault statutes. First degree and third degree of the revised sexual assault statute prohibit threats "to commit an unwanted sexual act or cause significant bodily injury to any person." "Significant bodily injury" is defined in RCC § 22A-3001.[410]

There is strong support in the criminal codes of other jurisdictions for first degree and third degree of the revised sexual assault statute prohibiting threats of "significant bodily injury." Only seven[411] of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[412] ("reformed jurisdictions") have an intermediate level of physical harm like "significant bodily injury" in current District law. None of these jurisdictions' sex offenses prohibit threats of the intermediate level of physical harm. However, three of these reformed jurisdictions[413] prohibit threats of "serious

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[406] Unless otherwise noted, this survey is limited to sex offenses in other jurisdictions that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[407] D.C. Code § 22-3002(a)(2).

[408] D.C. Code § 22-3004(2).

[409] D.C. Code § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[410] The RCC definition of "significant bodily injury" also clarifies certain injuries are within the scope of the term: "a fracture of a bone; a laceration that is at least one inch in length and at least one quarter inch in depth; a burn of at least second degree severity; a temporary loss of consciousness; a traumatic brain injury; and a contusion or other bodily injury to the neck or head caused by strangulation or suffocation." RCC § 22A-3001

[411] Haw. Rev. Stat. Ann. § 707-700 ("substantial bodily injury."); Ind. Code Ann. § 35-31.5-2-204.5 ("moderate bodily injury."); Minn. Stat. Ann. § 609.02(7a) ("substantial bodily injury."); N.D. Cent. Code Ann. § 12.1-01-04(29) ("substantial bodily injury."); Utah Code Ann. § 76-1-601(12) ("substantial bodily injury."); Wash. Rev. Code Ann. § 9A.04.110(4)(b) ("substantial bodily harm."); Wis. Stat. Ann. § 939.22(38) ("substantial bodily harm.").

[412] *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.

[413] Minn. §§ 609.342(1)(c), 609.02(8) (offense of criminal sexual conduct in the first degree including sexual penetration when "circumstances existing at the time of the act case the complainant to have a reasonable fear of imminent great bodily harm to the complainant or another" and defining "great bodily harm" as "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm."); N.D. Cent. Code Ann. §§ 12.1-20-03(1)(a), 12.1-01-04(27) (prohibiting a sexual act when the actor "compels the victim to submit . . . by threat of . . . serious bodily injury . . . to be inflicted on any human being" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any

bodily injury" or a similar term that requires a higher threshold of physical harm than the current definition of "bodily injury"[414] in the District's current sex offenses. Two of these reformed jurisdictions[415] prohibit threats of "bodily injury" or "physical injury," and require a similar threshold of physical harm as the current definition of "bodily injury"[416] in the District's current sex offenses. In the remaining two reformed jurisdictions,[417] the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms.

Of the remaining 22 reformed jurisdictions, six reformed jurisdictions[418] prohibit threats of "serious bodily injury" or a similar term that requires a higher threshold of physical harm than

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bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Utah Code Ann. §§ 76-5-405(1)(a)(ii), 76-1-601(11) (offense of aggravated sexual assault prohibiting threat of "serious bodily injury to be inflicted imminently on any person" and defining "serious bodily injury" as "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.").

[414] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[415] Haw. Rev. Stat. Ann. §§ 707-730(1)(a) (offense of first degree sexual assault prohibiting sexual penetration by "strong compulsion" and defining "strong compulsion" to include a threat "that places a person in fear of bodily injury to the individual or another person."), 707-700 (defining "bodily injury" as "physical pain, illness, or any impairment of physical condition."); Wash. Rev. Code Ann. §§ 9A.44.050(1)(a), 9A.44.010(6) (offense of second degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, that places a person in fear of . . . physical injury to herself or himself or another person."), 9A.04.110(4)(a) (defining "bodily injury," "physical injury," or "bodily harm" as "physical pain or injury, illness, or an impairment of physical condition.").

[416] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[417] Ind. Code § 35-42-4-1(1)(a)(1) (prohibiting sexual intercourse by "threat of force."); Wis. Stat. Ann. § 940.22(2)(a) (prohibiting sexual contact or sexual intercourse by "threat of force or violence.").

[418] Ala. Code §§ 13A-6-61(a)(1), 13A-6-60(8) (offense of first degree rape prohibiting sexual intercourse "by forcible compulsion" and defining "forcible compulsion to include "a threat, express or implied, that places a person in fear of immediate . . . serious physical injury to himself or another person."), 13A-1-2(14) (defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ."); Colo. Rev. Stat. Ann. §§ 18-3-402(4)(b), 18-1-901(3)(p) (making sexual assault a class 3 felony if the "actor causes submission of the victim by threat of imminent . . . serious bodily injury . . . to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Del. Code Ann. tit. 11, §§ 773(a)(2)(b) (offense of first degree rape prohibiting sexual intercourse without consent when "it was facilitated by or occurred during the course of the commission of attempted commission of . . . terroristic threatening."), 621(a)(1) (offense of terroristic threats prohibiting threats "to commit any crime likely to result in death or in serious injury to person."); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(1)(A), 251(E) (offense of gross sexual assault prohibiting a sexual act by "compulsion" and defining "compulsion" to include the use or threat of physical force that "produces in that person a reasonable fear that . . . serious bodily injury . . . might be immediately inflicted upon that person or another human being."), 2(23) (defining "serious bodily injury" as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or loss or substantial impairment of the function of any bodily member or organ, or extended convalescence necessary for recovery of physical health."); S.D. Codified Laws §§ 22-22-1(2), 22-1-2(44) (offense of rape prohibiting sexual penetration by "threats of immediate and great bodily harm against the victim or other persons within the victim's presence" and defining "great bodily harm" as "such injury as is grave and not trivial, and gives rise to apprehension of danger to life,

the current definition of "bodily injury"[419] in the District's current sex offenses. Eight[420] of these 22 reformed jurisdictions prohibit threats of "physical injury" or a similar term that require a similar or lower threshold of physical harm the current definition of "bodily injury"[421] in the District's current sex offenses. In the remaining eight reformed jurisdictions, the required level of physical harm is unclear because jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms[422] or the definitions do not specifically include threats.[423]

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health, or limb."); Tex. Penal Code §§ 22.021(a)(1)(A), (a)(2)(A)(ii), 1.07(a)(46) (offense of aggravated sexual assault prohibiting sexual activity if the actor "by actors or words places the victim in fear that . . . serious bodily injury . . . will be imminently inflicted on any person" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.").

[419] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[420] Alaska Stat. Ann. §§ 11.41.420(a)(1), 11.41.470(8)(A) (offense of first degree sexual assault prohibiting sexual penetration "without consent" and defining "without consent" to include "express or implied threat of . . . imminent physical injury . . . to be inflicted on anyone."), 11.81.900(47) (defining "physical injury" as a "physical pain or an impairment of physical condition."); Ark. Code Ann. §§ 5-14-103(a)(1), 5-14-101(2) (offense of rape prohibiting sexual activity "by forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, of . . . physical injury to . . . any person."), 5-1-102(14) (defining "physical injury" as "(A) Impairment of physical condition; (B) Infliction of substantial pain; or (C) Infliction of bruising, swelling, or a visible mark associated with physical trauma."); Conn. Gen. Stat. Ann. §§ 53a-70(a)(1) (offense of sexual assault in the first degree prohibiting sexual intercourse "by the threat of use of force against such other person or against a third person which reasonably causes such person to fear physical injury to such person or a third person."), 53a-3(3) (defining "physical injury" as "impairment of physical condition or pain."); Ky. Rev. Stat. Ann. §§ 510.0401)(a) (offense of rape in the first degree prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in fear of immediate . . . physical injury to self or another person."), 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition."); Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to inflict bodily injury on anyone . . . regardless of the immediacy of the threat."), 2C:11-1(a) (defining "bodily injury" as "physical pain, illness or any impairment of physical condition."); N.Y. Penal Law §§ 130.35(1), 130.00(8)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "a threat, express or implied, which places a person in fear of immediate . . . physical injury to himself, herself, of another person."), 10.00(9) (defining "physical injury" as "impairment of physical condition or substantial pain."); Or. Rev. Stat. Ann. §§ 163.375(1)(a), 163.305(1)(b) (offense of first degree rape prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include a "threat, express or implied, that places a person in reasonable fear of immediate or future . . . physical injury to self or another person."), 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain."); 500.080(13) (defining "physical injury" as "substantial physical pain or any impairment of physical condition.").

[421] D.C. Code Ann. § 22-3001(2) ("'Bodily injury' means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.").

[422] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of

Due to the RCC definition of "significant bodily injury," threats of impairment of a "mental faculty" are excluded from first degree and third degree of the revised sexual assault statute.[424] As is discussed in the commentary, it is unclear to what "mental faculty" refers. Regardless, there is strong support in the criminal codes of the reformed jurisdictions for excluding threats of mental injury or psychological distress from the revised sexual assault statute. Only one of the 29 reformed jurisdictions specifically includes threats of mental injury in its sexual assault offense, and it is limited to threats of "mental illness or impairment."[425] As previously discussed, eight reformed jurisdictions prohibit threats of "force" or threats of "physical injury," but do not statutorily define these terms[426] or the definitions do not specifically include threats.[427] It is unclear if these jurisdictions' sexual assault statutes extend to threats of mental illness or psychological distress.

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force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[423] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[424] The current definition of "bodily injury" includes "injury involving loss or impairment of the function of a . . . mental faculty." D.C. Code § 22-3001(2). By extension, the current first degree and third degree sexual abuse statutes extend to threats that any person will be subjected to such an injury of a "mental faculty."

[425] Mont. Code Ann. §§ 45-5-508(1), 45-5-501(2)(a) (offense of aggravated sexual intercourse without consent prohibiting sexual intercourse without consent with "force" and defining "force" to include "the threatened infliction of bodily injury."), 45-2-101(5) (defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment.").

[426] Ariz. Rev. Stat. Ann. §§ 13-1406(A), 13-1401(A)(7)(a) (offense of sexual assault prohibiting sexual activity "without consent" and defining "without consent" to include the "threatened use of force against a person."); 720 Ill. Comp. Stat. Ann. 11-1.20(a)(1) (offense of criminal sexual assault prohibiting sexual penetration by "threat of force."); Kan. Stat. Ann. §§ 21-5503(a)(1)(A) (offense of rape prohibiting sexual intercourse without consent when the complainant is "overcome by force or fear."); Mo. Ann. Stat. § 566.030(1) (offense of rape in the first degree prohibiting sexual intercourse by the use of "forcible compulsion."); N.H. Rev. Stat. Ann. § 632-A:2(1)(a), (1)(c) (offense of aggravated felonious sexual assault prohibiting sexual penetration "through the actual application of physical force [or] physical violence" or "threatening to use physical violence . . . and the victim believes that the actor has the present ability to execute these threats.").

[427] Ohio Rev. Code Ann. §§ 2907.02(A)(2), 2901.01(A)(1) (prohibiting sexual conduct by "force or threat of force" and defining "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing."); Tenn. Code Ann. §§ 39-13-503(a)(1), 39-13-501(1) (offense of rape prohibiting sexual penetration by "force or coercion" and defining "coercion" as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future."), 39-11-106(a)(12) (defining "force" as "compulsion as "the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title."); 18 Pa. Stat. Ann. § 3121(a)(1), (a)(2), 3101 (prohibiting sexual intercourse by "forcible compulsion" or "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion"

Only two of the 29 reformed jurisdictions have sexual assault statutes that specifically prohibit threats of unwanted sexual activity.[428] However, threats of unwanted sexual activity may fall under threats of physical harm, and at least eight of the reformed jurisdictions prohibit sexual assault by coercion that include threats of unwanted sexual activity.[429]

Second, regarding the actor's ability to claim he or she did not act "knowingly" or "with intent" due to his or her self-induced intoxication, the American rule governing intoxication for crimes with a culpable mental state of knowledge is that the culpable mental state element "may be negatived by intoxication" whenever it "negatives the required knowledge."[430] In practical effect, this means that intoxication may "serve as a defense to a crime [of knowledge so long as]

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as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied.").

[428] Del. Code Ann. tit. 11 §§ 772(a)(1), 761(j)(1) (offense of second degree rape prohibiting sexual intercourse without consent and defining "without consent" to include the actor "compelled the victim to submit . . . by any act of coercion as defined in §§ 791 and 792 of this title."), 791(3) ("A person is guilty of coercion when the person compels or induces a person to engage in conduct which the victim has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which the victim has a legal right to engage, by means of instilling in the victim a fear that, if the demand is not complied with, the defendant or another will . . . [e]ngage in other conduct constituting a crime."); Ky. Rev. Stat. Ann. §§ 510.040(1)(a), 510.010(2) (prohibiting sexual intercourse by "forcible compulsion" and defining "forcible compulsion" to include "threat of physical force, express or implied, which places a person in . . . fear of any offense under this chapter."); N.J. Stat. Ann. §§ 2C:14-2(c)(1), 2C:14-1(J) (offense of sexual assault prohibiting sexual penetration by "physical force or coercion" and defining "coercion" as "those acts which are defined as criminal coercion in [specified sections of the criminal coercion offense]."), 2C:13-5(a)(1) (offense of criminal coercion including "if, with purpose unlawfully to restrict another's freedom of action to engage in or refrain from engaging in conduct, [the actor] threatens to . . . commit any other offense.").

[429] Colo. Rev. Stat. Ann. § 18-3-402(1)(a) (sexual assault offense prohibiting sexual activity when the "actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will."); Me. Rev. Stat. Ann. tit. 17-A, § 253(2)(B) (prohibiting a sexual act "by any threat."); Mont. Code Ann. §§ 45-5-503(1), 45-5-501(1)(b)(iii) ("prohibiting sexual intercourse "without consent" and stating that a person is "incapable of consent" if he or she is "overcome by deception, coercion, or surprise."); N.D. Cent. Code Ann. § 12.1-20-04(1), 12.1-20-02(1) (prohibiting a sexual act or sexual contact when the actor "[c]ompels the other person to submit by any threat or coercion that would render a person reasonably incapable of resisting" and defining "coercion" as "to exploit fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."); Ohio Rev. Code Ann. § 2907.02(A)(1) (offense prohibiting sexual conduct when the actor "coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."); 18 Pa. Stat. Ann. § 3121(a)(1), 3101 (prohibiting sexual intercourse by "threat of forcible compulsion that would prevent resistance by a person of reasonable resolution" and defining "forcible compulsion" as "[c]ompulsion by the use of physical, intellectual, moral, emotional or psychological force, either express or implied."); S.D. Codified Laws § 22-22-1(1) (offense of rape prohibiting sexual penetration "through the use of coercion."); Tex. Penal Code Ann. §§ 22.011(a)(1), (b)(1) (prohibiting sexual activity without consent and stating that a sexual assault is "without the consent" of the complainant if "the actor compels the other person to submit or participate by the use of . . . coercion."), 1.07(9)(A) (defining "coercion" to include a "threat, however communicated to commit an offense.").

[430] WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 9.5 (Westlaw 2017). For reform codes that codify a logical relevance principle consistent with this rule, see, for example, Or. Rev. Stat. § 161.125; Me. Rev. Stat. Ann. tit. 17-A, § 37; Wash. Rev. Code Ann. § 9A.16.090. This logical relevance principle is based upon Model Penal Code § 2.08(1), which in turn was intended to approximate common law trends. *See* Model Penal Code § 2.08 cmt. at 354 ("To the extent [judicial decisions] have given a concrete content to the[] vague conceptions [of specific intent and general intent], the net effect of this rules seems to have come to this: when purpose or knowledge . . . must be proved as an element of the offense, intoxication may generally be adduced in disproof if it is logically relevant."). For other legal authorities in accord with this translation, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, 1WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 224 (1970); CHARLES E. TORCIA, 2 WHARTON'S CRIMINAL LAW § 111 (15th ed. 2014).

the defendant, because of his intoxication, actually lacked the requisite [] knowledge."[431] Among those reform jurisdictions that expressly codify a principle of logical relevance consistent with this rule, like in the RCC, none appear to make offense-specific carve outs for individual offenses.[432]

Third, there is mixed support in the criminal codes of the reformed jurisdictions for the revised sexual assault statute specifying one set of offense-specific penalty enhancements that is capped at a penalty increase of one class. Fifteen[433] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[434] However, it is not possible to generalize about the sentencing requirements for these penalty enhancements and gradations in these reformed jurisdictions due to the wide differences in sentencing structures.

Fourth, there is little support in the criminal codes of reformed jurisdictions for the revisions to the age-based sexual assault penalty enhancements for complainants under the age of 18 years. These revisions are as follows: 1) requiring at least a four year age gap between the actor and a complainant under the age of 12 years, and requiring strict liability for the age gap; 2) codifying a penalty enhancement for the actor recklessly disregarding that the complainant was under the age of 16 years when the actor, in fact, was at least four years older; 3) requiring at least a four year age gap between the actor and a complainant under the age of 18 years when the actor is in a position of trust with our authority over the complainant, and requiring strict liability for the age gap; 4) applying a penalty enhancement to all gradations for an actor that is 18 years of age or older and at least two years older than a complainant under 18 years of age and requiring a "recklessly" culpable mental state.

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[431] LAFAVE AT 2 SUBST. CRIM. L. § 9.5.

[432] For discussion of treatment of intoxication in reform codes, see FIRST DRAFT OF REPORT NO. 3, RECOMMENDATIONS FOR CHAPTER 2 OF THE REVISED CRIMINAL CODE—MISTAKE, DELIBERATE IGNORANCE, AND INTOXICATION, at 33-37 (March 13, 2017).

[433] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[434] Alaska Stat. Ann. § 11.41.410(2).

The limited support in the reformed jurisdictions for these revisions is due to the fact that most of the 29 reformed jurisdictions do not have sex offense penalty enhancements based on the age of the complainant. As few as three[435] of the 29 reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. Instead, most of the 29 reformed jurisdictions incorporate sexual assault of complainants under the age of 18 years as gradations of the general sexual assault offense, and do not have separate statutes for sexual assault of the youngest complainants.[436]

Of these three reformed jurisdictions, one jurisdiction has a penalty enhancement for a complainant under the age of 16 years,[437] a second jurisdiction has an enhancement for a complainant under the age of 15 years,[438] and the third jurisdiction has a penalty enhancement for a complainant under the age of 12 years.[439]

Fifth, there is little support in the criminal codes of reformed jurisdictions for the revisions to the age-based sexual assault penalty enhancements for complainants over the age of 65 years and for vulnerable adults. Only two of the 29 reformed jurisdictions' criminal codes have penalty enhancements for the sexual assault of an elderly person.[440] A third reformed

[435] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

[436] Citations indicate the subsections that codify gradations for complainants under the age of 18 years in the general sexual assault offense. Ala. Code §§ 13A-6-61(a)(3), 13A-6-62(a)(1); Ark. Code Ann. §§ 5-14-103(a)(3)(A), 5-14-127(a)(1)(A); Colo. Rev. Stat. Ann. § 13-3-402(1)(d), (1)(e); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), 53a-71(a)(1), Del. Code Ann. tit. 11, §§ 770(a)(1), 771(a)(1), 773(a)(5); Haw. Rev. Stat. Ann. §§ 707-730(b), (c); Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), 510.050(1)(a), 510.060(1)(b); Kan. Stat. Ann. § 21-5503(a)(3); Me. Rev. Stat. Ann. tit. 17-A, § 253(1)(B), (1)(C); Mont. Code Ann. § 45-5-503(3), (4), (5); Minn. Stat. Ann. §§ 609.342(1)(a), (1)(b), (1)(g), (1)(h), 609.344(1)(a), (1)(b); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4); N.Y. Penal Law §§ 130.25(2), 130.30(1), 130.35(3), (4), 130.96; N.D. Cent. Code Ann. § 12.1-20-03(1)(d); N.H. Rev. Stat. Ann. § 632-A:2(l); Ohio Rev Code Ann. § 2907.02(A)(1)(b); Or. Rev. Stat. Ann. §§ 163.355, 163.365, 163.366(1)(b); 18 Pa. Stat. Ann. § 3121(c); S.D. Codified Laws § 22-22-1(1), (5); Tex. Penal Code Ann. §§ 22.011(a)(2), (c)(1), 22.021(a)(1)(B), (a)(2)(b), (b)(1).

[437] Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony).

[438] Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705).

[439] Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

[440] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(5) (offense of aggravated criminal sexual assault prohibiting criminal sexual assault "when the victim is 60 years of age or older."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(2)

jurisdiction requires a relationship between the complainant and the actor and is limited to "frail" elderly individuals.[441] None of these reformed jurisdictions specify an age requirement for the actor, and none of them specify required culpable mental states in the penalty enhancement statutes. Only one of the 29 reformed jurisdictions' criminal codes has a penalty enhancement for the sexual assault of a vulnerable adult and does not statutorily specify a culpable mental state.[442]

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for the revised sexual assault penalty enhancement for weapons requiring that the actor "recklessly" caused the sexual act or sexual contact by "displaying" or "using" a dangerous weapon or imitation dangerous weapon. The current weapons aggravator for the current sex offense statutes requires that the "defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon."[443] In contrast, the revised sexual assault penalty enhancement requires that the actor "recklessly" caused the sexual act or sexual contact "by displaying" or "using" a dangerous weapon or imitation weapon. Fourteen of the 29 reformed jurisdictions have sex-offense specific penalty enhancements for the use of dangerous weapons during sexual assault.[444] There is strong support for requiring a causation requirement

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(aggravated sexual assault offense prohibiting sexual activity when the complainant is "an elderly individual" [person 65 years of age or older].").

[441] Wash. Rev. Code Ann. §§ 9A.44.050(1)(f) (offense of rape in the second degree prohibiting sexual intercourse with a "frail elder or vulnerable adult" when the actor had a "significant relationship" with the complainant or "was providing transportation, within the course of his or her employment, to the victim at the time of the offense."), 9A.44.010(16) (defining "frail elder or vulnerable adult" as a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.").

[442] Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(C), (b)(3) (aggravated sexual assault offense prohibiting sexual activity when the complainant is "a disabled individual" and defining "disabled individual" as "a person older than 13 years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self.").

[443] D.C. Code § 22-3020(a)(6).

[444] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Ind. Code Ann. § 35-42-41 (b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to

in the revised enhancement. Three of the 14 reformed jurisdictions explicitly require that the use or display of the dangerous weapon cause the sexual conduct[445] and an additional eight of these reformed jurisdictions require the use or display of the weapon during the course of the sexual assault,[446] which includes causation. The remaining three of these jurisdictions require that the actor was "armed with" the dangerous weapon and the scope of the enhancement and any

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reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion when the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[445] Colo. Rev. Stat. Ann. § 18-3-402(5)(III) (making sexual assault a class 2 felony if the "actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim."); Minn. Stat. Ann. § 609.342(1)(d) (offense of criminal sexual conduct in the first degree prohibiting sexual penetration when "the actor is armed with a dangerous weapon or any article used or fashioned in a manner to lead the complainant to reasonably believe it to be a dangerous weapon and uses or threatens to use the weapon or article to cause the complainant to submit."); Wis. Stat. Ann. § 940.225(1)(b) (offense of first degree sexual assault prohibiting sexual contact or sexual intercourse without consent "by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a dangerous weapon.").

[446] Conn. Gen. Stat. Ann. § 53a-70a(a)(1) (offense of aggravated sexual assault in the first degree prohibiting committing sexual assault in the first degree and "in the commission of such offense such person uses or is armed with and threatens the use of or displays or represents by such person's words or conduct that such person possesses a deadly weapon."); Del. Code Ann. tit. 11, § 773(a)(3) (first degree rape prohibiting sexual intercourse when "[i]n the course of the commission of rape in the second, third or fourth degree, or while in the immediate flight therefrom, the defendant displayed what appeared to be a deadly weapon or represents by word or conduct that the person is in possession of or control of a deadly weapon or dangerous instrument."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1) (offense of aggravated criminal sexual assault prohibiting committing criminal sexual assault and during the commission of the offense the actor "displays, threatens to use, or uses a dangerous weapon, other than a firearm, or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon."); Mo. Ann. Stat. §§ 566.010(1)(b) (defining "aggravated sexual offense" as "any sexual offense, in the course of which, the actor displays a deadly weapon or dangerous instrument in a threatening manner."); N.Y. Penal Law § 130.95(1)(b) (offense of predatory sexual assault prohibiting committing specified sex offenses when "in the course of the commission of the crime or the immediate flight therefrom" the actor "uses or threatens the immediate use of a dangerous instrument."); Tex. Penal Code Ann. § 22.021(a)(1), (a)(2)(A)(iv) (offense of aggravated sexual assault prohibiting sexual activity without consent when the actor "uses or exhibits a deadly weapon in the course of the same criminal episode."); Utah Code Ann. § 76-5-405(1)(a)(i) (offense of aggravated sexual assault prohibiting, in the course of committing specified sex offenses, "the actor uses, or threatens the victim with the use of, a dangerous weapon."); Wash. Rev. Code Ann. § 9A.44.045(1)(a) (offense of rape in the first degree prohibiting sexual intercourse by forcible compulsion where the actor "[u]ses or threatens to use a deadly weapon or what appears to be a deadly weapon.").

causation requirement is unclear. [447] Eight of the 14 reformed jurisdictions specifically include imitation weapons in the weapon enhancement. None 14 reformed jurisdictions specify a culpable mental state in the sex offense weapon enhancement.

Seventh, there is strong support in the criminal codes of the 29 reformed jurisdictions for omitting "extreme physical pain," rendering a complainant "unconscious," and causing impairment of a "mental faculty" from the revised penalty enhancement for causing serious bodily injury. At least 18 of the 29 reformed jurisdictions, require either serious bodily injury[448]

[447] Ind. Code Ann. § 35-42-41(b)(2) (making rape a Level 1 felony if "it is committed while armed with a deadly weapon."); N.J. Stat. Ann. § 2C:14-2(a)(4) (offense of aggravated sexual assault prohibiting sexual penetration when the "actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object."); Tenn. Code Ann. § 39-13-502(a)(1) (offense of aggravated rape prohibiting sexual penetration when "[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon.").

[448] Alaska Stat. Ann. §§ 11.41.410(a)(2), 11.81.900(a)(57 (offense of sexual assault in the first degree prohibiting engaging in sexual penetration and causing "serious physical injury" and defining "serious physical injury" as "(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or (B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy."); Ariz. Rev. Stat. Ann. §§ 13-1406(D), 13-105(39) (enhancing the sentence for sexual assault if the actor inflicted "serious physical injury" and defining "serious physical injury" as "includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb."); Colo. Rev. Stat. Ann. §§ 18-3-402(5)(a)(II), 18-1-901(3)(p) (elevating the penalty for sexual assault if the complainant suffers "serious bodily injury" and defining "serious bodily injury" as "bodily injury which, either at the time of the actual injury or at a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures, or burns of the second or third degree."); Conn. Gen. Stat. Ann. §§ 53a-70a(a)(3), 53a-3(4) (aggravated sexual assault requiring "under circumstances evincing an extreme indifference to human life [the actor] recklessly engages in conduct which creates a risk of death to the [complainant], and thereby causes serious physical injury to such [complainant]" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes serious disfigurement, serious impairment of health or serious loss or impairment of the function of any bodily organ."); Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); Mo. Ann. Stat. §§ 566.010(1)(a), 556.061 (defining "aggravated sexual offense" as any sexual offense, where, in the course of the offense, the actor inflicts "serious physical injury" on the complainant and defining "serious physical injury" as "physical injury that creates a substantial risk of death or that causes serious disfigurement or protracted loss or impairment of the function of any part of the body."); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); N.Y. Penal Law §§ 130.95(1)(a), 10.00(10) (offense of rape in the first degree requiring "serious physical injury" and defining "serious physical injury" as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Tex. Penal Code Ann. §§ 22.021(a)(2)(i), § 1.07(46) (offense of aggravated sexual assault requiring "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or

or a lower threshold of bodily injury[449] for a sexual assault offense or gradation. Of these 18 jurisdictions, three include rendering the complainant unconscious[450] and two jurisdictions include extreme pain.[451] Of the 29 reformed jurisdictions, five include some kind of mental distress or mental injury in their sexual assault offenses.[452]

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impairment of the function of any bodily member or organ."); Utah Code Ann. §§ 76-5-402(3)(b)(i), 76-6-601(11) (enhancing the penalty for rape if the actor caused "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death."); Wash. Rev. Code Ann. § 9A.44.040(1)(c) (offense of first degree rape requiring "serious physical injury, including but not limited to physical injury which renders the [complainant] unconscious."); Wis. Stat. Ann. §§ 940.225(1)(a), 939.22(14) (first degree sexual assault requiring "great bodily harm" and defining "great bodily harm" as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.").

[449] 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(2), 5/11-0.1 (offense of aggravated criminal sexual assault requiring "bodily harm" to the complainant and defining "bodily harm" as "physical harm, and includes, but is not limited to, sexually transmitted disease, pregnancy, and impotence."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the complainant and defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.").

[450] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs."); Wash. Rev. Code Ann. § 9A.44.040(1)(c) (offense of first degree rape requiring "serious physical injury, including but not limited to physical injury which renders the [complainant] unconscious.").

[451] Ind. Code Ann. §§ 34-42-4-1(b)(3), 35-31.5-2-292 (elevating the penalty for rape if it results in "serious bodily injury" and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus."); N.D. Cent. Code Ann. §§ 12.1-20-03(3)(a), 12.1-01-04(27) (elevating the penalty for sexual assault if the actor inflicts "serious bodily injury" on the complainant and defining "serious bodily injury" as "bodily injury that creates a substantial risk of death or which causes serious permanent disfigurement, unconsciousness, extreme pain, permanent loss or impairment of the function of any bodily member or organ, a bone fracture, or impediment of air flow or blood flow to the brain or lungs.")

[452] Del. Code Ann. tit. 11, § 773(a)(1) (offense of first degree rape requiring "physical injury or serious mental or emotional injury" to the complainant); N.J. Stat. Ann. §§ 2C:14-2(c)(6), 2C:14-1(f) (offense of aggravated sexual assault requiring "severe personal injury" and defining "severe personal injury" as "severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain."); Mont. Code Ann. §§ 45-5-503(3)(a), 45-2-101(5) (elevating the punishment for sexual intercourse without consent if the actor inflicts "bodily injury" on anyone and defining "bodily injury" as "physical pain, illness, or an impairment of physical condition and includes mental illness or impairment."); Minn. Stat. Ann. §§ 609.342(1)(e), 609.341(1)(8) (offense of criminal sexual conduct in the first degree requiring that the actor cause "personal injury" to the complainant and defining "personal injury" as "bodily harm as defined in section 609.02, subdivision 7, or severe mental anguish or pregnancy."); Tenn. Code Ann. §§ 39-13-502(a)(2), 39-11-106(a)(2) (offense of aggravated rape requiring "bodily injury" to the

complainant and defining “bodily injury” as “a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.”).

RCC § 22A-1304. SEXUAL ABUSE OF A MINOR.

(a) *First Degree Sexual Abuse of a Minor.* An actor commits the offense of first degree sexual abuse of a minor when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act; and
  (2) In fact:
    (A) The complainant is under 12 years of age; and
    (B) The actor is at least four years older than the complainant.

(b) *Second Degree Sexual Abuse of a Minor.* An actor commits the offense of second degree sexual abuse of a minor when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act; and
  (2) In fact:
    (A) The complainant is under 16 years of age; and
    (B) The actor is at least four years older than the complainant.

(c) *Third Degree Sexual Abuse of a Minor.* An actor commits the offense of third degree sexual abuse of a minor when that actor:
  (1) Knowingly causes the complainant to engage in or submit to a sexual act;
  (2) While in a position of trust with or authority over the complainant; and
  (3) In fact:
    (A) The complainant is under 18 years of age; and
    (B) The actor is at least 18 years of age and at least four years older than the complainant.

(d) *Fourth Degree Sexual Abuse of a Minor.* An actor commits the offense of fourth degree sexual abuse of a minor when that actor:
  (1) Knowingly engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact; and
  (2) In fact:
    (A) The complainant is under 12 years of age; and
    (B) The actor is at least four years older than the complainant.

(e) *Fifth Degree Sexual Abuse of a Minor.* An actor commits the offense of fifth degree sexual abuse of a minor when that actor:
  (1) Knowingly engages in sexual contact with the complainant, or causes the complainant to engage in or submit to sexual contact; and
  (2) In fact:
    (A) The complainant is under 16 years of age; and
    (B) The actor is at least four years older than the complainant.

(f) *Sixth Degree Sexual Abuse of a Minor.* An actor commits the offense of sixth degree sexual abuse of a minor when that person:
  (1) Knowingly engages in sexual contact with the complainant or causes the complainant to engage in or submit to sexual contact;
  (2) While in a position of trust with or authority over the complainant; and
  (3) In fact:
    (A) The complainant is under 18 years of age; and
    (B) The actor is, in fact, at least 18 years of age and at least four years older than the complainant.

(g) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:

(1) First degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(3) Third degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(4) Fourth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(5) Fifth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(6) Sixth degree sexual abuse of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(h) *Definitions*. The term "knowingly," has the meaning specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "domestic partnership," and "position of trust with or authority over" have the meanings specified in § 22A-1001.

(i) *Defenses.* In addition to any defenses otherwise applicable to the actor's conduct under District law:
(1) It is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.
(2) It is an affirmative defense to prosecution under subsections (b) and (e), which the actor must prove by a preponderance of the evidence, that the actor reasonably believed that the complainant was 16 years of age or older at the time of the offense.
(3) It is an affirmative defense to prosecution under subsections (c) and (f), which the actor must prove by a preponderance of the evidence, that the actor reasonably believed that the complainant was 18 years of age of older at the time of the offense.

Commentary

Explanatory Note. *The RCC sexual abuse of a minor offense prohibits specified acts of sexual penetration or sexual touching when the complainant is under the age of 18 years. The penalty gradations are primarily based on the nature of the sexual conduct, as well as the age of the complainant. The revised sexual abuse of a minor offense replaces four distinct offenses in the current D.C. Code: first degree sexual abuse of a child,*[453] *second degree sexual abuse of a child,*[454] *first degree sexual abuse of a minor,*[455] *and second degree sexual abuse of a minor.*[456] *The revised sexual abuse of a minor offense also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,*[457] *the*

[453] D.C. Code § 22-3008.
[454] D.C. Code § 22-3009.
[455] D.C. Code § 22-3009.01.
[456] D.C. Code § 22-3009.02.
[457] D.C. Code § 22-30011.

state of mind proof requirement,[458] *the attempt statute,*[459] *and the aggravating sentencing factors.*[460] *Insofar as they are applicable to sexual abuse of a child and sexual abuse of a minor, the revised sexual abuse of a minor offense also replaces two penalty enhancements: the "while armed" penalty enhancement*[461] *and the enhancement for minors.*[462]

First degree sexual abuse of a minor (subsection (a)), second degree sexual abuse of a minor (subsection (b)), and third degree sexual abuse of a minor (subsection (c)), each require that the actor cause the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person.

Subsection (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (a)(2) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to each element in subsection (a)(2)(A) and subsection (a)(2)(B). Subsection (a)(2)(A) specifies that the complainant must be under 12 years of age and subsection (a)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Subsection (b)(1) specifies the prohibited conduct for second degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (b)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (b)(2) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to each element in subsection (b)(2)(A) and subsection (b)(2)(B). Subsection (b)(2)(A) specifies that the complainant must be under 16 years of age and subsection (b)(2)(B) specifies that the actor must be at least four years older than the complainant. There is no culpable mental state required for either the age of the complainant or the age gap.

Subsection (c)(1) specifies the prohibited conduct for third degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (c)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." Subsection (c)(2) requires that the actor be in a "position of trust with or authority over the" the complainant. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (c)(1) applies to this element. "Knowingly," a defined term in RCC § 22A-206, requires that the actor be "practically certain" that he or she is in a position of trust with or authority over" the

[458] D.C. Code § 22-3012.
[459] D.C. Code § 22-3018.
[460] D.C. Code § 22-3020.
[461] D.C. Code § 22-4502.
[462] D.C. Code § 22-3611.

complainant. "Position of trust with or authority over" is a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (c)(3) uses the phrase "in fact," a defined term that indicates there is no culpable mental state requirement as to a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to each element in subsection (c)(3)(A) and subsection (c)(3)(B). Subsection (c)(3)(A) specifies that the complainant must be under 18 years of age and subsection (c)(3)(B) specifies that the actor must be at least 18 years of age and at least four years older than the complainant. There is no culpable mental state required for the age of the complainant, the age of the actor, or the age gap.

Fourth degree sexual abuse of a minor (subsection (d)), fifth degree sexual abuse of a minor (subsection (e)), and sixth degree sexual abuse of a minor (subsection (f)), are identical to first degree sexual abuse of a minor, second degree sexual abuse of a minor, and third degree sexual abuse of a minor except that they require that the actor cause the complainant to engage in or submit to "sexual contact" instead of "sexual act." "Sexual contact" is a defined term in RCC § 22A-1301 that means touching the specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. Subsection (d)(1), subsection (e)(1), and subsection (f)(1) each specify a culpable mental state of "knowingly" for causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to "sexual contact." The requirements for the complainant and the actor are the same.

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

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

Subsection (i) codifies three defenses for the revised sexual abuse of a minor statute and establishes that these defenses are in addition to any other defenses otherwise applicable to the actor's conduct under District law. First, subsection (i)(1) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22A-1301. The actor must prove this defense by a preponderance of the evidence. Subsection (i)(2) codifies an affirmative defense for a reasonable mistake of age for second degree sexual abuse of a minor (subsection (b)) and fifth degree sexual abuse of a minor (subsection (e)) when the complainant is under the age of 16 years. The actor must prove the affirmative defense by a preponderance of the evidence. Subsection (i)(3) codifies an affirmative defense for a reasonable mistake of age for third degree sexual abuse of a minor (subsection (c)) and sixth degree sexual abuse of a minor (subsection (f)) when the complainant is under the age of 18 years. The actor must prove the affirmative defense by a preponderance of the evidence. There is no affirmative defense for reasonable mistake of age for first degree sexual abuse of a minor (subsection (a)) or fourth degree sexual abuse of a minor (subsection (d)) when the complainant is under the age of 12 years.

Relation to Current District Law. *The revised sexual abuse of a minor statute changes existing District law in four 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 sexual abuse of a minor statute provides separate gradations for a complainant under the age of 12 years when the actor is at least four years older than the complainant. The current child sexual abuse statutes only require that the complainant be under

the age of 16 years when the actor is at least four years older.[463] The current sex offense aggravators provide a penalty enhancement for when the complainant was "under the age of 12 years at the time of the offense."[464] In contrast, first degree and third degree of the revised sexual abuse of a minor statute provide gradations for a complainant under the age of 12 years when the actor is at least four years older. A more serious gradation for harming a complainant under the age of 12 years is consistent with the current penalty enhancement for complainants of such an age. The four year age gap matches the age gap in the current child sexual abuse statutes[465] and the other gradations of the revised sexual abuse of a minor statute. This change improves the consistency and proportionality of the revised sexual abuse of a minor statute.

Second, third degree and sixth degree of the revised sexual abuse of a minor statute require that the actor be at least four years older than the complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current sexual abuse of a minor statutes require that the complainant be under the age of 18 years and that the actor be 18 years of age or older and in a "significant relationship" with the complainant.[466] Unlike the current child sexual abuse statutes, which require at least a four year age gap between the actor and the complainant,[467] the current sexual abuse of a minor statutes do not have a required age gap. In contrast, third degree and sixth degree of the revised sexual abuse of a minor statute require at least a four year age gap between the actor and complainant and, by use of the phrase "in fact," require strict liability for this age gap. The current definition of "significant relationship"[468] and the revised definition of "position of trust with or authority over" (RCC § 22A-1301) include a broad range of custodial and non-custodial relationships, and without an age gap between the

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

[464] D.C. Code Ann. § 22-3020(a)(1) ("Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1 1/2 times the maximum penalty prescribed for the particular offense, and may receive a sentence of more than 30 years up to, and including life imprisonment without possibility of release for first degree sexual abuse or first degree child sexual abuse, if any of the following aggravating circumstances exists: (1) The victim was under the age of 12 years at the time of the offense."). First degree child sexual abuse has a maximum term of imprisonment of 30 years. D.C. Code §§ 22-3008 (first degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of first degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 45 years or life imprisonment without the possibility of release. Second degree child sexual abuse has a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3009 (second degree child sexual abuse); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years."). A person convicted of second degree child sexual abuse when the child is under 12 years of age "may" face a maximum term of imprisonment of 15 years.

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

[466] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

[468] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[469] While the special relationship between the actor and the complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[470] Strict liability for the age gap matches the current sexual abuse of a child statutes,[471] the other gradations of the revised sexual abuse of a minor statute (RCC § 22A-1304), and the revised sexually suggestive conduct with a minor statute (RCC § 22A-1306). This change improves the consistency and proportionality of the revised sexual assault of a minor offense.

Third, the revised sexual abuse of a minor statute provides an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or under the age of 18 years. Current D.C. Code § 22-3012 establishes strict liability for the age of the complainant in the current child sexual abuse statutes[472] (complainant under the age of 16 years) and current D.C. Code § 22-3011 establishes strict liability for the age of the complainant in the current sexual abuse of a minor statutes[473] (complainant under the age of 18 years). In contrast, the revised sexual abuse of a minor statute codifies an affirmative defense to the equivalent gradations in the revised statute—second degree, third degree, fifth degree, and sixth degree sexual abuse of a minor. The accused must prove by a preponderance of the evidence that the accused reasonably believed that the complainant was 16 years of age or older or 18 years of age or older at the time of the offense. Applying strict liability to statutory elements that distinguish

[469] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old with "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" may be guilty of second degree sexual abuse of a minor under current District law.

[470] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22A-1304(i)(1) provides that marriage is a defense to the revised sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

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[471] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[472] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[473] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

innocent from criminal behavior is strongly disfavored by courts[474] and legal experts[475] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[476] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[477] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[478] An affirmative defense requiring reasonableness is akin to requiring recklessness,[479] but places the initial burden of proof on the accused. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexual abuse of a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[480] D.C. Code § 22-3611 provides a separate penalty enhancement for committing child sexual abuse against complainants under the age of 18 years,[481] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child

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[474] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[475] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[476] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

[477] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[478] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[479] *See* RCC § 22A-208(b)(3) and accompanying commentary.

[480] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[481] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous weapon.[482] Current District statutes are silent as to whether or how these different penalty enhancements can each be applied to an offense, although DCCA case law suggests that the age-based sex offense aggravators and separate penalty enhancement may not apply to certain sex offenses because they overlap with elements of the offense.[483] In contrast, the revised sexual abuse of a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020 and the current "while armed with" enhancement in D.C. Code § 22-4502[484] are not necessary in the revised sexual abuse of a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexual assault statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the revised sexual abuse of a minor statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant or "submit to" the sexual conduct.[485] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[486] In addition to case law, District

[482] D.C. Code § 22-4502.

[483] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, or enticing staute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[484] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexual abuse of a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[485] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[486] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the

practice does not appear to follow the variations in statutory language.[487] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Second, the revised sexual abuse of a minor statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current child sexual abuse statutes[488] and sexual abuse of a minor statutes[489] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[490] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted the additional intent requirement.[491] There is no DCCA case law regarding commission of a "sexual act" in the current child sexual abuse statutes or the sexual abuse of a minor statutes.[492] The revised sexual abuse of a minor statute resolves these ambiguities by

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statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[487] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

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

[489] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[490] D.C. Code § 22-3001(9) (defining "sexual contact.").

[491] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[492] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC XXXXX, Sexual assault, above, for further discussion.

requiring a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[493] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[494] This change improves the clarity and consistency of the revised statutes.

Third, third degree and sixth degree of the revised sexual abuse of a minor statute require a "knowingly" culpable mental state for the element that actor was in a "position of trust with or authority over" the complainant. The current sexual abuse of a minor statutes require that the actor be "in a significant relationship with a minor,"[495] but they do not specify what, if any, culpable mental states apply, and there is no DCCA case law on point. Third degree and sixth degree of the revised sexual abuse of a minor statute resolve this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[496] This change improves the clarity and consistency of the revised statutes.

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

First, the revised sexual abuse of a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[497] and sexual abuse of a minor, for complainants under the age of 18 years.[498] For clarification, the revised sexual abuse of a minor statute no longer distinguishes separate offenses for complainants who are a "child"

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

[494] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[495] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor, and engages in a sexual act with a minor or causes that minor to engage in a sexual act."); 22-3009.02 (second degree sexual abuse of a minor statute prohibiting "[w]hoever, being 18 years of age or older, is in a significant relationship with a minor[,] and engages in a sexual contact with that minor or causes that minor to engage in a sexual contact."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

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

[498] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

or "minor" and instead organizes all offenses against minors as gradations of one "sexual abuse of a minor" statute. The text of the revised sexual abuse of a minor statute also specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[499] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexual abuse of a minor statute, by use of the phrase "in fact," clarifies that no culpable mental state is required as to the age of the complainant, the actor's own age, or the required age gap. Neither the current sexual abuse of a child statutes[500] nor the current sexual abuse of a minor statutes[501] specify culpable mental states as to the ages of the parties or the gap in their ages. However, current D.C. Code § 22-3012 states that for child sexual abuse, the government "need not prove that the defendant knew the child's age or the age difference between himself or herself and the child"[502] and current D.C. Code § 22-3011 establishes that "mistake of age" is not a defense to prosecution under the child sexual abuse and sexual abuse of a minor statutes.[503] DCCA case law further suggests that no culpable mental state whatsoever is required as to the age of the complainant or the age gap with the actor.[504] The revised sexual abuse of a minor statute, by use of the phrase "in fact," establishes strict liability as to the age of the complainant, the age of the actor, or the relevant age gap. Codifying the strict liability requirement improves the clarity and consistency of the revised statute.

Third, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[505] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a

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[499] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

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

[501] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[502] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[503] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[504] *See, e.g., Green v. United States*, 948 A.2d 554, 558 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instruction apparently required no culpable mental state as to the complainant's age).

[505] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

maximum term of imprisonment of 15 years.[506] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[507] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[508] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fourth, the marriage and domestic partnership defense in the revised sexual abuse of a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to sexual abuse of a minor "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[509] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[510] The marriage or domestic partnership defense in the revised sexual abuse of a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute,

[506] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[507] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[508] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

[509] D.C. Code § 22-30011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[510] D.C. Crim. Jur. Instr. § 9.700.

and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[511] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22A-301 to the completed offenses.[512] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexual abuse of a minor offense.

Relation to National Legal Trends. *The revised sexual abuse of a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[513]

First, there is strong support in the criminal codes of other jurisdictions for separate gradations for a complainant under the age of 12 years when the actor is at least four years older. When compared to the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[514] ("reformed jurisdictions"), the District's current child sexual abuse statutes are an outlier in having only one gradation for complainants under the age of 16 years.[515] Of these 29 reformed jurisdictions,[516] only three reformed jurisdictions' sex offenses are limited to one gradation for the age of a complainant under 16 years.[517] Fifteen of the 29 reformed jurisdictions have two gradations for the age of a complainant under 16 years in their sex offenses.[518] Eight of the reformed

[511] See Commentary to RCC § 22A-1304 on reliance on the RCC general attempt statute.

[512] See Commentary to RCC § 22A-1202 (revised assault statute).

[513] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[514] *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.

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

[516] This survey only includes gradations based solely on the age of the complainant. This survey counted the number of different age categories, even if the penalties did not change, or if the penalties varied with the age of the actor or the age gap between the actor and the complainant.

[517] Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); N.D. Cent. Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age); Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years).

[518] Ala. Code §§ 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years), 13A-6-62(a)(1), (b) (making it a Class B felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years but more than 12 years old); Alaska Stat. Ann. §§ 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years), 11.41.436(a)(1), (b) (making it a Class B felony for an actor 17 years of age or older to engage in sexual penetration with a complainant that is 13, 14, or 15 years of age and at least four years younger than the actor); Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e), (1)(f) (2), (3) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the

jurisdictions have three gradations for the age of a complainant under 16 years in their sex offenses.[519] Two jurisdictions have four gradations for the age of a complainant under 16 years

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complainant is less than 15 years of age and the actor is at least four years older than the complainant and a class 1 misdemeanor with special sentencing requirements if the complainant is at least 15 years of age but less than 17 years of age and the actor is at least 10 years older than the complainant); Conn. Gen. Stat. Ann. §§ 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant), 53a-71(a)(1), (b) (making it a Class B felony to engage in sexual intercourse when the complainant is 13 years of age or older but under 16 years of age and the actor is more than three years older than the complainant); Haw. Rev. Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); Ind. Code Ann. §§ 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age), 35-42-4-9(a), (a)(1) (making it a Level 5 felony to engage in sexual intercourse or other sexual conduct with a complainant at least 14 years of age but less than 16 years of age and a Level 4 felony if the actor is at least 21 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); Ohio Rev. Code Ann. §§ 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met), 2907.04(A), (B)(1) (making it a fourth degree felony for an actor 18 years of age or older to engage in sexual conduct with a complainant that is 13 years of age or older but less than 16 years of age, a first degree misdemeanor if the actor is less than four years older than the complainant, and a third degree felony if the actor is 10 or more years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3 felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); Utah Code Ann. §§ 76-5-401(1), (2)(A), (3)(A)(a) (making it a third degree felony for an actor 18 years of age or older to engage in sexual intercourse or sexual penetration with a complainant that is 14 years of age or older, but younger than 16 years of age, but a class B misdemeanor if the actor establishes by a preponderance of the evidence that the actor is less than four years older), 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met).

[519] Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or

in their sex offenses[520] and one jurisdiction has five gradations for the age of a complainant under 16 years in their sex offenses.[521]

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more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years); Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); 21-5506(b)(1), (c)(2)(A) (aggravated indecent liberties offense making it a severity level 3, person felony to engage in sexual intercourse with a complainant that is 14 or more years of age but less than 16 years of age); 21-5507(a)(1)(A), (2), (b)(1) (making it a severity level 8, person felony for an actor under 19 years of age and less than four years older than the complainant to engage in "voluntary sexual intercourse" with a complainant that is 14 or more years of age but less than 16 years of age); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (3), (4), (5) (prohibiting sexual intercourse with a complainant incapable of consent, and requiring different penalties if the complainant is under 16 years of age and the actor is four or more years older, if the complainant was 12 years of age or younger and the actor was 18 years of age or older, and if the complainant is at least 14 years of age and the actor is 18 years of age or younger); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years), 609.344(1)(a), (1)(b) (2) (requiring a term of imprisonment of not more than 15 years if the complainant is under 13 years of age and the actor is no more than 36 months older than the complainant or if the complainant is at least 13 years of age but less than 16 years of age and the actor is more than 24 months older than the complainant, but requiring a term of imprisonment of not more than five years if the actor was no more than 48 months but more than 24 months older than a complainant at least 13 years of age but under 16 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under 16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years); Tenn. Code Ann. § 39-13-506(a), (d)(1) (making it a Class E felony to engage in sexual penetration when the complainant is at least 15 years of age but less than 18 years of age and the actor is at least four but not more than five years older than the complainant), (b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant or when the complainant is at least 15 years of age but less than 18 years of age and the actor is more than five years but less than 10 years older than the complainant), (c), (d)(3) (making it a Class D felony to engage in sexual penetration when the complainant is at least 13 years of age but less than 18 years of age and the actor is at least 10 years older than the complainant); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant), 9A.44.076 (making it a Class A felony to engage in sexual intercourse with a complainant is at least 12 years old but less than 14 years old and the actor is at least 36 months older than the complainant), 9A.44.079 (making it a class C felony to engage in sexual intercourse with a complainant that is at least 14 years old but less than 16 years old when the actor is at least 48 months older than the complainant).

[520] Del. Code Ann. tit. 11, §§ 770(a)(1) (making it a class C felony to engage in sexual intercourse with a complainant under the age of 16 years), 771(a)(1) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 16 years when the actor is at least 10 years older than the complainant or with a complainant that is under the age of 14 years when the actor "has reached [his or her] nineteenth birthday and is not otherwise subject to prosecution pursuant to § 772 or § 773 of this title."), 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

The basis for the four year age gap between the actor and a complainant under the age of 12 years in the revised sexual abuse of a minor statute is the District's current child sexual abuse statutes,[522] which require at least a four year age gap between the actor and a complainant under the age of 16 years. However, there is strong support in the criminal codes of the 29 reformed jurisdictions for requiring an age gap between the actor and the complainant in the gradation with the youngest complainant, although the number of years required varies. Eight of the 29 reformed jurisdictions require an age gap between the actor and the complainant in the gradation or sex offense with the youngest complainant.[523] An additional six reformed jurisdictions sentence the offense more leniently if there is an age gap between the actor the youngest complainant.[524] Eleven of the reformed jurisdictions require an age gap between the actor and the complainant only in the gradations for comparatively older complainants.[525] The remaining

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[521] Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years).

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

[523] Ala. Code § 13A-6-61(a)(3), (b) (making it a Class A felony for an actor 16 years of age or older to engage in sexual intercourse with a complainant under the age of 12 years); Alaska Stat. Ann. § 11.41.434(a)(1), (b) (making it an unclassified felony for an actor 16 years of age or older to engage in sexual penetration with a complainant that is under the age of 13 years); Colo. Rev. Stat. Ann. §§ 18-1.3-402(1)(e) (making it a class 4 felony to engage in sexual intrusion or sexual penetration when the complainant is less than 15 years of age and the actor is at least four years older than the complainant); Conn. Gen. Stat. Ann. § 53a-70(a)(2), (b)(1) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 13 years when the actor is more than two years older than the complainant); Mont. Code Ann. §§ 45-5-501(b)(iv) (stating that a complainant is incapable of consent if he or she is under 16 years of age), 45-5-503(1), (4)(a) (requiring a term of imprisonment of 100 years for an actor 18 years of age or older engaging in sexual intercourse with a complainant 12 years of age or younger); Tenn. Code Ann. § 39-13-506(b), (d)(2) (making it a Class E felony to engage in sexual penetration with a complainant that is at least 13 years of age but less than 15 years of age when the actor is at least four years but less than 10 years older than the complainant); Del. Code Ann. tit. 11, § 773(a)(5) (making it a Class A felony to engage in sexual intercourse with a complainant that is under 12 years of age when the actor is at least 18 years of age); Wash. Rev. Code Ann. §§ 9A.44.073 (making it a class A felony to engage in sexual intercourse with a complainant that is under 12 years when he actor is at least 24 months older than the complainant).

[524] N.D. Cent. Code Ann. § 12.1-20-03(1)(d), (3) (making it class A felony to engage in a sexual act with a complainant under the age of 15 years and a class AA felony if the actor is at least 21 years of age); Ind. Code Ann. § 35-42-4-3(a), (a)(1) (making it a Level 3 felony to engage in sexual intercourse or other sexual conduct with a complainant under 14 years of age and a Level 1 felony is the actor is at least 21 years of age);); Ohio Rev. Code Ann. § 2907.02(A)(1)(b) (making it a felony of the first degree to engage in sexual conduct with a complainant that is under the age of 13 years, with a penalty other than life imprisonment if the actor was less than 16 years of age and other conditions are met); Utah Code Ann. § 76-5-402.1(1), (2)(a), (4) (requiring a term of imprisonment of not less than 25 years and up to life for engaging in sexual intercourse with a complainant that is under the age of 14 years, with a lesser penalty if the actor is younger than 21 years of age and other conditions are met); Kan. Stat. Ann. §§ 21-5503(a)(3), (b)(1)(B), (b)(2) (making it a severity level 1, person felony to engage in sexual intercourse with a complainant under the age of 14 years, unless the actor is 18 years of age or older, in which case it is an off-grid person felony); Minn. Stat. Ann. § 609.342(1)(a), (2)(a) (requiring a term of imprisonment of not more than 30 years if an actor more than 36 months older than the complainant engages in sexual penetration with a complainant under the age of 13 years).

[525] Ark. Code Ann. §§ 5-14-103(a)(3)(A), (c)(1) (making it a Class Y felony to engage in sexual activity with a complainant who is under 14 years of age), 5-14-127(a)(1)(A)(i), (b)(1) (making it a Class D felony for an actor that is 20 years of age or older to engage in sexual activity with a complainant that is under 16 years of age); Haw. Rev.

four reformed jurisdictions do not have a required age gap in any gradation for complainants under the age of 16 years.[526]

Stat. Ann. §§ 707-730(1)(b), (1)(c) (making it a Class A felony to engage in sexual penetration with a complainant that is under 14 years old or with a complainant that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); that is at least 14 years old but less than 16 years old if the actor "is not less than five years older than the minor."); 720 Ill. Comp. Stat. Ann. 5/11-1.30(b)(i), (d)(1) (making it a Class X felony for an actor that is under the age of 17 years to engage in sexual penetration with a complainant that is under the age of 9 years), 5/11-1.40(a)(1), (b)(1) (making it a Class X felony with a term of imprisonment of not less than 6 years and not more than 60 years for an actor 17 years of age or older to engage in sexual penetration with a complainant under the age of 13 years); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(l), 632-A:10-a(I)(a) (requiring a maximum sentence of 20 years with a minimum not to exceed half the maximum for engaging in sexual penetration with a complainant under the age of 13 years), 632-A:3(II) (making it a class B felony to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is four or more years older), 632-A:4(I)(c) (making it a class A misdemeanor to engage in sexual penetration with a complainant that is 13 years of age or older but under 16 years of age when the actor is less than four years older); N.J. Stat. Ann. § 2C:14-2(a)(1), (c)(4) (making it a crime of the first degree to engage in sexual penetration with a complainant that is under the age of 13 years and a crime in the second degree to engage in sexual penetration with a complainant that is at least 13 years of age but less than 16 years of age when the actor is at least four years older than the complainant); 18 Pa. Sta. Ann. §§ 3121(c) (making it a first degree felony to engage in sexual intercourse with a complainant under the age of 13 years), 3122.1(a), (b) (making it a felony of the second degree to engage in sexual intercourse with a complainant that is under the age of 16 years when the actor is either four years older but less than eight years older than the complainant or is eight years older but less than 11 years older than the complainant, and making it a felony of the first degree to engage in sexual intercourse with a complainant under the age of 16 years when the actor is 11 or more years older than the complainant); S.D. Codified Laws § 22-22-1(1) (making it a Class C felony to engage in sexual penetration with a complainant that is under 13 years of age and a Class 3 felony if the complainant is 13 years of age, but less than 16 years of age, and the actor is at least three years older than the complainant); Ky. Rev. Stat. Ann. §§ 510.040(1)(b)(2), (2) (making it a Class A felony to engage in sexual intercourse with a complainant under the age of 12 years), 510.050(1)(a), (2) (making it a Class C felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under the age of 14 years), 510.060(1)(b), (2) (making it a Class D felony for an actor 21 years of age or older to engage in sexual intercourse with a complainant under the age of 16 years); Me. Rev. Stat. Ann. tit. 17-A, §§ 253(B), (C) (making it a Class A crime to engage in a sexual act with a complainant under the age of 14 years or under the age of 12 years), § 254(1)(A), (1)(A-2) (making it a Class D crime for an actor at least 5 years older than the complainant to engage in a sexual act with a complainant that is 14 or 15 years of age and making it a Class C crime if the actor is at least 10 years older); Wis. Stat. Ann. §§ 948.02(1)(b), (1)(e) (making it a class B felony to engage in sexual intercourse with a complainant that is under 12 years of age or under 13 years of age), (2) (making it a Class C felony to engage in sexual intercourse with a complainant that is under 16 years of age), 948.093 (making it a class A misdemeanor for an actor that is under 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 15 years), 948.09 (making it a Class A misdemeanor for an actor that has attained the age of 19 years of age to engage in sexual intercourse with a complainant who has attained the age of 16 years); N.Y. Penal Law §§ 130.30(1) (making it a class D felony for an actor 18 years of age or more to engage in sexual intercourse with a complainant under 15 years of age), 130.35(3), (4) (making it a class B felony to engage in sexual intercourse with a complainant under the age of 11 years or with a complainant under the age of 13 years when the actor is 18 years of age or more), 130.96 (making it a class A-II felony to commit rape in the first degree as codified in N.Y. Penal Law § 130.35 when the complainant is under 13 years of age).

[526] Tex. Penal Code § 22.021(a)(1)(B), (a)(2)(B), (e) (making it a first degree felony to engage in sexual activity with a complainant that is under the age of 14 years); Ariz. Rev. Stat. Ann. § 13-1405(A), (B) (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age); Mo. Ann. Stat. §§ 566.030(2)(3) (requiring life imprisonment without eligibility for probation or parole unless certain conditions are met for engaging in sexual intercourse with a complainant under the age of 12 years), 566.032 (requiring a life imprisonment or a term of imprisonment of not less than five years for engaging in sexual intercourse with a complainant that is under 14 years of age and requiring life imprisonment or a term of imprisonment of not less than 10 years if the complainant is less than 12 years of age); Or. Rev. Stat. Ann. §§ 163.55 (making it a Class C felony to engage in sexual intercourse with a complainant under

Second, there is mixed support in the criminal codes of reformed jurisdictions for third degree and sixth degree of the revised sexual abuse of a minor statute requiring a four year age gap between the complainant and applying strict liability to this gap. Third degree and sixth degree of the revised sexual abuse of a minor statute require a four year gap to match the current child sexual abuse statutes[527] and the other gradations of the revised sexual abuse of a minor statute. There is mixed support in the reformed jurisdictions for requiring this age gap in third degree and sixth degree of the revised offense. At least 14 of the 29 reformed jurisdictions have gradations in their sex offenses for a complainant under the age of 18 years when the actor is in a position of trust with or authority over the complainant.[528] Five of these 14 reformed

16 years of age), 163.365 (making it a Class B felony to engage in sexual intercourse with a complainant under 14 years of age), 163.375(1)(b), (2) (making it a Class A felony to engage in sexual intercourse with a complainant that is under the age of 12 years).

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

[528] This survey was limited to offenses that required as an element that the complainant is under the age of 18 years. Alaska Stat. Ann. §§ 11.41.434(a)(2) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Ariz. Rev. Stat. Ann. § 13-1404 (prohibiting sexual intercourse with a complainant under 18 years of age and making it a class 6 felony if the complainant is at least 15 years of age but under 18 years of age and a class 2 felony if the complainant is under 15 years of age and the actor is in a position of trust); Ark. Code Ann. §§ 5-14-103(a)(4)(A) (prohibiting sexual intercourse or deviate sexual activity with a complainant under the age of 18 years when the actor is the complainant's guardian or specified family member), 5-14-101(6) (defining "minor" as "a person who is less than eighteen (18) years of age."); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.20(a)(3), (a)(4) (prohibiting sexual penetration when the actor is a family member of the complainant and the complainant is under the age of 18 years or the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant and the complainant is at least 13 years of age but under 18 years of age); Ind. Code Ann. § 35-42-4-7(m) (prohibiting a person at least 18 years of age who is a guardian, child care worker, custodian, or specified family member from engaging in sexual intercourse or other sexual conduct with a complainant at least 16 years of age but less than 18 years of age), (n) (prohibiting a person who has or had a "professional relationship" with a complainant at least 16 years of age but less than 18 years when the actor uses or exerts the "professional relationship" to engage in sexual intercourse or other sexual conduct); Ky. Rev. Stat. Ann. § 510.060(1)(c) (prohibiting sexual intercourse when the actor is in a "position of authority or position of special trust" with a complaint under the age of 18 years with whom the actor comes into contact as a result of that position); Me. Rev. Stat. Ann. tit. 17-A, § 253(G), (H) (prohibiting an actor who has "instructional, supervisory or disciplinary authority" over a complainant under the age of 18 years or who is a parent, guardian, or other similar person from engaging in a sexual act with a complainant under the age of 18 years); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); N.J. Stat. Ann. § 2C:14-2(c)(3) (prohibiting sexual

jurisdictions require an age gap between the actor and the complainant in at least one of the offenses or gradations[529] and one jurisdiction makes the age gap an affirmative defense.[530] An additional jurisdiction narrows the offense not by an age gap requirement, but by requiring that the actor use the position of authority to coerce the complainant.[531]

None of the five reformed jurisdictions that require an age gap between the actor and a complainant under the age of 18 years specifies in the sex offense statutes whether there is a culpable mental state for the required age gap. However, one jurisdiction has an affirmative defense for mistake of the complainant's age which may extend to a mistake as to the required age gap[532] and another jurisdiction provides that mistake as to the complainant's age is not a defense, which may suggest strict liability for the age gap.[533]

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penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is a specified family member, guardian or other similar individual, or has "supervisory or disciplinary power of any nature or in any capacity over" the complainant); N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant); 18 Pa. Stat. Ann. §§ 3124.2(a.1) (prohibiting actors that are employees or agents at specified institutions from engaging in sexual intercourse or deviate sexual intercourse with complainants under the age of 18 years), 3124.3(a) (prohibiting sports officials from engaging in sexual intercourse or deviate sexual intercourse with a complainant under the age of 18 years); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

[529] Alaska Stat. Ann. §§ 11.41.434(a)(2), (b) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant under 18 years of age when the actor is the complainant's nature parent, stepparent, adopted parent, or legal guardian), 11.41.436(a)(6) (prohibiting an actor 18 years of age or older from engaging in sexual penetration with a complainant that is 16 or 17 years of age and at least three years younger than the actor when the actor is in a "position of authority in relation" to the complainant); Conn. Gen. Stat. Ann. § 53a-71(a)(4) (prohibiting sexual intercourse when the complainant is less than 18 years of age and the actor is the complainant's guardian or otherwise responsible for the general supervision of the complainant's welfare), (a)(9)(B) (prohibiting sexual intercourse when the actor is a coach or individual who provides "intensive, ongoing instruction" and the complainant is under the age of 18 years), (a)(10) (prohibiting sexual intercourse when the actor is 20 years of age or older and "stands in a position of power, authority or supervision" over the complainant and the complainant is under the age of 18 years); Del. Code Ann. tit. 11, § 778(3), (4), (subsection (3) prohibiting sexual intercourse or sexual penetration with "a child who has reached that child's own sixteenth birthday but has not yet reached that child's own eighteenth birthday" when the actor is at least four years older than the complainant and the actor "stands in a position of trust, authority, or supervision" over the complainant and subsection (4) prohibiting the same conduct as in subsection (3) but not requiring an age gap between the actor and the complainant); Minn. Stat. Ann. § 609.344(1)(e) (prohibiting sexual penetration when the complainant is at least 16 years of age but under 18 years of age and the actor is more than 48 months older than the complainant and "in a position of authority" over the complainant), (1)(f) (prohibiting sexual penetration when the actor had a "significant relationship" to the complainant and the complainant was at least 16 years but under 18 years of age); Tenn. Code Ann. § 39-13-532(a) (prohibiting sexual penetration when the complainant is at least 13 years of age but less than 18 years of age, the actor is at least four years older than the complainant, and the actor was in a "position of trust or had supervisory or disciplinary power" over the complainant or "parental or custodial authority" over the complainant and used the power or authority to accomplish the sexual penetration).

[530] Ark. Code Ann. § 5-14-103(a)(4)(B) ("It is an affirmative defense to a prosecution under subdivision (a)(4)(A) of this section that the actor was not more than three (3) years older than the victim.").

[531] N.H. Rev. Stat. Ann. § 632-A:2(I)(k) (prohibiting sexual penetration when the complainant is 13 years of age or older but under 18 years of age and the actor is in "a position of trust or authority over" the complainant and uses that authority to coerce the complainant);

[532] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of

Third, there is mixed support in the criminal codes of the reformed jurisdictions for codifying an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years. Current District law applies strict liability to the age of complainants under the age of 16 years[534] and complainants under the age of 18 years.[535] However, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[536] The revised sexual abuse of a minor statute codifies an affirmative defense for a reasonable mistake of age when the complainant is under the age of 16 years or 18 years.

There is mixed support in the 29 reformed jurisdictions for codifying a defense for mistake of age for complainants under the age of 18 years, particularly for the comparatively older complainants. One reformed jurisdiction codifies as an affirmative defense for mistake of age in all gradations, regardless of the age of the complainant.[537] An additional twelve reformed jurisdictions codify an affirmative defense for mistake of age for all age categories except the lowest age.[538] Instead of a defense, another reformed jurisdiction requires that the actor know

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the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

[533] Minn. Stat. Ann. § 609.344(1)(e) ("Neither mistake as to the complainant's age . . . is a defense."), (1)(f) ("Neither mistake as to the complainant's age . . . is a defense.");

[534] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-3010, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes. In addition to D.C. Code § 22-3012, D.C. Code § 22-3011 states that "mistake of age" is not a defense to child sexual abuse. D.C. Code § 22-3011(a).

[535] D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01. D.C. Code § 22-3011(a). The current sexual abuse of a minor statutes are codified at D.C. Code §§ 22-3009.01 and 22-3009.02 and fall within the specified range of statutes. The current sexual abuse of a minor statutes were enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include them. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[536] *See Elonis*, 135 S. Ct.at 2009 ("[O]ur cases have explained that a defendant generally must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime. (Internal citation omitted)").

[537] Alaska Stat. Ann. § 11.41.445(b) ("In a prosecution under AS 11.41.410--11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant (1) reasonably believed the victim to be that age or older; and (2) undertook reasonable measures to verify that the victim was that age or older.).

[538] Ariz. Rev. Stat. Ann. § 13-1407(B) ("It is a defense to a prosecution pursuant to §§ 13-1404 and 13-1405 in which the victim's lack of consent is based on incapacity to consent because the victim was fifteen, sixteen or seventeen years of age if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim."); Ark. Code Ann. § 5-14-102 (d) ("(1) When criminality of conduct depends on a child's being below a critical age older than fourteen (14) years, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be."); Ind. Code Ann. §§ 35-42-4-3(d) ("It is a defense to a prosecution under this section that the accused person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct, unless: (1) the offense is committed by using or threatening the use of deadly force or while armed with a deadly weapon; (2) the offense results in serious bodily injury; or (3) the commission of the offense is facilitated by furnishing the victim, without the victim's knowledge, with a drug (as defined in IC 16-42-19-2(1)) or a controlled substance (as defined in IC 35-48-1-9) or knowing that the victim was furnished with the drug or controlled substance without the victim's knowledge."), 35-42-4-9(c) ("It is a defense that the accused person reasonably believed that the child was at least sixteen (16) years of age at the time of the conduct. However, this subsection does not apply to an offense described in subsection (a)(2) or (b)(2) [the offense is committed by the use of deadly force or while armed with a deadly

the age of a complainant that is at least 13 years of age but under 16 years of age or is reckless in that regard.[539] Only two of the reformed jurisdictions statutorily codify that strict liability applies to the age of the complainant.[540]

Fourth, there is mixed support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexual abuse of a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes,[541] D.C. Code § 22-3611 provides a separate penalty enhancement

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weapon or if serious bodily injury occurs or the complainant is involuntary intoxicated]."); Ky. Rev. Stat. Ann. § 510.030 ("In any prosecution under this chapter in which the victim's lack of consent is based solely on his or her incapacity to consent because he or she was, at the time of the offense . . . (1) Less than sixteen (16) years old . . . the defendant may prove in exculpation that at the time of the conduct constituting the offense he or she did not know of the facts or conditions responsible for such incapacity to consent."); Me. Rev. Stat. tit. 17-A, § 254(2) ("It is a defense to a prosecution under subsection 1, paragraphs A, A-1, A-2 and F, that the actor reasonably believed the other person is at least 16 years of age."); Mo. Ann. Stat. § 566.020(2) ("Whenever in this chapter the criminality of conduct depends upon a child being less than seventeen years of age, it is an affirmative defense that the defendant reasonably believed that the child was seventeen years of age or older."); Mont. Code Ann. § 45-5-511(1) ("When criminality depends on the victim being less than 16 years old, it is a defense for the offender to prove that the offender reasonably believed the child to be above that age. The belief may not be considered reasonable if the child is less than 14 years old."); N.D. Cent. Code Ann. § 12.1-20-01(1), (2) (stating that "[w]hen criminality depends on the victim being a minor, it is an affirmative defense that the actor reasonably believed the victim to be an adult" but stating there is no defense if the "child" must be below the age of fifteen); Or. Rev. Stat. Ann. § 163.325(2) ("When criminality depends on the child's being under a specified age other than 16, it is an affirmative defense for the defendant to prove that the defendant reasonably believed the child to be above the specified age at the time of the alleged offense."); 18 Pa. Stat. Ann. § 3102 ("Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age."); Minn. Stat. Ann. § 609.344(1)(b) (making it an affirmative defense, which must be proved by a preponderance of the evidence, that "the actor reasonably believes the complainant to be 16 years of age or older" to a charge of sexual penetration with a complainant that is at least 13 years but less than 16 years old when the actor is no more than 120 months older than the complainant); Wash. Rev. Code Ann. § 9A.44.030(2) ("In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.").

Arkansas also has a limited defense for the lowest age requirement. Ark. Code Ann. § 5-14-102(c) "(1)When criminality of conduct depends on a child's being below fourteen (14) years of age and the actor is under twenty (20) years of age, it is an affirmative defense that the actor reasonably believed the child to be of the critical age or above. (2) However, the actor may be guilty of the lesser offense defined by the age that the actor reasonably believed the child to be.")."

[539] Ohio Rev. Code Ann. § 2907.04(A). Ohio codifies strict liability for the age of a complainant that is under 13 years of age. Ohio Rev. Code Ann. § 2907.03(A)(1)(b).

[540] N.J. Stat. Ann. § 2C:14-5(c) ("It shall be no defense to a prosecution for a crime under this chapter that the actor believed the victim to be above the age stated for the offense, even if such a mistaken belief was reasonable."); Tex. Penal Code §§ 22.011(a)(2), (c)(1) (prohibiting sexual activity with a complainant under the age of 17 years "regardless of whether [the actor] knows the age of [the complainant] at the time of the offense."), 22.021(a)(1)(B), (2)(B) (prohibiting sexual activity with a complainant that is under the age of 14 years "regardless of whether [the actor] knows the age of the child at the time of the offense.").

[541] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02),

for committing child sexual abuse against complainants under the age of 18 years,[542] and D.C. Code § 22-4502 provides separate penalty enhancements for committing child sexual abuse against complainants when "armed with" or having "readily available" a deadly or dangerous weapon.[543] The revised sexual abuse of a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC.

There is mixed support in the criminal codes of reform jurisdictions for so limiting the application of penalty enhancements to the revised sexual abuse of a minor offense. Fifteen[544] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[545] Six of these reformed jurisdictions apply a weapons enhancement[546] to sexual assault of a minor. Five of these reformed jurisdictions apply an accomplices enhancement to

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sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[542] D.C. Code §§ 22-3611(a), (c); 23-1331(4) (defining "crime of violence" to include child sexual abuse).

[543] D.C. Code § 22-4502.

[544] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[545] Alaska Stat. Ann. § 11.41.410(2).

[546] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(III); Conn. Gen. Stat. Ann. § 53a-70a(a)(1); Mo. Ann. Stat. § 566.010(1)(b); N.Y. Penal Law § 130.95(1)(b); Tex. Penal Code Ann. § (a)(2)(A)(iv); Utah Code Ann. § 76-5-405(1)(a)(i).

sexual assault of a minor.[547] Six of these reformed jurisdictions apply an enhancement for serious bodily injury to sexual assault of a minor.[548]

Just three[549] of these reformed jurisdictions have age-based penalty enhancements for complainants under the age of 18 years for their general sexual assault statutes. None of these 15 reformed jurisdictions apply the age-based enhancement to their sexual assault of a minor offenses.

[547] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(I); Conn. Gen. Stat. Ann. § 53a-70a(a)(4); Mo. Ann. Stat. §§ 566.010(1)(1)(c); Tex. Penal Code Ann. § 22.021(a)(2)(A)(v); Utah Code Ann. § 76-5-405(1)(a)(iii).

[548] Colo. Rev. Stat. Ann. § 18-3-402(5)(a)(II); Conn. Gen. Stat. Ann. § 53a-70a(a)(2), (a)(3); Mo. Ann. Stat. § 566.010(1)(a); N.Y. Penal Law § 130.95(1)(a); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i); Wash. Rev. Code Ann. § 9A.44.045(1)(c).

[549] A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense or have separate offenses for sexual assault of complainants under the age of 18 years were not considered to have age-based penalty enhancements. Ariz. Rev. Stat. Ann. § 13-1406(A), (B) (making sexual assault a class 2 felony, unless the complainant is under the age of 15, in which case the offense is subject to enhanced penalties under Ariz. Rev. Stat. Ann. § 13-705); Conn. Gen. Stat. Ann. §§ 53a-70(a), (b)(1), (b)(2) (making sexual assault in the first degree a class B felony, unless it is a forcible rape of a complainant under 16 years of age or the complainant is under 13 years of age and the actor is more than two years older, in which case it is a class A felony), 53a-70a(a), (b)(1), (b)(2) (making aggravated sexual assault in the first degree a Class B felony unless the complainant is under the age of 16 years, in which case it is a Class A felony); Mo. Ann. Stat. § 566.030(1), (2), (3) (making rape in the first degree a felony with a term of imprisonment of life or not less than five years unless the complainant is under the age of 12 years, in which case the required term of imprisonment is life imprisonment without eligibility for parole until certain conditions are met).

RCC § 22A-1305. SEXUAL EXPLOITATION OF AN ADULT.

(a) *First Degree Sexual Exploitation of an Adult.* An actor commits the offense of first degree sexual exploitation of an adult when that actor:

(1) Knowingly causes the complainant to engage in or submit to a sexual act;

(2) In one or more of the following ways:

(A) The actor is a person of authority in a secondary school and recklessly disregards that the complainant is an enrolled student in the same school system and is under the age of 20 years;

(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant;

(C) The actor is a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy, and:

(i) Falsely represents that the sexual act is for a bona fide professional purpose;

(ii) Commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services; or

(iii) Commits the sexual act while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual act; or

(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(b) *Second Degree Sexual Exploitation of an Adult.* An actor commits the offense of second degree exploitation of an adult when that actor:

(1) Knowingly causes the complainant to engage in or submit to sexual contact;

(2) In one or more of the following ways:

(A) The actor is a person of authority in a secondary school and recklessly disregards that the complainant is an enrolled student in the same school system and is under the age of 20 years;

(B) The actor knowingly and falsely represents that he or she is someone else who is personally known to the complainant.

(C) The actor is a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy:

(i) Falsely represents that the sexual contact is for a bona fide professional purpose;

(ii) Commits the sexual contact during a consultation, examination, treatment, therapy, or other provision of professional services; or

(iii) Commits the sexual contact while the complainant is a patient or client of the actor, and recklessly disregards that the mental, emotional, or physical condition of the complainant is such that he or she is impaired from declining participation in the sexual contact; or

(D) The actor knowingly works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian of persons at such an institution, and recklessly disregards that the complainant is a ward, patient, client, or prisoner at such an institution.

(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:

(1) First degree sexual exploitation of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree sexual exploitation of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. In this section, the terms "knowingly" and "recklessly" have the meaning specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "person of authority in a secondary school," and "domestic partnership" have the meanings specified in § 22A-1001.

(e) *Defenses.* In addition to any defenses otherwise applicable to the actor's conduct under District law it is an affirmative defense to prosecution under this section, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

Commentary

Explanatory Note. *The RCC sexual exploitation of an adult offense prohibits specified acts of sexual penetration or sexual touching with several populations of vulnerable adults. The penalty gradations are based on the nature of the sexual conduct. The revised sexual abuse of a minor offense replaces six distinct offenses in the current D.C. Code: first degree sexual abuse of a secondary education student,[550] second degree sexual abuse of a secondary education student,[551] first degree sexual abuse of a ward,[552] second degree sexual abuse of a ward,[553] first degree sexual abuse of a patient or client,[554] and second degree sexual abuse of a patient or client.[555] The RCC sexual exploitation of an adult offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,[556] the attempt statute,[557] and the aggravating sentencing factors.[558]*

Subsection (a)(1) specifies the prohibited conduct for first degree sexual abuse of a minor—causing the complainant to engage in or submit to a "sexual act." Subsection (a)(1) specifies a culpable mental state of "knowingly" for this conduct. "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to a "sexual act." "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person.

[550] D.C. Code § 22-3009.03.
[551] D.C. Code § 22-3009.04.
[552] D.C. Code § 22-30013.
[553] D.C. Code § 22-3014.
[554] D.C. Code § 22-3015.
[555] D.C. Code § 22-3016.
[556] D.C. Code § 22-30017.
[557] D.C. Code § 22-3018.
[558] D.C. Code § 22-3020.

Subsection (a)(2)(A) through subsection (a)(2)(D) specify the prohibited means of causing the complainant to engage in or submit to the "sexual act." Subsection (a)(2)(A) requires that the actor be a "person of authority in a secondary school," a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(1) applies to the element that the actor is a "person of authority in a secondary school," and the actor must be "practically certain" that he or she is a "person of a authority in a secondary school" as that term is defined in RCC § 22A-1301. Subsection (a)(2)(A) further requires that the actor "recklessly disregard" that the complainant is an enrolled student in the same school system and is under the age of 20 years. "Recklessly" is a defined term in RCC § 22A-206 that means the actor is aware of a substantial risk that the complainant is enrolled in that school system and is under the age of 20 years.

Subsection (a)(2)(B) specifies that the actor must cause the complainant to engage in or submit to the sexual act by falsely representing that he or she is someone else who is personally known to the complainant. Subsection (a)(2)(B) specifies a culpable mental state of "knowingly, a defined term in RCC § 22A-206 that requires that the actor be "practically certain" that his or her conduct falsely represents that he or she is someone else who is personally known to the complainant. The actor's false representation must cause the complainant to engage in or submit to the sexual act.

Subsection (a)(2)(C) requires that the actor be a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to this element, and per the definition of "knowingly" in RCC § 22A-206, the actor must be "practically certain" that he or she is a healthcare provider or member of the clergy, or purports to be a healthcare provider or member of the clergy. Subsection (a)(2)(C)(i) through subsection (a)(2)(C)(iii) specify additional requirements for an actor that is a healthcare provider or member of the clergy, or purports to be such. Subsection (a)(2)(C)(i) requires that the actor falsely represents that the sexual act is done for a bona fide professional purpose and subsection (a)(2)(C)(ii) requires that the actor commit the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to all the elements in subsection (a)(2)(C)(i) and subsection (a)(2)(C)(ii). Per the definition of "knowingly" in RCC § 22A-206, the actor must be "practically certain" that he or she falsely represents that the sexual act is done for a bona fide professional purpose or that he or she commits the sexual act during a consultation, examination, treatment, therapy, or other provision of professional services.

Subsection (a)(2)(C)(iii) requires that the actor commit the sexual act while the complainant is a patient or client of the actor. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state in subsection (a)(2)(B) applies to these elements. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be "practically certain" that he or she commits the sexual act while the complainant is a patient or client. Subsection (a)(2)(C)(iii) also requires that the actor "recklessly disregard" that the mental, emotional, or physical condition of the complainant is such that the complainant is impaired for declining participation in the sexual act. "Recklessly" is a defined term in RCC § 22A-206 that means the actor must be aware of a "substantial risk" that the mental, emotional, or physical

condition of the complainant is such that the complainant is impaired for declining participation in the sexual act.

Subsection (a)(2)(D) requires that the actor "knowingly" work at a specified institution or "knowingly" transports or is a custodian of persons at such an institution. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be "practically certain" that he or she works at such an institution or transports or is a custodian of persons at such an institution. Subsection (a)(2)(D) further requires that the actor "recklessly disregard" that the complainant is a ward, patient, client, or prisoner at such an institution. "Recklessly" is a defined term in RCC § 22A-206 that means that the actor must be aware of a "substantial risk" that the complainant is a ward, patient, client, or prisoner at such an institution.

Subsection (b) specifies the required conduct for second degree sexual exploitation of an adult. The prohibited conduct is the same as first degree sexual exploitation of an adult except it requires a "sexual contact" instead of a "sexual act." "Sexual contact" is a defined term in RCC § 22A-1301 that means touching the specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. Subsection (b)(1) specifies a culpable mental state of "knowingly" for causing the complainant to engage in or submit to "sexual contact." "Knowingly," a defined term in RCC § 22A-206 means the actor must be "practically certain" that his or her conduct causes the complainant to engage in or submit to "sexual contact."

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

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

Subsection (e) codifies a defense for the RCC sexual exploitation of an adult statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (e) establishes an affirmative defense that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22A-1301. The actor must prove this defense by a preponderance of the evidence.

Relation to Current District Law. *The RCC sexual exploitation of an adult 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 RCC sexual exploitation of an adult statute limits liability to actors that are "healthcare provider[s] or member[s] of the clergy," or actors who "purport[] to be a healthcare provider or member of the clergy." The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a professional relationship of trust" with the complainant.[559] "Professional relationship of trust" is not defined in the D.C. Code and there is no DCCA case law interpreting the phrase. In contrast, the RCC sexual exploitation of an adult statute limits the offense to actors that are "healthcare provider[s] or member[s] of the clergy, or actors who "purport[] to be a healthcare provider or member of the clergy." Complainants in a healthcare or spiritual setting are especially vulnerable to the conduct prohibited in the RCC sexual exploitation of an adult

[559] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).

offense. Sexual activity in other professional settings[560] can be addressed by professional censure or civil liability. This change improves the clarity and proportionality of the sexual exploitation of an adult statute.

Second, the RCC sexual exploitation of an adult statute no longer prohibits "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[561] There is no DCCA case law interpreting this provision. Other provisions in the current sexual abuse of a patient or client statutes prohibit committing a sexual act or sexual contact during the "provision of professional services," when the actor "represents falsely that the sexual… [act or contact] is for a bona fide professional purpose," or when the actor "knows or has reason to know that the patient or client is impaired from declining participation."[562] In contrast, the RCC sexual exploitation of an adult statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. The RCC sexual exploitation of an adult offense continues to penalize sexual conduct when falsely representing the conduct is for a therapeutic purpose, during the provision of professional services, or when the actor disregards the possibility that the complainant is impaired. Apart from such circumstances, criminal punishment for lying about the status of one's professional licensing may be reprehensible but is not directly related to the sexual conduct. This change improves the proportionality of the revised offense.

Third, only the general penalty enhancements in subtitle I of the RCC apply to the RCC sexual exploitation of an adult statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[563] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[564] are not necessary in the RCC sexual exploitation of an adult statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle

[560] For example, it is possible that "a professional relationship of trust" could be alleged to exist between a supervisor and employee, a contractor and contractee, and other common business relationships that involve a measure of trust.

[561] D.C. Code §§ 22-3015; 22-3016.

[562] D.C. Code §§ 22-3015 and 22-3016.

[563] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[564] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

I to the RCC sexual exploitation of an adult offense improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the RCC sexual exploitation of an adult statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant or "submit to" the sexual conduct.[565] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[566] In addition to case law, District practice does not appear to follow the variations in statutory language.[567] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

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[565] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[566] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[567] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

Second, the sexual exploitation of an adult statute separately prohibits a sexual act or sexual contact by falsely representing that the actor is someone else who is personally known to the complainant." The current sexual abuse of a patient or client statutes do not contain a provision specifically addressing false identity used to engage in sexual conduct. However, the current misdemeanor sexual abuse (MSA) statute[568] prohibits engaging in a sexual act or sexual contact without the "permission" of the other person. "Permission" is not defined in the current D.C. Code and it is unclear whether or how "permission" differs from the defined term "consent."[569] In addition, the DCCA has used the terms "permission" and "consent" interchangeably in discussing the current MSA statute.[570] To the extent that the current MSA statute prohibits a sexual act or sexual contact without "consent," the current definition of "consent" appears to exclude consent that is obtained by deception because the current definition of "consent" requires that the words or actions be "freely given."[571] There is no DCCA case law on point. Instead of this ambiguity, the RCC sexual exploitation of an adult statute prohibits a specific type of deception, when the actor falsely represents that he or she is someone else who is personally known to the complainant.[572] This particular form of coercion is more serious than other forms of deception that the RCC nonconsensual sexual conduct offense (RCC § 22A-1309) may prohibit. This change improves the clarity and proportionality of the revised offense.

Third, the RCC sexual exploitation of an adult statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current sexual abuse statutes that comprise the RCC sexual exploitation of an adult statute[573] do not specify any culpable mental state for engaging in or submitting to a sexual act or sexual contact. Due to the statutory definition of "sexual contact,"[574] the second degree gradations of these offenses require an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," although the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the

[568] D.C. Code § 22-3006.

[569] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[570] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[571] D.C. Code § 22-3001(4) ("'Consent' means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[572] *See, e.g.*, *People v. Morales*, 150 Cal. Rptr. 3d 920 (2013) (Defendant entered the dark bedroom of complainant after seeing her boyfriend leave late at night, and has sex with the complainant by pretending to be the boyfriend). *See also* Shakespeare, Measure for Measure, Act IV, Scene I.

[573] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[574] D.C. Code § 22-3001(9) (defining "sexual contact.").

complainant and erroneously omitted the additional intent requirement.[575] There is no DCCA case law regarding commission of a "sexual act" in the current statutes that comprise the RCC sexual exploitation of an adult statute.[576] The RCC sexual exploitation of an adult statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[577] Requiring a "knowingly" culpable mental state may also clarify that the gradations that require "sexual contact" are lesser included offenses of the gradations that require a "sexual act," an issue which has been litigated in current DCCA case law, but remains unresolved.[578] This change improves the clarity and consistency of the revised statute.

Fourth, the RCC sexual exploitation of an adult statute requires a "knowingly" culpable mental state for offense elements concerning the actor's own status and actions. The current sexual abuse statutes that comprise the RCC sexual exploitation of an adult statute[579] do not specify culpable mental states for the many facts regarding the actor's status or actions that must be proven for the offenses, apart from the "intent" required for "sexual contact."[580] There is no DCCA case law on point. The RCC sexual exploitation of an adult statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the many alternative facts that constitute the offense and involve the actor's own status or actions.[581] Requiring, at a minimum,

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[575] *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[576] The DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC 22A-1303, Sexual assault, above, for further discussion.

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

[578] *In re E.H.* is a child sexual abuse case, but the court's reasoning regarding the relationship between "sexual act" and "sexual contact" may be instructive for the general sexual abuse statutes. In *In re E.H.*, the appellant was convicted of first degree child sexual abuse, but the court reversed the conviction due to insufficient evidence. *In re E.H.*, 967 A.2d 1270, 1271, 1275 (D.C. 2009). The court declined to address whether second degree child sexual abuse is a lesser included offense of first degree child sexual abuse, but did note that "[a]t oral argument, counsel for the government agreed with appellant's counsel that second-degree sexual abuse is not a lesser-included offense of first-degree sexual abuse because, at least in two instances, to prove a "sexual act" (for first-degree) it is not necessary to show the specific intent required to prove "sexual contact" (for second-degree)." *Id.* at 1276 n. 9. The DCCA further noted that "[i]n general, a crime can only be a lesser-included offense of another if its required proof contains some, but not all, of the elements of the greater offense" and "the gravamen of whether a crime is the lesser-included offense of another is legislative intent. *Id.* (internal quotation omitted).

[579] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[580] D.C. Code § 22-3001(9).

[581] Specifically, the RCC sexual exploitation of an adult offense requires a "knowingly" culpable mental state as to the following alternative elements: being a "person of authority in a secondary school"; falsely representing oneself to be someone else personally known to the complainant; being a healthcare provider or member of the clergy, or purporting to be such; falsely representing that a sexual act is for a bona fide professional purpose; committing sexual conduct during a consultation, examination, treatment, therapy, or other provision of professional services;

a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[582] This change improves the clarity and consistency of the revised statutes.

Fifth, the sexual exploitation of an adult statute requires a "recklessly" culpable mental state as to facts about the complainant's status. The current sexual abuse statutes that comprise the sexual exploitation of an adult statute[583] do not specify culpable mental states for the many facts that must be proven for the offenses, apart from the "intent" required by the statutory definition of "sexual contact."[584] There is no DCCA case law on point. The RCC sexual exploitation of an adult statute resolves this ambiguity by requiring a "recklessly" culpable mental state for the many alternative facts that constitute the offense and involve the complainant's status.[585] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[586] However, a lower culpable mental state may be justified given the heightened power, responsibilities, and training of a person of authority in a secondary school, healthcare providers, clergy, and persons who work at custodial institutions. Recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[587] This change improves the clarity and consistency of the revised statutes.

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

First, the RCC sexual exploitation of an adult offense combines in one offense the current sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client offenses, with the same penalty. The current D.C. Code codifies as separate statutes sexual abuse of a secondary education student, sexual abuse of a ward, and sexual abuse of a patient or client, but these statutes all have the same penalties—a maximum term of imprisonment of 10 years for first degree, requiring a "sexual act"[588] and a maximum term of imprisonment of 5 years for second degree, requiring "sexual contact."[589] Having separate

committing sexual conduct while the complainant is a patient or client of the actor; and being a person who works at a hospital, treatment facility, detention or correctional facility, group home, or other institution housing persons who are not free to leave at will, or transports or is a custodian to persons at such an institution.

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

[583] As discussed elsewhere in this commentary as a clarificatory change to District law, the sexual exploitation of an adult statute codifies into one offense, with the same penalty, the current sexual abuse of a secondary education student statutes (D.C. Code §§ 22-3009.03 and 22-3009.04.), the current sexual abuse of a ward statutes (D.C. Code §§ 22-3013 and 22-3014), and the current sexual abuse of a patient or client statutes (D.C. Code §§ 22-3015 and 22-3016).

[584] D.C. Code § 22-3001(9).

[585] Specifically, the RCC sexual exploitation of an adult offense requires a "recklessly" culpable mental state as to the following alternative elements: that the complainant is a specified secondary education student under the age of 20 years; that the complainant is "impaired from declining participation" in sexual activity; and that the complainant is a ward, patient, client, or prisoner at a specified institution.

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

[587] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[588] D.C. Code §§ 22-3009.03 (first degree sexual abuse of a secondary education student); 22-3013 (first degree sexual abuse of a ward; 22-3015 (first degree sexual abuse of a patient or client).

[589] D.C. Code §§ 22-3014 (second degree sexual abuse of a ward); 22-3016 (second degree sexual abuse of a patient or client). Second degree sexual abuse of a secondary education student prohibits "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system and is punishable by a maximum term of

statutes for these various offenses is unnecessarily confusing given that their penalties are equivalent and all pertain to sexual conduct with vulnerable adult populations. This change improves the clarity and organization of the RCC sexual exploitation of an adult statute.

Second, the RCC sexual exploitation of an adult statute makes a "person of authority in a secondary school" a defined term in RCC § 22A-1301. The current sexual abuse of a secondary education student statutes apply to "[a]ny teacher, counselor, principal, coach or other person in a position of authority in a secondary level school."[590] For clarification, the sexual exploitation of an adult statute refers to a "person of authority in a secondary school," and defines the term in RCC § 22A-1001 as "includ[ing] any teacher, counselor, principal, or coach in a secondary school." This change improves the clarity of the RCC sexual exploitation of an adult statute.

Third, the RCC sexual exploitation of an adult statute prohibits falsely representing that the sexual act or sexual contact "is for a bona fide professional purpose." The current sexual abuse of a patient or client statutes prohibit falsely representing that the "sexual act" or "sexual contact" is for "a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided."[591] For clarification, the sexual exploitation of an adult statute deletes "for a bona fide medical or therapeutic purpose." The "bona fide medical or therapeutic purpose" language is surplusage because it is included in a "bona fide professional purpose." This change improves the clarity of the RCC sexual exploitation of an adult statute.

Fourth, the RCC second degree sexual exploitation of an adult statute requires "sexual contact" with a secondary education student. The current second degree sexual abuse of a secondary education student statute prohibits engaging in "sexual conduct" with specified secondary education students under the age of 20 years or causing specified secondary education students to engage in "sexual conduct."[592] "Sexual conduct" is not defined in the current sexual abuse statutes, nor does it appear in any other sexual abuse statute. In addition, the lower gradations of all the current sexual abuse statutes require "sexual contact."[593] There is no legislative history or DCCA case law for the current sexual abuse of a secondary education student statutes. For clarification, second degree of the sexual exploitation of an adult statue codifies "sexual contact." This change improves the clarity and consistency of the RCC sexual exploitation of an adult statute.

Fifth, the revised sexual abuse of a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[594] Under the

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imprisonment of 5 years. D.C. Code § 22-3009.04. As is discussed elsewhere in this commentary, "sexual conduct" appears to be a typo for "sexual contact."

[590] D.C. Code §§ 22-3009.03; 22-3009.04.

[591] D.C. Code §§ 22-3015(a)(1); 22-3016(a)(1).

[592] D.C. Code § 22-3009.04 (second degree sexual abuse of a secondary education student prohibiting "sexual conduct" with a student under the age of 20 years enrolled in the same school or school system as any "teacher, counselor, principal, couch, or other person of authority in a secondary school and punishable by a maximum term of imprisonment of 5 years).

[593] D.C. Code §§ 22-3004 and 22-3005 (third degree and fourth degree sexual abuse requiring "sexual contact."); 22-3009 (second degree child sexual abuse requiring "sexual contact."); 22-3009.02 (second degree sexual abuse of a minor requiring "sexual contact."); 22-3014 (second degree sexual abuse of a ward requiring "sexual contact."); 22-3016(a) (second degree sexual abuse of a patient or client requiring "sexual contact.").

[594] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02),

statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[595] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[596] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[597] In the revised sexual abuse of a minor statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for sexual assault, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the RCC sexual exploitation of an adult offense.

Relation to National Legal Trends. *The RCC sexual exploitation of an adult offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[598]

First, there is strong support in the criminal codes of the reformed jurisdictions for limiting the RCC sexual exploitation of an adult statute to actors that are "healthcare provider[s] or member[s] of the clergy," or actors who "purport[] to be a healthcare provider or member of the clergy." The current first and second degree sexual abuse of a patient or client statutes apply to any person who "purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature" or is "otherwise in a

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sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[595] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[596] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[597] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, first degree sexual abuse of a child and second degree sexual abuse of a child are "crimes of violence" and would have a maximum term of imprisonment of five years. First degree and second degree sexual abuse of a minor are not "crimes of violence," however, and would have a maximum term of imprisonment of 180 days.

[598] Unless otherwise noted, this survey is limited to sex offenses that require sexual penetration, not sexual contact or touching. If a jurisdiction has multiple sex offenses for penetration, the offense that includes vaginal intercourse was used. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

professional relationship of trust" with the complainant.[599] Of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[600] ("reformed jurisdictions"), 16 of the 29 reformed jurisdictions have patient-client sex offenses or gradations[601] or include the patient-client relationship in the definition of "without consent."[602] All 16 of these reformed jurisdictions are limited to healthcare professionals or therapists or healthcare professionals, therapists, and clergy.

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[599] D.C. Code §§ 22-3015 (first degree sexual abuse of a patient or client); 22-3016 (second degree sexual abuse of a patient or client).

[600] *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.

[601] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[602] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined

Second, there is strong support in the criminal codes of the reformed jurisdictions for the RCC sexual exploitation of an adult statute no longer prohibiting "the actor falsely represents that he or she is licensed as a particular kind of professional." The current first and second degree sexual abuse of a patient or client statutes prohibit an actor from "represent[ing] falsely that he or she is licensed as a particular type of professional."[603] In contrast, the RCC sexual exploitation of an adult statute does not specifically criminalize sexual conduct when the actor falsely represented that he or she is licensed as a particular kind of professional. None of the 16 reformed jurisdictions that have patient-client sex offenses or gradations[604] or include the patient-client relationship in the definition of "without consent"[605] have a similar provision.

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herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.");

[603] D.C. Code §§ 22-3015; 22-3016.

[604] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Ark. Code Ann. § 5-14-126(a)(1)(D) (prohibiting a mandated reporter or member of the clergy who is in a "position of trust or authority over" the complainant and uses the position to engage in sexual intercourse or deviate sexual activity); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Me. Rev. Stat. tit. 17-A, § 253(2)(I) (prohibiting a sexual act when the actor is a psychiatrist, a psychologist, or licensed as a social worker or purports to be a psychiatrist, a psychologist, or licensed social worker and the complainant is a current patient or client); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); N.D. Cent. Code Ann. § 12.1-20-06.1 (prohibiting "any person who holds oneself out to be a therapist" from engaging in sexual contact "with a patient or client during any treatment, consultation, interview, or examination."); N.H. Rev. Stat. Ann. § 632-

Third, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the RCC sexual exploitation of an adult statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[606] The RCC sexual exploitation of an adult statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general

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A:2(I)(g) (prohibiting sexual penetration "[w]hen the actor provides therapy, medical treatment or examination of the victim and in the course of that therapeutic or treating relationship or within one year of termination of that therapeutic or treating relationship: (1) Acts in a manner or for purposes which are not professionally recognized or acceptable; or (2) uses this position as such provider to coerce the victim to submit."); Ohio Rev. Code Ann. § 2907.03(A)(10) (prohibiting sexual penetration when the actor is a "mental health professional, the other person is a mental health client or patient of the offender, and the offender induces the other person to submit by falsely representing to the other person that the sexual conduct is necessary for mental health treatment purposes."); S.D. Codified Laws § 22-22-29 (prohibiting a psychotherapist from engaging in sexual penetration with a "patient who is emotionally dependent on the psychotherapist" at the time of the act); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination."); Wis. Stat. Ann. § 940.22(2) (prohibiting a therapist or an actor that purports to be a therapist from engaging in sexual contact "with a patient or client during any ongoing therapist-patient or therapist-client relationship, regardless of whether it occurs during any treatment, consultation, interview or examination.").

[605] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[606] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the RCC sexual exploitation of an adult statute. Fifteen[607] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[608] Of these 16 reformed jurisdictions, nine have patient-client sex offenses or gradations[609] or include the patient-client relationship in

[607] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.
Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[608] Alaska Stat. Ann. § 11.41.410(2).

[609] Ariz. Rev. Stat. Ann. § 13-1418(A) (prohibiting a "behavioral health professional," psychiatrist, or psychologist from engaging in sexual intercourse with a current patient); Colo. Rev. Stat. Ann. § 18-3-405.5(1)(a)(I), (1)(a)(II) (prohibiting a psychotherapist from committing sexual penetration or sexual intrusion on a client, including when done by "therapeutic deception."); Conn. Gen. Stat. Ann. § 53a-71(a)(6) (prohibiting a psychotherapist from engaging in sexual intercourse with another person when the other person is "(A) a patient of the actor and the sexual intercourse occurs during the psychotherapy session, (B) a patient or former patient of the actor and such patient or former patient is emotionally dependent upon the actor, or (C) a patient or former patient of the actor and the sexual intercourse occurs by means of therapeutic deception."); Minn. Stat. Ann. § 609.344(h), (i), (j) (prohibiting sexual penetration when "the actor is a psychotherapist and the complainant is a patient of the psychotherapist and the sexual penetration occurred during the psychotherapy session or outside the psychotherapy session if an ongoing psychotherapist-patient relationship exists," when the actor is a psychotherapist and the complainant is a former patient of the psychotherapist and the former patient is emotionally dependent upon the psychotherapist," or when the actor is a psychotherapist and the complainant is a patient or former patient and the sexual penetration occurred by means of therapeutic deception."); 609.344(l) (prohibiting sexual penetration when the actor is a member of, or purports to be a member of, the clergy "during the course of a meeting in which the complainant sought or received religious or spiritual advice, aid, or comfort from the actor in private" or "during a period of time in which the complainant was meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice, aid, or comfort in private."); Wash. Rev. Code Ann. § 9A.44.050(1)(d) (prohibiting a health care provider from engaging in sexual intercourse with a client or patient during a treatment session, consultation, interview, or examination.").

the definition of "without consent"[610] have a similar provision. Only two of these reformed jurisdictions apply the enhancements to the patient-client sex offenses or gradations.[611]

[610] Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1) (including in second degree rape sexual intercourse "without the victim's consent" and defining "without consent" to include "the defendant is a health professional, as defined herein, or a minister, priest, rabbi or other member of a religious organization engaged in pastoral counseling . . .and the acts are committed under the guise of providing professional diagnosis, counseling or treatment and where at the times of such acts the victim reasonably believed the acts were for medically or professionally appropriate diagnosis, counseling or treatment, such that resistance by the victim could not reasonably have been manifested."); N.Y. Penal Law §§ 130.05(3)(h), 130.25(1) (including in third degree rape "engages in sexual intercourse with another person who is incapable of consent by reason of some factor other than being less than seventeen years old" and stating a person is incapable of consenting when he or she "is a client or patient and the actor is a health care provider or mental health care provider charged with rape in the third degree" and the sexual conduct "occurs during a treatment session, consultation, interview, or examination."); Tex. Penal Code Ann. § 22.011(a)(1) (b)(9), (b)(10) (prohibiting sexual activity "without consent" and defining "without consent" to include when "the actor is a mental health services provider or a health care services provider who causes the other person, who is a former patient of the actor, to submit or participate by exploiting the other person's emotional dependency on the actor" or "the actor is a clergyman who causes the other person to submit to or participate by exploiting the other person's emotional dependency on the clergyman in the clergyman's professional character as spiritual advisor."); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12) (defining rape as sexual intercourse "without the victim's consent" and stating "without consent" includes "the actor is a health professional or religious counselor . . . the act is committed under the guise of providing professional diagnosis, counseling, or treatment, and at the time of the act the victim reasonably believed that the act was for medically or professionally appropriate diagnosis, counseling, or treatment to the extent that resistance by the victim could not reasonably be expected to have been manifested.").

[611] Both jurisdictions, Delaware and Utah, include the patient-client relationship in the definition of without consent. Del. Code Ann. tit. 11 §§ 761(j)(4), 772(a)(1); Utah Code Ann. §§ 76-5-402(1), 76-5-406(12). Delaware applies the penalty enhancements when the actor "engages in sexual intercourse," Del. Code Ann. tit. 11, § 773, which seems to include the offense of rape in Del. Code Ann. tit. 11, § 772 (sexual intercourse "without consent."). Utah defines rape as sexual intercourse without the complainant's consent, Utah Code Ann. § 76-5-402(1), and applies the penalty enhancements to the offense of rape in Utah Code Ann. § 76-5-405.

RCC § 22A-1306. SEXUALLY SUGGESTIVE CONDUCT WITH A MINOR.

(a) *Sexually Suggestive Contact with a Minor.* An actor commits the offense of sexually suggestive contact with a minor when that actor:
  (1) With intent to cause the sexual arousal or sexual gratification of any person;
  (2) Knowingly:
    (A) Touches the complainant inside his or her clothing;
    (B) Touches the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks;
    (C) Places the actor's tongue in the mouth of the complainant; or
    (D) Touches the actor's genitalia or that of a third person in the sight of the complainant; and
  (3) The actor, in fact, is at least 18 years of age and at least four years older than the complainant; and:
    (A) The actor recklessly disregarded that the complainant is under 16 years of age; or
    (B) The actor recklessly disregarded that the complainant is under 18 years of age and the actor knows that he or she is in a position of trust with or authority over the complainant.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "position of trust with or authority over," and "domestic partnership" have the meanings specified in § 22A-1001.

(d) *Marriage or Domestic Partnership Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

Commentary

Explanatory Note. *The RCC sexually suggestive conduct with a minor offense prohibits comparatively less serious sexual conduct with certain complainants under the age of 18 years, such as touching a complainant inside his or her clothing. The offense has a single penalty gradation. The revised sexually suggestive conduct with a minor offense replaces the current misdemeanor sexual abuse of a child or minor statute.*[612] *The revised sexually suggestive conduct with a minor statute also replaces in relevant part three distinct provisions for the sexual abuse offenses: the marriage and domestic partnership defense,*[613] *the attempt statute,*[614] *and the aggravating sentencing factors.*[615]

[612] D.C. Code § 22-3010.01.
[613] D.C. Code § 22-30011.
[614] D.C. Code § 22-3018.
[615] D.C. Code § 22-3020.

Subsection (a)(1) of the revised sexually suggestive conduct with a minor statute requires that the actor engage in the prohibited conduct "with intent to cause the sexual arousal or sexual gratification of any person." "Intent" is a defined term in RCC § 22A-206 meaning the actor believed his or her conduct was practically certain to cause the sexual arousal or sexual gratification of any person. It is not necessary to prove that such an arousal or gratification actually occurred, just that the defendant believed to a practical certainty, or consciously desired, that such arousal or gratification would result.

Subsection (a)(2)(A) through subsection (a)(2)(D) specify the prohibited conduct—touching the complainant inside his or her clothing (subsection (a)(2)(A)), touching the complainant inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks (subsection (a)(2)(B)), placing the actor's tongue in the mouth of the complainant (subsection (a)(2)(C)), or touching the actor's genitalia or that of a third person in the sight of the complainant. Subsection (a)(2) specifies a culpable mental state of "knowingly" for this prohibited conduct. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state applies to each type of prohibited conduct in subsection (a)(2)(A) through subsection (a)(2)(D). "Knowingly" is a defined term in RCC § 22A-206 meaning that the actor was "practically certain" that his or her conduct would result in touching the complainant in the specified manner or touching the actor's genitalia or that of a third person in the sight of the complainant.

Subsection (a)(3) specifies the requirements for the age of the actor, the age of the complainant, and whether there is a special relationship between the actor and the complainant. Subsection (a)(3) requires that the actor is "in fact" at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term that indicates there is no culpable mental state for a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to both elements and there is no culpable mental state requirement for the age of the actor or the age gap. Subsection (a)(3)(A) requires that the actor "recklessly disregard" that the complainant is under the age of 16 years. "Recklessly" is a defined term in RCC § 22A-206 that means the actor is aware of a substantial risk that the complainant is under the age of 16 years. Subsection (a)(3)(B) requires that he actor "recklessly disregard" that the complainant is under the age of 18 years. "Recklessly" is a defined term in RCC § 22A-206 that means the actor is aware of a substantial risk that the complainant is under the age of 18 years. Subsection (a)(3)(B) also requires that the actor be in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (a)(3)(B) requires a "knowingly" culpable mental state for the "position of trust with or authority over" element. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant.

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

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

Subsection (d) codifies a defense for the revised sexually suggestive conduct with a minor statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (d) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic partnership" at the time of the offense. "Domestic

partnership" is defined in RCC § 22A-1301. The actor must prove this defense by a preponderance of the evidence.

Relation to Current District Law. *The revised sexually suggestive conduct with a minor statute changes existing District law in four 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 sexually suggestive conduct with a minor statute requires "intent to cause the sexual arousal or sexual gratification of any person." The current misdemeanor sexual abuse of a child or minor (MSACM) statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[616] There is no DCCA case law interpreting this language. In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person." The current "reasonably causes" alternative language may be interpreted to mean that the current MSACM offense is a general (rather than specific) intent offense,[617] or may indicate a culpable mental state similar to negligence. However, using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[618] Conduct that is not intended but "reasonably causes" sexual arousal or sexual gratification may be criminalized by the offensive physical contact offense in RCC § 22A-1205.[619] This change improves the proportionality of the revised offense.

Second, the revised sexually suggestive conduct with a minor statute requires a "recklessly" culpable mental state for the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[620] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[621] and legal experts[622] for any

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[616] D.C. Code § 22-3010.01(b).

[617] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC XXXXX, Sexual assault, above, for further discussion.

[618] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand").) *See also Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

[619] RCC § 22A-1205(b) (defining second degree offensive physical contact as "(1) Knowingly causes physical contact with another person; (2) With intent that the physical contact be offensive to that other person; and (3) In fact, a reasonable person in the situation of the recipient of the physical contact would regard it as offensive.").

[620] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[621] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

non-regulatory crimes, although "statutory rape" laws are often an exception.[623] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[624] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[625] A "recklessly" culpable mental state in the revised sexually suggestive conduct with a minor statute is consistent with the culpable mental state required in parts of the sexual exploitation of an adult statute (RCC § 22A-1305) and the nonconsensual sexual conduct statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised offense.

Third, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current MSACM statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[626] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[627] In contrast, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability for this age gap. The current definition of "significant relationship"[628] and the revised definition of "position of trust with or authority over" (RCC § 22A-1301) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between

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[622] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[623] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

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

[625] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring)("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.

[626] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[627] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[628] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

individuals close in age would be criminal.[629] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[630] Strict liability for the age gap matches the current sexual abuse of a child statutes[631] and the revised sexual abuse of a minor statute (RCC § 22A-1304), the revised enticing a minor statute (RCC § 22A-1307), and the revised arranging for sexual conduct with a minor statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised statute.

Fourth, only the general penalty enhancements in subtitle I of the RCC apply to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[632] DCCA case law suggests that the age-based sex offense aggravators may not apply to certain sex offenses because they overlap

[629] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, touches the buttocks of a 17 year old touches the 17 year old inside his or her clothing with intent to cause the sexual arousal or sexual gratification of any person would be guilty under the current MSACM statute.

[630] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22A-1306(d) provides that marriage is a defense to the revised sexually suggestive conduct with a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).
For example, current D.C. Code § 22-3011 and corresponding RCC § 22A-1307(d) provide that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse and sexual abuse of a minor statutes and the RCC sexual abuse of a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[631] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[632] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

with elements of the offense.[633] In contrast, the revised sexually suggestive conduct with a minor statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[634] are not necessary in the revised sexually suggestive conduct with a minor statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised sexually suggestive conduct with a minor statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for touching the complainant in a specified manner. The current MSACM statute requires engaging in specified conduct "which is intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[635] The current "reasonably causes" language may mean that the offense is a general (rather than specific) intent offense,[636] or may indicate a culpable mental state similar to negligence as defined in the RCC. There is no DCCA case law interpreting this language. The revised sexual abuse of a minor statute resolves any ambiguities as to the required culpable mental state for touching the complainant by requiring a "knowingly" culpable mental state for this element. Using negligence as the basis for criminal liability is disfavored for elements that distinguish otherwise non-criminal from criminal conduct.[637] This change improves the proportionality of the revised offense.

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[633] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging for sexual conduct with a real or fictitious child statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[634] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[635] D.C. Code § 22-3010.01(b).

[636] DCCA case law has characterized the current first and third degree sexual abuse statutes, which concern a sexual act, as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness. See commentary to RCC 22A-1303, Sexual assault, above, for further discussion.

[637] *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand")). *See also Elonis v. United States*, 135 S. Ct. 2001, 2015, 192 L. Ed. 2d 1 (2015) (J. Alito, concurring) ("Whether negligence is morally culpable is an interesting philosophical question, but the answer is at least sufficiently debatable to justify the presumption that a serious offense against the person that lacks any clear common-law counterpart should be presumed to require more.").

Second, the revised sexually suggestive conduct with a minor statute requires a "knowingly" culpable mental state for the fact that the actor is in a position of trust with or authority over the complainant. The current MSACM statute requires that an actor 18 years of age or older be in a "significant relationship" with a complainant under the age of 18 years,[638] but it does not specify a culpable mental state and there is no DCCA case law on point. The revised sexually suggestive conduct with a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[639] This change improves the clarity and consistency of the revised statute.

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

First, the revised sexually suggestive conduct with a minor statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[640] and sexual abuse of a minor, for complainants under the age of 18 years.[641] The current MSACM statute has the same distinction in one statute, applying to complainants under the age of 16 years[642] and complainants under the age of 18 years.[643] For clarification, the revised sexually suggestive conduct with a minor statute no longer distinguishes specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[644] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised sexually suggestive conduct with a minor statute, by use of the phrase "in fact," requires no culpable mental state as to the actor's own age or the required age gap. The current MSACM statute does not specify any culpable mental states for the age of the actor or the required age gap.[645] However, current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[646] For clarification, the revised sexually suggestive

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[638] D.C. Code §§ 22-3010.01(a) ("Whoever . . . being 18 years of age or older and being in a significant relationship with a minor."); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

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

[641] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[642] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[643] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[644] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[645] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3), (5A) (defining "child" as a "person who has not yet attained the age of 16 years" and "minor" as a "person who has not yet attained the age of 18 years.").

[646] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

conduct with a minor statute uses the phrase "in fact," establishing strict liability as to the ages of the actor and the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[647] Strict liability for these elements also is consistent with the revised sexual abuse of a minor statute (RCC § 22A-1304). This change improves the clarity and consistency of the revised offense.

Third, the revised sexually suggestive conduct with a minor statute requires that the actor touching his or her own genitalia or that of a third person must be "in the sight of the complainant." The current MSACM statute prohibits simply "touching one's own genitalia or that of a third person" with a child or minor.[648] The only DCCA case law concerning this provision sustained an attempted MSACM conviction when the actor touched his genitalia "in front of" the complainant.[649] For clarification, the revised sexually suggestive conduct with a minor statute codifies a requirement that the actor touch his or her own genitalia or that of a third person "in the sight" of the complainant. The "in sight of" requirement clarifies the scope of the revised offense without changing current District law.

Fourth, for a complainant under the age of 16 years, the revised sexually suggestive conduct with a minor statute requires an age gap between the complainant and the actor of "at least four years." The current MSACM statute requires that an actor 18 years of age or older be "more than 4 years older" than a complainant under the age of 16 years.[650] The current child sexual abuse statutes, in contrast, are worded to require that the complainant be "at least four years older" than the complainant.[651] Consequently, there is a difference of a day in liability between the two offenses due to the different required age gaps.[652] For clarification, the revised sexually suggestive conduct with a minor statute uses the language "at least four years older," the same as in the revised sexual abuse of a minor statute (RCC § 22A-1304) for complainants that are under the age of 16 years. The change improves the consistency of the revised offense.

Fifth, the revised sexually suggestive conduct with a minor statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual

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[647] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[648] D.C. Code § 22-3010.01(b).

[649] *Sutton v. United States*, 140 A.3d 1198, 1201, 1202 (D.C. 2016) (holding that the evidence was sufficient for attempted misdemeanor sexual abuse of a child under D.C. Code § 22-3010.01 when appellant touched his penis "in front of" the complainant).

[650] D.C. Code §§ 22-3010.01(a) ("Whoever, being 18 years of age or older and more than 4 years older than a child."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[651] D.C. Code §§ 22-3008 (first degree child sexual abuse prohibiting "[w]hoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act."); 22-3009 (second degree child sexual abuse statute prohibiting "[w]hoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact."); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[652] For a complainant that is 15 years and 364 days old, an actor that is 19 years and 364 days old would be liable under the current child sexual abuse statutes because the complainant is under 16 years of age and the actor is "at least four years older" than the complainant. However, the actor would not be liable under the current MSACM statute because, while the actor is over the age of 18, the actor is not "more than four years older" than the complainant.

offenses.[653] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[654] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[655] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[656] In the revised sexually suggestive conduct with a minor statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for sexually suggestive conduct, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexually suggestive conduct with a minor offense.

Sixth, the marriage and domestic partnership defense in the revised sexually suggestive conduct with a minor statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to MSACM "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[657] There is no DCCA case law interpreting this

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[653] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor).

[654] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[655] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[656] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSACM statute would have a maximum term of imprisonment of 180 days, which is the same penalty as the completed offense.

[657] D.C. Code § 22-30011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code §

provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[658] The marriage or domestic partnership defense in the revised sexually suggestive conduct with a minor statute applies only to prosecution for the revised sexual abuse of a minor offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[659] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22A-301 to the completed offenses.[660] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised sexually suggestive conduct with a minor offense.

Relation to National Legal Trends. *The revised sexually suggestive conduct with a minor offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[661]

First, there is strong support in the reformed jurisdictions' criminal codes for requiring "intent to cause the sexual arousal or sexual gratification of any person." The current MSACM statute prohibits specified conduct that is "intended to cause or reasonably causes the sexual arousal or sexual gratification of any person."[662] In contrast, the revised sexually suggestive conduct with a minor statute requires "with intent to cause the sexual arousal or sexual gratification of any person." At least six of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[663] ("reformed jurisdictions") prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks"[664] in the

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22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[658] D.C. Crim. Jur. Instr. § 9.700.

[659] See above Commentary to RCC § 22A-1304 on reliance on the RCC general attempt statute.

[660] See Commentary to RCC § 22A-1202 (revised assault statute).

[661] This survey excluded offenses with statutorily undefined terms such as "intimate parts" or "genital area." In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[662] D.C. Code § 22-3010.01(b).

[663] *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.

[664] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4) (defining "intimate parts" as "the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person" and "sexual contact" as the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse."), 18-3-405(1) (prohibiting sexual contact with a complainant that is less than 15 years of age when the actor is at least four years older), 18-3-405.3(1), (2)(a), (3) (prohibiting sexual contact when the actor is "in a position of trust" with the complainant if the complainant is less than 18 years of age, with different penalties depending on the age of the complainant); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.60(c)(1)(i), (c)(2)(i) (prohibiting an actor that is 17 years of age or older from committing an act of sexual conduct with a complainant under the age of 13 years and an actor that is under 17 years of age from committing an act of sexual

current MSACM statute.[665] An additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant"[666] in the current MSACM statute.[667] None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

Of these seven reformed jurisdictions that specifically prohibit conduct comparable to the current MSACM statute, five of them require an intent or purpose to sexually arouse or gratify.[668] The sixth jurisdiction consistently requires "an intent to arouse or satisfy the sexual desires" for the comparable conduct, except for the least serious offense.[669] The seventh

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conduct with a complainant that is under the age of nine years); Ind. Code Ann. §§ 35-42-4-3(b) (prohibiting an actor with a complainant under the age of 14 years from "peform[ing] or submit[ing] to any fondling or touching" of either the complainant or the actor, with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor), 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age), 35-42-4-9(b) (prohibiting an actor at least 18 years of age with a complainant that is at least 14 years of age but less than 16 years of age from "perform[ing] or submit[ing] to any fondling or touching" of either the actor or the complainant with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2) (prohibiting sexual contact with a complainant younger than 17 years and defining "sexual contact" as "any touching of any part of the body of a child, including touching through clothing, with the anus, breast, or any part of the genitals of a person" if done "with the intent to arouse or gratify the sexual desire of any person.").

[665] D.C. Code § 22-3010.01(b).

[666] N.H. Rev. Stat. Ann. §§ 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification."), 632-A:3(III) (prohibiting sexual contact with a complainant under 13 years of age), 632-A:4(I)(a), (I)(b), (I)(c) (though reference to N.H. Rev. Stat. Ann. § 632-A:2, prohibiting sexual contact with a complainant that is 13 years of age or older and under 17 years of age and the actor is in a "position of trust with or authority over the complainant, as well as sexual contact with a complainant that is 13 years of age or older but less than 16 years with different age gap requirements).

[667] D.C. Code § 22-3010.01(b).

[668] Colo. Rev. Stat. Ann. §§ 18-3-401(4) (definition of "sexual contact" requiring "for the purposes of sexual arousal, gratification, or abuse."); 720 Ill. Comp. Stat. Ann. 5/11-0.1 (definition of "sexual conduct" requiring "for the purpose of sexual gratification or arousal of the victim or the accused."); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9-(b) (prohibiting "any fondling or touching" with the "intent to arouse or satisfy the sexual desires of either" the complainant or the actor); Ohio Rev. Code Ann. § 2907.01(B) (definition of "sexual contact" requiring "for the purpose of sexually arousing or gratifying either person."); Tex. Penal Code Ann. § 21.11(c)(2) (definition of "sexual contact" requiring "with the intent to arouse or gratify the sexual desire of any person.").

[669] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(2)(3) (offenses of indecent liberties and aggravated indecent liberties prohibiting any "lewd fondling or touching of the person of either the child or the offender, done or

jurisdiction requires that the conduct "can be reasonably construed as being for the purpose of sexual arousal or gratification,"[670] and still appears to require a specific purpose to sexually arouse or gratify.

Second, there is limited support in the criminal codes of the reformed jurisdictions for the revised sexually suggestive conduct with a minor statute requiring a "recklessly" culpable mental state for the age of the complainant. Current D.C. Code § 22-3011 states that a mistake of age is not a defense to the current MSACM statute.[671] In contrast, the revised sexually suggestive conduct with a minor statute applies a "recklessly" culpable mental state to the age of complainant. The seven reformed jurisdictions with conduct that is comparable to the current MSACM statute[672] generally do not statutorily specify any culpable mental states in these sex offense statutes. However, two of these reformed jurisdictions codify that strict liability applies to the age of the complainant.[673] A third reformed jurisdiction codifies a defense for a reasonable mistake of age for younger complainants,[674] but requires a "knowledge" culpable mental state for older complainants.[675]

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submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both" with complainants of different ages under the age of 18 years); 21-5507(a)(1)(C)(2), (a)(1)(C)(3) (offense of unlawful voluntary sexual relations prohibiting "any lewd fondling or touching of the person" when the complainant is 14 or more years of age but less than 16 years of age and the actor is less than 19 years of age and less than four years of age older than the complainant).

[670] N.H. Rev. Stat. Ann. § 632-A:1(IV) (defining "sexual contact" as the "intentional touching whether directly, through clothing, or otherwise, of the victim's or actor's sexual or intimate parts, including . . . tongue. Sexual contact includes only that aforementioned conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification.").

[671] D.C. Code § 22-3011(a) (stating that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01."). The current MSACM statute is codified at D.C. Code § 22-301.01 and falls within the specified range of statutes. The current MSACM statute was enacted in 2007 and D.C. Code § 22-3011 was amended in 2007 to include it. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[672] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

[673] Ohio Rev. Code Ann. §§ 2907.05(A)(4) (prohibiting "sexual contact" when the complainant is less than 13 years of age "whether or not the offender knows the age" of the complainant), 2907.06(A)(4) (prohibiting "sexual contact" when the complainant is 13 years of age or older but less than 16 years of age, "whether or not the offender knows the age" of the complainant and the actor is at least 18 years of age and four or more years older); Tex. Penal Code Ann. § 21.11(a), (c)(2) (prohibiting "sexual contact" with a complainant under the age of 17 years "regardless of whether [the actor] knows the age" of the complainant).

[674] Ind. Code Ann. § 35-42-4-3(b), (d) (making it a defense that the actor "reasonably believed" that the complainant was 16 years of age or older for an offense that prohibits fondling or touching with a complainant under 14 years of age).

[675] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant, and requiring that the actor "knows" the complainant is at least 16 years of age but under 18 years of age for the professional relationship gradation).

Third, there is mixed support for the revised sexually suggestive conduct with a minor statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current MSACM statute, which requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 16 years,[676] but does not require any age gap when the complainant is under the age of 18 years and in a "significant relationship" with the actor.[677] For consistency with the current provision for complainants under the age of 16 years and other RCC sex offenses, the revised sexually suggestive conduct with a minor statute requires at least a four year age gap between an actor and a complainant under the age of 18 years and requires strict liability for this age gap.

There is mixed support in the criminal codes of the reformed jurisdictions because only four[678] of the seven reformed jurisdictions[679] with conduct that is comparable to the current MSACM statute include complainants under 18 years of age when the actor is in a significant relationship with the complainant. None of these four reformed jurisdictions require an age gap between the actor and the complainant. However, these four reformed jurisdictions still support narrowing the scope of the revised sexually suggestive conduct with a minor statute for complainants under the age of 18 years. Two of these four reformed jurisdictions are narrower than the District's current MSACM statute because they require the actor to use the position of authority to coerce the complainant into engaging in the sexual activity.[680] A third jurisdiction

[676] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[677] D.C. Code §§ 22-3010.01(a) (MSACM statute); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

[678] Colo. Rev. Stat. Ann. § 18-3-405.3(1) (prohibiting "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant); 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant); Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a guardian, custodian, or child care worker or has or had a "professional relationship" with the complainant); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named in [section] 632-A:2, which include when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant).

[679] At least six of the 29 reformed jurisdictions prohibit conduct that is comparable to touching the complainant "inside or outside his or her clothing close to the genitalia, anus, breast, or buttocks" in the current MSACM statute. Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b); Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A), 21-5507; Ohio Rev. Code Ann. §§ 2907.01(B), 2907.05(A)(4); Tex. Penal Code Ann. § 21.11(a)(1), (c)(2). One additional reformed jurisdiction prohibits conduct comparable to placing the actor's tongue "inside the mouth of the complainant" in the current MSACM statute. N.H. Rev. Stat. Ann. §§ 632-A:1(IV), 632-A:3(III), 632-A:4(I)(a), (I)(b), (I)(c). None of these reformed jurisdictions specifically prohibit conduct that is comparable to touching a complainant "inside his or her clothing" in the current MSACM statute. [Conduct comparable to touching genitalia in the sight of the complainant in the current MSACM statute will be surveyed when revising current D.C. Code § 22-1312 (indecent proposals to minors)].

[680] Ind. Code Ann. § 35-42-4-7(m), (n) (prohibiting fondling or touching with a complainant at least 16 years of age but less than 18 years of age when the actor is a specified individual such as a guardian, custodian, or child care worker, or has or had a "professional relationship" with the complainant and for the "professional relationship" prong requiring that the actor "uses or exerts . . . the professional relationship" to engage in the fondling or lewd touching); N.H. Rev. Stat. Ann. § 632-A:4(I)(a) (prohibiting "sexual contact under any of the circumstances named

grades the offense more severely if a complainant is under the age of 15 years as opposed to under 18 years of age.[681] Only one jurisdiction is similar in scope to the current MSACM statute, requiring no age gap and permitting liability for any complainant under the age of 18 years.[682]

Of the remaining three reformed jurisdictions with conduct that is comparable to the current MSACM statute, two do not include any complainants under the age of 18 years.[683] The remaining jurisdiction applies to complainants under the age of 17 years, regardless of whether there is a relationship with the actor, and provides an affirmative defense if the actor is "not more than three years older" than the complainant.[684]

Fourth, there is limited support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised sexually suggestive conduct with a minor statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[685] The revised sexually suggestive conduct with a minor statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is limited support in

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in [section] 632-A:2," which includes when the complainant is 13 years of age or older and under 18 years of age and the actor is in a "position of trust with or authority over" the complainant and "uses this authority to coerce [the complainant] to submit.").

[681] Colo. Rev. Stat. Ann. § 18-3-405.3(1), (2)(a), (3) (making it a class 4 felony to engage "sexual contact" with a complainant less than 18 years of age when the actor is in a "position of trust with or authority over" the complainant and a class 3 felony if the complainant is less than 15 years of age).

[682] 720 Ill. Comp. Stat. Ann. 5/11-1.60(f), (prohibiting "sexual conduct" with a complainant that is at least 13 years of age but under 18 years of age when the actor is 17 years of age or older and "holds a position of trust, authority, or supervision in relation" to the complainant).

[683] Kan. Stat. Ann. §§ 21-5506(a)(1), (b)(2)(A), (b)(3)(A) (prohibiting any "lewd fondling or touching" of either the actor or the complainant "done or submitted to with the intent to arouse or to satisfy the sexual desires" of either the actor or the complainant or both when the complainant is 14 years of age or more but less than 16 years and making it an aggravated offense if done without consent or if the complainant is under the age of 14 years), 21-5507 (prohibiting "any lewd fondling or touching of the person" when the actor is less than 19 years of age, less than four years older than the complainant, and the complainant is 14 years of age or more but less than 16 years of age); Ohio Rev. Code Ann. §§ 2907.01(B) (defining "sexual contact" as "any touching of an erogenous zone of another, including without limitation the . . . pubic region . . . for the purpose of sexually arousing or gratifying either person."), 2907.05(A)(4) (prohibiting sexual contact with a complainant under 13 years of age), 2907.06(A)(4) (prohibiting sexual contact with a complainant 13 years of age or older but less than 16 years of age when the actor is at least 18 years of age or older and four or more years older);

[684] Tex. Penal Code Ann. § 21.11(a), (b) (prohibiting "sexual contact" with a complainant under the age of 17 years and making it an affirmative defense if the actor "was not more than three years older" than the complainant and other conditions are met).

[685] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[686] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[687] Of these 16 reformed jurisdictions, three[688] have statutes that prohibit conduct that is comparable to the current MSACM statute. Two[689] of these three reformed jurisdictions apply

[686] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[687] Alaska Stat. Ann. § 11.41.410(2).

[688] Colo. Rev. Stat. Ann. §§ 18-3-401(2), (4), 18-3-405(1), 18-3-405.3(1), (2)(a), (3); 720 Ill. Comp. Stat. Ann. 5/11-0.1, 5/11-1.50(b), 5/11-1.60(c)(1)(i), (c)(2)(i); Ind. Code Ann. §§ 35-42-4-3(b), 35-42-4-7(m), (n)(3), 35-42-4-9(b).

[689] In these jurisdictions, the relevant penalty enhancements are not codified with the penalty enhancements that apply to the sexual act or sexual intercourse offenses, but are codified separately in the relevant offenses. The first jurisdiction is Illinois. 720 Ill. Comp. Stat. Ann. 5/11-0.1 (defining "sexual conduct" as "any knowing touching or fondling by the victim or the accused, either directly or through clothing, of . . . any part of the body of a child under 13 years of age, . . . for the purpose of sexual gratification or arousal of the victim or the accused."), 5/11-1.50(b) (offense of criminal sexual abuse prohibiting an actor who is under 17 years of age from committing an act of sexual conduct with a complainant who is at least nine years of age but under 17 years of age), 5/11-1.6(a)(1), (a)(2) (offense of aggravated criminal sexual abuse prohibiting committing criminal sexual abuse when the actor "displays, threatens to use, or uses a dangerous weapon or any other object fashioned or used in a manner that leads the victim, under the circumstances, reasonably to believe that the object is a dangerous weapon" and when the actor "causes bodily harm to the victim.").

The second jurisdiction is Indiana, and only the comparable offenses for complainants under the age of 16 years have penalty enhancements. Ind. Code Ann. §§ 35-42-4-3(b), (b)(2) (making it a Level 4 felony for an actor to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor when the complainant is under the age of 14 years, but a Level 2 felony if "it is committed while armed with a deadly weapon."), 35-42-4-9(b) (making it a Level 6 felony for an actor at least 18 years of age to engage in "any fondling or touching . . . with intent to arouse or satisfy the sexual desires of either" the complainant or the actor with a complainant that is at least 14 years of age but less than 16 years of age, but making it a Level 2 felony if "it is committed by using or threatening by the use of deadly force, while armed with a deadly weapon."). Indiana does not have any penalty enhancement for the comparable offense for complainants under the age of 18 years. Ind. Code Ann. § 35-42-4-7(m), (n)(3) (prohibiting specified individuals, such as a guardian or adoptive parent, or a

the penalty enhancements to the statutes prohibiting conduct comparable to the current MSACM statute.

person who has or had a professional relationship with the complainant, from engaging in "any fondling or touching with the intent to arouse or satisfy the sexual desires" of either the actor or the complainant with a complainant that is at least 16 years of age but less than 18 years of age).

RCC § 22A-1307. ENTICING A MINOR.

(a) *Enticing a Minor.* An actor commits the offense of enticing a minor when that actor:
  (1) Knowingly:
    (A) Persuades or entices, or attempts to persuade or entice, the complainant to engage in or submit to a sexual act or sexual contact; or
    (B) Persuades or entices, or attempts to persuade or entice, the complainant to go to another location in order to engage in or submit to a sexual act or sexual contact; and
  (2) The actor, in fact, is at least 18 years of age and at least four years older than the complainant, and:
    (A) The actor recklessly disregards that the complainant is under 16 years of age; or
    (B) The actor recklessly disregards that the complainant is under 18 years of age, and the actor is in a position of trust with or authority over the complainant; or
    (C) The complainant, in fact, is a law enforcement officer who purports to be a person under 16 years of age, and the actor recklessly disregards that complainant purports to be a person under 16 years of age.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "position of trust with or authority over," "law enforcement officer," and "domestic partnership" have the meanings specified in § 22A-1001.

(d) *Marriage or Domestic Partnership Defense.* In addition to any defenses otherwise applicable to the actor's conduct under District law, it is an affirmative defense to prosecution under this section for conduct involving only the actor and the complainant, which the actor must prove by a preponderance of the evidence, that the actor and the complainant were in a marriage or domestic partnership at the time of the offense.

Commentary

Explanatory Note. *The RCC enticing a minor offense prohibits soliciting certain complainants under the age of 18 years to engage in sexual conduct. The revised enticing a minor offense replaces the current enticing a child statute.*[690] *The revised enticing a minor statute also replaces in relevant part four distinct provisions for the sexual abuse offenses: the marriage or domestic partnership defense,*[691] *the state of mind proof requirement,*[692] *the attempt statute,*[693] *and the aggravating sentencing factors.*[694]

Subsection (a)(1)(A) specifies one type of prohibited conduct—persuading or enticing, or attempting to persuade or entice, the complainant to engage in or submit to a "sexual act" or

[690] D.C. Code § 22-3010.
[691] D.C. Code § 22-30011.
[692] D.C. Code § 22-3012.
[693] D.C. Code § 22-3018.
[694] D.C. Code § 22-3020.

"sexual contact." Subsection (a)(1)(B) specifies the other type of prohibited conduct-persuading or enticing, or attempting to persuade or entice, the complainant to go to another location in order to engage in or submit to a "sexual act" or "sexual contact." "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person. "Sexual contact" is a defined term in RCC § 22A-1301 that means touching the specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. Subsection (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state applies to the prohibited conduct in subsection (a)(1)(A) and (a)(1)(B). "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be practically certain that his or her conduct will persuade or entice, or attempt to persuade or entice the complainant as required in subsection (a)(1)(A) and subsection (a)(1)(B).

Subsection (a)(2) requires that the actor "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term that means no culpable mental state is required for a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to both the age of the actor and the four year age gap and there is no culpable mental state required for either element.

Subsection (a)(2)(A), subsection (a)(2)(B), and subsection (a)(2)(C) specify the requirements for the complainant. Each subsection requires that the actor "recklessly disregard" the required age or purported age of the complainant. "Recklessly" is a defined term in RCC § 22A-206 that means the actor was aware of a substantial risk that the complainant was the required age. For subsection (a)(2)(A), the actor must "recklessly disregard" that the complainant is under the age of 16 years. The actor must be aware of a substantial risk that the complainant is under the age of 16 years. For subsection (a)(2)(B), the actor must "recklessly disregard" that the complainant is under the age of 18 years. The actor must be aware of a substantial risk that the complainant is under the age of 18 years. Subsection (a)(2)(B) also requires that the actor be in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (a)(2)(B) requires a "knowingly" culpable mental state for the "position of trust with or authority over" element. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant.

Finally, subsection (a)(2)(C) requires the actor to "recklessly disregard" that the complainant purports to be a person under 16 years of age. The actor must be aware of a substantial risk that the complainant purports to be a person under 16 years of age. The complainant, in fact, must be a law enforcement officer. "In fact" is a defined term that means there is no culpable mental state required for the fact that the complainant is a law enforcement officer. "Law enforcement officer" is a defined term in RCC § 22A-1001.

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

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

Subsection (d) codifies a defense for the revised enticing a minor statute and establishes that this defense is in addition to any other defenses otherwise applicable to the actor's conduct under District law. Subsection (d) establishes an affirmative defense for conduct involving only the actor and the complainant that the actor and the complainant were in a marriage or "domestic

partnership" at the time of the offense. "Domestic partnership" is defined in RCC § 22A-1301. The actor must prove this defense by a preponderance of the evidence.

Relation to Current District Law. *The revised enticing a minor statute changes existing District law in seven 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 enticing statute requires a "recklessly" culpable mental state for the age of the complainant. The current enticing a child statute[695] (enticing statute) does not specify any culpable mental states and there is no DCCA case law on this issue. However, current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the age of the complainant, real or fictitious, in the current enticing statute.[696] In contrast, the revised enticing statute applies a "recklessly" culpable mental state to the age of complainant. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[697] and legal experts[698] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[699] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[700] However, recklessness has been upheld in some cases as a minimal basis for

[695] D.C. Code § 22-3010.

[696] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error.
D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute is included.

[697] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[698] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[699] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

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

punishing morally culpable crime.[701] A "recklessly" culpable mental state in the revised enticing statute is consistent with the culpable mental state required in parts of the sexually suggestive conduct with a minor statute (RCC § 22A-1306), sexual exploitation of an adult statute (RCC § 22A-1305), and the nonconsensual sexual conduct statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised offense.

Second, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The current enticing statute[702] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised enticing statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the enticing offense is reserved for adults to who engage in predatory behavior of complainants under the age of 18 years.[703] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[704] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with this element in the revised sexually suggestive contact with a minor statute (RCC § 22A-1306), third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22A-1304), and the revised arranging statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised offense.

Third, the revised enticing statute requires at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requires strict liability for this age gap. The current enticing statute requires a four year age gap between the actor and a complainant under the age of 16 years,[705] but does not have an age gap requirement when the complainant is under the age of 18 years.[706] In contrast, the revised enticing statute requires at least a four year age gap between the actor and a complainant under the age of 18 years and, by use of the phrase "in fact," requires strict liability

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[701] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[702] D.C. Code §§ 22-3010(a), (b) ("Whoever, being at least four years older than a child, or being in a significant relationship with a minor" and "Whoever, being at least four years older than the purported age of a person who represents himself or herself to be a child."); 22-3001(3), (5A) (defining "child" as "a person who has not yet attained the age of 16 years" and "minor" as "a person who has not yet attained the age of 18 years.").

[703] For example, under the revised enticing statute, a 17 year old actor would not be guilty of enticing a 12 year old complainant to engage in sexual intercourse. However, depending on the facts of the case, the 17 year old could be guilty of attempted second degree sexual abuse of a minor (RCC § 22A-1304) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of second degree sexual abuse of a minor unless there was a reasonable mistake of age defense.

[704] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[705] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[706] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

for this age gap. The current definition of "significant relationship"[707] and the revised definition of "position of trust with or authority over" (RCC § 22A-1301) include a broad range of custodial and non-custodial relationships, and without an age gap between the complainant and the actor, otherwise consensual sexual conduct between individuals close in age would be criminal.[708] While the special relationship between the actor and complainant may be sufficient to make such consensual sexual conduct criminal, in some contexts, the Council has recognized that consensual sexual activity between persons close in age should not be criminal.[709] Strict liability for the age gap matches the current sexual abuse of a child statutes[710] and third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22A-1304), the revised sexually suggestive conduct with a minor statute (RCC § 22A-1306), and the revised arranging statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised statute.

Fourth, the revised enticing statute limits the offense to fictitious complainants that are law enforcement officers. The current enticing statute applies to any fictitious complainant,[711] while the closely-related statute for arranging sexual conduct with a real or fictitious child (current arranging statute) is limited to fictitious complainants that are law enforcement officers.[712] The legislative history for the current arranging statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or

[707] D.C. Code § 22-3001(10) ("'Significant relationship' includes: (A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, domestic partnership, or adoption; (B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim; (C) The person or the spouse, domestic partner, or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and (D) Any employee or volunteer of a school, church, synagogue, mosque, or other religious institution, or an educational, social, recreational, athletic, musical, charitable, or youth facility, organization, or program, including a teacher, coach, counselor, clergy, youth leader, chorus director, bus driver, administrator, or support staff, or any other person in a position of trust with or authority over a child or a minor.").

[708] For example, a 19 year old camp counselor who, with consent and in the context of a dating relationship, texts his 17 year old girlfriend that he wants to touch her buttocks may be guilty of enticing a minor under current District law.

[709] For example, current D.C. Code § 22-3011 provides that marriage or domestic partnership between the actor and the complainant is a defense to charges under the District's current child sexual abuse, sexual abuse of a minor, sexually suggestive conduct with a minor, and enticing statutes and corresponding RCC § 22A-1307(d) provides that marriage is a defense to the revised enticing a minor statute. Also, in the original Anti-Sexual Abuse Act of 1994, the Council of the District of Columbia inserted the four year age gap requirement in the current child sexual abuse statutes "recognizing, but not condoning the sexual curiousity [sic] which exists among young persons of similar ages." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 15. The current sexual abuse of a minor statutes were enacted in 2007. Omnibus Public Safety Amendment Act of 2006, 2006 District of Columbia Laws 16-306 (Act 16-482).

[710] D.C. Code § 22-3012 ("In a prosecution under §§ 22-3008 to 22-010 . . . the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child."). The current child sexual abuse statutes are codified at D.C. Code § 22-3008 and D.C. Code § 22-3009, and fall within the specified range of statutes.

[711] D.C. Code § 22-3010(b) ("Whoever, being at least 4 years older than the purported age of a person who represents himself or herself to be a child.").

[712] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

intended to involved (the thrill such as it is, being in the salacious banter)."[713] In contrast, the revised enticing statute is limited to fictitious complainants who actually are law enforcement officers. The same legislative rationales that underlie the current arranging statute's limitation to fictitious persons who are really police officers also apply to enticement-type conduct. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised enticing statute is limited to persuading or enticing a child to go to another location to engage in or submit to a sexual act or sexual contact. The current enticing statute prohibits "tak[ing] that child or minor to any place for the purpose of committing any offense set forth in §§ 22-3002 to 22-3006 and §§ 22-3008 to 22-3009.02."[714] The current kidnapping statute[715] provides liability for similar conduct of "enticing" and "carrying away" a person, although DCCA case law suggests that kidnapping and enticing do not merge.[716] In contrast, the revised enticing statute omits liability for "taking" a person and is limited to persuading or enticing, or attempting to persuade or entice, the complainant. Physically taking a child somewhere without persuasion or enticement (and without appropriate consent) may still be subject to criminal charges in the RCC as a criminal restraint or kidnapping.[717] This change improves the proportionality and consistency of the revised offense.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[718] DCCA case law suggests that the age-based sex offense

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[713] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

[714] D.C. Code § 22-3010(a)(1).

[715] D.C. Code § 22-2001 ("Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for not more than 30 years.").

If there is an exchange of value, the current enticing statute also overlaps with the enticing a child for prostitution statute, D.C. Code §§ 22-2704, and the sex trafficking of children statute. D.C. Code §§ 22-1834(a).

[716] In *Blackledge v. United States*, the DCCA held that kidnapping and enticing do not merge because "each of the two crimes requires proof of a factual element which the other does not." *Blackledge v. United States*, 871 A.2d 1193, 1197 (D.C. 2005). *Blackledge* was decided in 2005, and the enticing statute that appellant was prosecuted under has since been repealed. *Blackledge*, 871 A.2d at 1195. However, the repealed enticing statute is substantively identical to part of subsection (a) of the current enticing statute. D.C. Code § 22-4110 (1981) (repl.) ("Whoever, being at least 4 years older than a child, takes that child to any place, or entices, allures, or persuades a child to go to any place for the purpose of committing any offense set forth in §§ 22–4102 to 22–4106 and §§ 22–4108 and 22–4109 shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed $50,000."). It seems likely that *Blackledge* may still be applicable to the parts of subsection (a) of the current enticing statute that are identical to the repealed statute. For the remainder of the current enticing statute, including subsection (b) dealing with fictitious complainants, the DCCA's reasoning in *Blackledge* appears to still apply. The court in *Blackledge* noted that under an elements test, the repealed enticing statute "requires proof of three separate elements" which kidnapping does not—the age of the complainant, the age gap, and that the actor took the complainant "with the specific intent of committing a sexual offense." *Blackledge*, 871 A.2d at 1197. The current enticing statute continues to require elements that are not required in kidnapping, and it seems likely that the DCCA would continue to hold that the offenses do not merge.

[717] See RCC §§ 22A-1401 – 22A-1404 and accompanying commentary.

[718] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual

aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[719] In contrast, the revised enticing statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[720] are not necessary in the revised enticing statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised enticing statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Seventh, an actor may not receive a conviction for enticing a complainant and a conviction for engaging in the prohibited conduct. The current enticing statute prohibits consecutive sentences for enticing and for engaging in the sexual conduct if "the enticement occurred closely associated in time with the sexual act or sexual contact."[721] In contrast, the revised enticing statute is subject to the merger provisions in RCC § 22A-1302 and RCC § 212(d)-(e), which prohibit multiple convictions for two or more sex offenses arising from the same course of conduct. Even if the sentences for convictions run concurrently, multiple convictions for enticing and engaging in the prohibited conduct can result in collateral consequences and disparate outcomes where such overlapping offenses are not uniformly charged and convicted. This change improves the proportionality of the revised sex offenses.

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

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abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[719] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[720] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[721] D.C. Code § 22-3010(c) ("No person shall be consecutively sentenced for enticing a child or minor to engage in a sexual act or sexual contact under subsection (a)(2) of this section and engaging in that sexual act or sexual contact with that child or minor, provided, that the enticement occurred closely associated in time with the sexual act or sexual contact.").

First, the revised enticing statute requires a "knowingly" culpable mental state for persuading or enticing, or attempting to persuade or entice. The current enticing statute does not specify any culpable mental states, and there is no DCCA case law on this issue. The revised enticing statute resolves these ambiguities by requiring a "knowingly" culpable mental state in each gradation for persuading or enticing, or attempting to persuade or entice. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[722] This change improves the clarity and consistency of the revised statutes.

Second, the revised enticing statute consistently requires that the actor require that the actor persuade or entice, or attempt to persuade or entice, the complainant "to engage in or submit to a sexual act or sexual contact." While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant or "submit to" the sexual conduct.[723] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current misdemeanor sexual abuse statute suggests that the DCCA may not construe such language variations as legally significant.[724] In addition to case law, District practice does not appear to follow the variations in statutory language.[725] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. For the

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

[723] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[724] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

[725] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

revised enticing statute, the language clearly establishes that the actor is liable for soliciting the complainant to engage in or submit to a sexual act or sexual contact with the actor, with a third party, or with the complainant. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

Third, the revised enticing statute requires a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. The current enticing statute requires that the actor be "in a significant relationship with a minor,"[726] but it does not specify a culpable mental state and there is no DCCA case law for this issue. The revised enticing statute resolves this ambiguity by requiring a "knowingly" culpable mental state for the fact that the actor is in a "position of trust with or authority over" the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[727] This change improves the clarity and consistency of the revised statute.

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

First, the revised enticing statute categorizes all persons under the age of 18 as "minors" and defines revised offenses in terms of the specific ages of complainants. The D.C. Code currently contains two sets of offenses for sexual abuse of complainants under the age of 18—child sexual abuse, for complainants under the age of 16 years,[728] and sexual abuse of a minor, for complainants under the age of 18 years.[729] The current enticing statute[730] makes the same distinctions. For clarification, the revised enticing statute specifies the numerical ages of relevant classes of complainants rather than using "child" or "minor" terminology. Referring to a teenager as a "child" may be misleading and leads to inconsistency with other District offenses that have different definitions of "child."[731] These changes improve the clarity and consistency of the revised sexual abuse of a minor statute.

Second, the revised enticing statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainants under the age of 16 years. Current D.C. Code § 22-3012 and current D.C. § 22-3011 establish strict liability for the required age gap between the actor and a complainant, real or fictitious, under the age of 16 years in the current enticing statute.[732] For clarification, the revised enticing statute uses the phrase "in fact,"

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[726] D.C. Code §§ 22-3010; 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years.").

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

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

[729] D.C. Code §§ 22-3009.01 (first degree sexual abuse of a minor); 22-3009.02 (second degree sexual abuse of a minor); 22-3001(5A) (defining "minor" as a "person who has not yet attained the age of 18 years").

[730] D.C. Code § 22-3010.

[731] For example, the current child cruelty statute considers a person under the age of 18 years to be a "child" (D.C. Code § 22-1101(a)), but the current contributing to the delinquency of a minor statute considers a person under the age 18 to be a "minor" (D.C. Code § 22-811(f)(2)).

[732] D.C. Code § 22-3012 states that "[i]n a prosecution under §§ 22-3008 to 22-3010 . . . the government need not prove that the defendant knew the child's age." D.C. Code § 22-3012. The current enticing statute is codified at D.C Code § 22-3010 and falls within the specified range of statutes, but D.C. Code § 22-3012 does not apply to the entire enticing statute. D.C. Code § 22-3012 and the enticing statute were part of the original 1994 Anti-Sexual

establishing strict liability as to the relevant age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[733] Strict liability for the required age gap also is consistent with the revised sexual abuse of a minor statute (RCC § 22A-1304), the revised sexually suggestive conduct with a minor statute (RCC § 22A-1306), and the revised arranging for sexual conduct with a minor statute (RCC § 22A-1308). This change improves the clarity and consistency of the revised offense.

Third, the revised enticing statute requires that the actor "persuade" or "entice" or attempt to "persuade" or "entice." The current enticing statute uses differing verbs to convey the prohibited conduct—"seduce," "entice," "allure," "convince," persuade" and "seduce."[734] For clarification, the revised enticing statute consistently requires that the actor "persuade[s] or entice[s]" or "attempt[s] to persuade or "entice" the complainant. The other verbs, "seduce," "allure," "convince," and "seduce" appear to convey the same meaning and are surplusage. This change improves the clarity of the revised statute.

Fourth, the revised enticing statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[735] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[736] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[737] These

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Abuse Act. Crimes—Anti-Sexual Abuse Act, 1994 District of Columbia Laws 10-257 (Act 10-385). At that time, the enticing statute was limited to "real" complainants under the age of 16 years. The enticing statute was amended in 2007 to include "real" complainants under the age of 18 years when the actor is in a significant relationship with the complainant (D.C. Code § 22-3010(a)) and to include fictitious complainants (D.C. Code § 22-3010(b)). D.C. Code § 22-3012 was not amended in 2007, thus limiting its application to the original enticing statute, although this was likely a drafting error. However, D.C. Code § 22-3011 states that "mistake of age" is not a defense "to a prosecution under §§ 22-3008 to 22-3010.01." D.C. Code § 22-3011(a). Unlike D.C. Code § 22-3012, D.C. Code § 22-3011 was amended in 2007 to expand the specified range of statutes to § 22-3010.01 (the current misdemeanor sexual abuse of a child or minor statute, also enacted in 2007). Given this amendment, it likely that the entire enticing statute was meant to be included in D.C. Code § 22-3011.

[733] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[734] D.C. Code § 22-3010(a)(2) requires "seduces, entices, allures, convinces, or persuades" or attempts to do so. D.C. Code § 22-3010(b)(1) requires "attempts" to "seduce, entice, allure, convince, or persuade." D.C. Code § 22-3010(b)(2) requires "attempts" to "entice, allure, convince, or persuade."

[735] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[736] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[737] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for

attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[738] In the revised enticing statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for the enticing offense, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised sexual abuse of a minor offense.

Fifth, the marriage and domestic partnership defense in the revised enticing statute does not refer to other offenses. The current marriage or domestic partnership defense states that marriage or domestic partnership is a defense to enticing "prosecuted alone or in conjunction with § 22-3018 [sex offense attempt statute] or § 22-403 [assault with intent to commit certain offenses]."[739] There is no DCCA case law interpreting this provision. The language is not included in the current jury instruction for the marriage or domestic partnership defense.[740] The marriage or domestic partnership defense in the revised enticing statute applies only to prosecution for the revised enticing offense. In the RCC, the revised sex offenses no longer have their own attempt statute, and there are no longer separate "assault with intent to" offenses, or "AWI" offenses.[741] Similarly, the revised assault statutes in the RCC no longer include separate "assault with intent to" crimes and instead provide liability through application of the general attempt statute in RCC § 22A-301 to the completed offenses.[742] Deleting the "prosecuted alone or in conjunction with language" improves the clarity of the revised enticing offense.

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not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[738] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, taking a child for sexual purposes (D.C. Code § 22-3010(a)(1)) would have a maximum term of imprisonment of 180 days. The remaining prongs of the enticing statute include an attempt within the offense and subject it to the same five year penalty as completed enticing. D.C. Code § 22-3010(a)(2), (b). Thus, the remaining prongs of the enticing statute are not subject to the general attempt statute.

[739] D.C. Code § 22-30011(b). The "prosecuted alone or in conjunction with" language appears in two other statutes in addition to D.C. Code § 22-3011. D.C. Code § 22-3007, which codifies defenses for first degree through fourth degree sexual abuse and misdemeanor sexual abuse, and D.C. Code § 22-3017, which codifies defenses for sexual abuse of a ward and sexual abuse of a patient or client. The "prosecuted alone or in conjunction with" language in these statutes consistently refers to D.C. Code § 22-3018, which is the current attempt statute for the sexual abuse offenses, but inconsistently refers to D.C. Code § 22-401, which prohibits assault with intent to commit specified offenses, including first degree sexual abuse, second degree sexual abuse, or child sexual abuse, and D.C. Code § 22-403 which prohibits assault with intent to commit "any other offense which may be punished by imprisonment in the penitentiary."

[740] D.C. Crim. Jur. Instr. § 9.700.

[741] See above Commentary to RCC § 22A-1304 on reliance on the RCC general attempt statute)

[742] See Commentary to RCC § 22A-1202 (revised assault statute).

Relation to National Legal Trends. *The revised enticing offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[743]

First, there is strong support in the criminal codes of other jurisdictions for the revised enticing statute requiring a "recklessly" culpable mental state for the age of the complainant, as opposed to strict liability under current law. Seventeen of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[744] ("reformed jurisdictions") have general enticing a minor statutes.[745] Nine of these 18 reformed jurisdictions statutorily specify a culpable mental state for the age of the complainant—two jurisdictions require "knows or should know" or "knows or has reason to know"[746] and seven jurisdictions require "believes"[747] or "knows or believes."[748] Only one of the 18 reformed jurisdictions statutorily specifies that the age of the complainant is a matter of strict liability, but even in this jurisdiction strict liability is limited to the younger complainants[749] and a culpable mental state of "recklessly" is required for complainants that are 16 or 17 years of age.[750]

The remaining eight reformed jurisdictions with general enticing a minor statutes do not statutorily specify a culpable mental state for the age of the complainant in the enticing statutes.

Second, there is strong support in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element, as opposed to the current enticing statute, which does not specify any requirements for the age of the actor. Of the 17 reformed

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[743] Unless otherwise noted, this survey is limited to general enticing statutes, which may include specific provisions for online and other electronic means of enticing. Statutes that are limited to online and other electronic means of enticing were excluded. In addition, parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[744] *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.

[745] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[746] Ariz. Rev. Stat. Ann. § 13-3554(A) ("knowing or having reason to know that the other person is a minor."); Tenn. Code Ann. § 39-13-528(a)("knows, or should know, is less than eighteen (18) years of age.").

[747] Del. Code Ann. tit. 11, § 1112A(a)(1), (b)(3) (defining "child" to include "an individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) ("believes to be a child."); Ind. Code Ann. § 35-42-4-6(b) ("believes to be a child under fourteen (14) years of age."); Mont. Code Ann. § 45-5-625(1)(c) ("believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) ("believes is a child."); S.D. Codified Laws § 22-24A-5(1) ("reasonably believes is a minor.").

[748] Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1), (A)(2), (1)(B)(2) ("knows or believes" is a complainant of a certain age).

[749] Ohio Rev. Code Ann. § 2907.07(A), (B)(1) (stating "whether or not the offender knows the age of such person" for a complainant that is under the age of 13 years or at least 13 years of age but under 16 years of age).

[750] Ohio Rev. Code Ann. § 2907.07(B)(2) (prohibiting enticing a complainant that is 16 or 17 years of age when "the offender knows or has reckless disregard of the age" of the complainant).

jurisdictions with general enticing a minor statutes,[751] ten have an age requirement for the actor, with a majority of these jurisdictions requiring that the actor be 18 years of age or older.[752] An additional reformed jurisdiction requires that the actor be 18 years of age or older in the gradations of the enticing offense with older complainants,[753] and has no age requirement for the actor in the gradation for the youngest complainants.[754]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the age of the actor in the general enticing statutes.

Third, there is limited supported in the criminal codes of the reformed jurisdictions for the revised enticing statute requiring at least a four year age gap between the actor and the complainant when the complainant is under the age of 18 years, and, by the use of the phrase "in fact," requiring strict liability for this age gap. The basis for this revision is the current enticing statute, which requires a four year age gap between the actor and a complainant under the age of 16 years,[755] but does not have an age gap requirement when the complainant is under the age of 18 years.[756] There is limited support in the criminal codes of the reformed jurisdictions for this revision because most of the 17 reformed jurisdictions that have general enticing a minor statutes[757] do not require an age gap between the actor and the complainant. However, five of these 17 reformed jurisdictions do require an age gap between the actor and the complainant, with an age gape of three or four years being the most common,[758] and a sixth jurisdiction

[751] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[752] Ark. Code Ann. § 5-14-110(a)(1) (requiring the actor to be 18 years of age or older); Del. Code Ann. tit. 11, §§ 1112(a)(1) (requiring the actor to be 18 years of age or older); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (requiring the actor to be 17 years of age or older); Ind. Code Ann. § 35-42-4-6(b) (requiring the actor to be 18 years of age or older); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(1), (1)(B)(1) (requiring the actor to be 16 years of age or older); Mo. Ann. Stat. § 566.151(1) (requiring the actor to be 21 years of age or older); Minn. Stat. Ann. § 609.352(2) (requiring the actor to be 18 years of age or older); N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (requiring the actor to be an "adult.") S.D. Codified Laws § 22-24A-5(1) (requiring the actor to be 18 years of age or older); Tenn. Code Ann. § 39-13-528(a) (requiring the actor to be 18 years of age or older).

[753] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that the actor be 18 years of age or older when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[754] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense applying to any "person" when the complainant is less than 13 years of age).

[755] D.C. Code §§ 22-3010(a), (b); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[756] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining a "minor" as "a person who has not yet attained the age of 18 years."). The current arranging statute is limited to complainants under the age of 16 years and requires at least a four year age gap. D.C. Code §§ 22-3010.02(a); 22-3001(3) (defining "child" as a "person who has not yet attained the age of 16 years.").

[757] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[758] Ark. Code Ann. § 5-14-110(a)(1) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 15 years of age); Ind. Code Ann. § 35-42-4-6(b) (enticing offense requiring that the actor be 18 years of age or older and the complainant be less than 14 years of age); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A), (1)(B) (enticing offense requiring that the actor be at least 16 years of age, that the complainant be either

appears to grade the offense more severely if there is an age gap between the actor and the complainant.[759] A seventh jurisdiction requires an age gap of at least four years in the gradations for older complainants,[760] and has no age gap requirement in the gradation for the youngest complainants.[761]

These reformed jurisdictions do not statutorily specify whether there is a culpable mental state requirement for the required age gap in the general enticing statutes.

Fourth, there is little support in the criminal codes of the reformed jurisdictions for the revised enticing statute limiting the offense to fictitious complainants that are law enforcement officers. The basis for this revision is that the current closely-related statute for arranging sexual conduct with a real or fictitious child is limited to fictitious complainants that are law enforcement officers[762] and the legislative concerns that underlie this limitation apply equally to the enticing offense.[763] Of the 17 reformed jurisdictions with general enticing a minor statutes,[764] nine include fictitious children.[765] Of these nine jurisdictions, only one includes fictitious children only if they are really law enforcement officers posing as children.[766]

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less than 14 years of age or less than 12 years of age, and that the actor be at least three years older than the complainant); Mo. Ann. Stat. § 566.151(1) (enticing offense requiring the actor to be 21 years of age or older and the complainant be less than 15 years of age); Minn. Stat. Ann. § 609.352(1)(a), (2) (enticing offense requiring that the actor be 18 years of age or older and soliciting a "child" and defining "child" to include a person 15 years of age or younger);

[759] N.D. Cent. Code Ann. § 12.1-20-05(1), (2) (enticing offense requiring that the actor be an "adult" and making the offense a class A misdemeanor if the compliant is a "minor"15 years of age or older, but making the offense a class C felony if the actor is at least 22 years of age and the complainant is a "minor" 15 years of age or older).

[760] Ohio Rev. Code Ann. § 2907.07(B)(1), (C)(1) (enticing offense requiring that at least a four year age gap between the actor and the complainant when the complainant is at least 13 years of age but less than 16 years of age or when the complainant is 16 or 17 years of age).

[761] Ohio Rev. Code Ann. § 2907.07(A) (enticing offense not requiring any age gap between the actor and the complainant when the complainant is less than 13 years of age).

[762] D.C. Code § 22-3010.02(a) ("For the purposes of this section, arranging to engage in a sexual act or sexual contact with an individual who is fictitious shall be unlawful only if the arrangement is done by or with a law enforcement officer.").

[763] The legislative history for the current arranging statute states that the statute was limited to law enforcement officers because otherwise the statute could "enable mischief, such as blackmail, between adults where they are acting out fantasies with no real child involved or intended to involved (the thrill such as it is, being in the salacious banter)." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary, Bill 18-963, the "Criminal Code Amendment Act" at 7 (internal quotation marks omitted) (quoting written testimony of Richard Gilbert, District of Columbia Association of Criminal Defense Lawyers). The current arranging contact statute was enacted in 2011 as part of the "Criminal Code Amendment Act of 2010, 2010 District of Columbia Laws 18-377 (Act 18-722)."

[764] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[765] Ark. Code Ann. § 5-14-110(a)(1) (prohibiting solicitation of a "person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age."); Del. Code Ann. tit. 11, § 1112A(b) (defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); 720 Ill. Comp. Stat. Ann. 5/11-6(a) (prohibiting solicitation of a "child or one whom [the actor] believes to be a child."); Ind. Code Ann. § 35-42-4-6(b) (prohibiting solicitation of a "child under fourteen (14) years of age, or an individual the person believes to be a child under fourteen (14) years of age."); Me. Rev. Stat. Ann. tit. 17-A, § 259-A(1)(A)(2), (B)(2) (prohibiting solicitation when the actor "knows or believes that the other person is less than 14 years of age" or "knows or believes that the other person is less than 12 years of

There are 14 reformed jurisdictions with statutes that specifically prohibit online or other electronic enticing, either in either in addition to the general enticing a minor statute[767] or as the jurisdiction's only enticing statute.[768] All 14 of these jurisdictions include fictitious children—12 include all fictitious children[769] and two are limited to fictitious children if they are law enforcement officers posing as children.[770]

Fifth, there is strong support in the criminal codes of reformed jurisdictions for limiting the revised enticing statute to persuading or enticing a child to go to another location to engage in or submit to a sexual act or sexual contact and eliminating the provision of the current enticing statute which prohibits actually taking a complainant. Of the 17 reformed jurisdictions with general enticing a minor statutes,[771] only one jurisdiction[772] includes making the complainant go somewhere for the purposes of sexual activity like the current enticing statute.

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age."); Mont. Code Ann. § 45-5-625(1)(c) (prohibiting solicitation of a "child under 16 years of age or a person the offender believes to be a child under 16 years of age."); Minn. Stat. Ann. § 609.352(2) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); S.D. Codified Laws § 22-24A-5(1) (prohibiting solicitation of a "minor, or someone [the actor] reasonably believes is a minor."); Mo. Ann. Stat. § 566.151(2) ("It is not a defense to a prosecution for a violation of this section that the other person was a peace officer masquerading as a minor.");

[758] Tenn. Code Ann. § 39-13-528(a) (prohibiting solicitation of a person who "is less than eighteen (18) years of age" or "a law enforcement officer posting as a minor, and whom the person making the solicitation reasonably believes to be less than eighteen (18) years of age.").

[767] Ala. Code § 13A-6-122; Ark. Code Ann. § 5-27-306(a)(1), (a)(2); Colo. Rev. Stat. Ann. § 18-3-306; Del. Code Ann. tit. 11, § 1112A(a)(2); Kan. Stat. Ann. § 21-5509; Minn. Stat. Ann. § 609.352(2a)(1); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b); Ohio Rev. Code Ann. § 2907.07(C), (D).

[768] Alaska Stat. Ann. § 11.41.452; Conn. Gen. Stat. Ann. § 53a-90; Ky. Rev. Stat. Ann. § 510.155; N.H. Rev. Stat. Ann. § 649-B:4; Or. Rev. Stat. Ann. §§ 163.431 – 163.434; Tex. Penal Code Ann. § 33.021(c).

[769] Ala. Code § 13A-6-122 (prohibiting soliciting "a child who is at least three years younger than the defendant or another person believed by the defendant to be a child at least three years younger than the defendant."); Alaska Stat. Ann. § 11.41.452 (a)(1), (a)(2) (prohibiting solicitation of a "child under 16 years of age" or a person the actor "believes" is a child under 16 years of age); Ark. Code Ann. § 5-27-306(a)(1), (a)(2) (prohibiting solicitation of a "child fifteen (15) years of age or younger" or a person the actor "believes to be fifteen (15) years of age or younger."); Colo. Rev. Stat. Ann. § 18-3-306(1) (prohibiting solicitation of a person "the actor knows or believes to be under fifteen (15) years of age."); Conn. Gen. Stat. Ann. § 53a-90(a)(1), (a)(2) (prohibiting solicitation of a person "under eighteen years or age or who the actor reasonably believes to be under eighteen years of age."); Del. Code Ann. tit. 11, §§ 1112A(a)(2), (b) and 1112B(a)(2), (b) (prohibiting solicitation of a "child" and defining "child" as "[a]n individual who is younger than 18 years of age; or [a]n individual who represents himself or herself to be younger than 18 years of age; or [a]n individual whom the person committing the offense believes to be younger than 18 years of age."); Kan. Stat. Ann. § 21-5509(a) (prohibiting solicitation of a person "whom the offender believes to be a child."); Minn. Stat. Ann. § 609.352(2a)(1) (prohibiting solicitation of a "child or someone [the actor] reasonably believes is a child."); N.D. Cent. Code Ann. § 12.1-20.05.1(1)(b) (prohibiting solicitation of a "person [the actor] believes to be a minor."); N.H. Rev. Stat. Ann. § 649-B:4(I) (prohibiting solicitation of a "child or another person believed by [the actor] to be a child."); Or. Rev. Stat. Ann. §§ 163.431(1), .432(1)(a), .433(1) (prohibiting solicitation of a child and defining "child" as a "person who the defendant reasonably believes to be under 16 years of age."); Tex. Penal Code Ann. § 33.021(a)(1), (c) (prohibiting solicitation of a "minor" and defining "minor" to include "an individual whom the actor believes to be younger than 17 years of age.").

[770] Ky. Rev. Stat. Ann. § 510.155(1) (prohibiting procuring or promoting "the use of a minor, or a peace officer posing as a minor if the person believes that the piece officer is a minor or is wanton or reckless in that belief."); Ohio Rev. Code Ann. § 2907.07(C), (D) (prohibiting solicitation of a child of specified ages or a "law enforcement officer posing as a person" of the specified ages and "the offender believes that the other person [is of the specified ages] or is reckless in that regard.").

[771] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. §

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised enticing statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[773] The revised enticing statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised sexually suggestive conduct with a minor statute. Fifteen[774] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a

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45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[772] Wis. Stat. Ann. § 948.07(1) ("Whoever, with intent to commit any of the following acts, causes . . . any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class D felony: (1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02, 948.085, or 948.095.").

[773] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[774] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

higher gradation of the sex offenses.[775] Of the 17 reformed jurisdictions with general enticing a minor statutes,[776] nine have general enticing a minor statutes,[777] none applies the penalty enhancements to the general enticing a minor statutes.

Seventh, it is difficult to determine the national legal trends for prohibiting an actor from receiving a conviction for both enticing a complainant and engaging in the prohibited conduct because none of the 17 reformed jurisdictions with general enticing a minor statutes,[778] statutorily addresses convictions for both enticing and engaging in the prohibited conduct in the general enticing statutes.

[775] Alaska Stat. Ann. § 11.41.410(2).

[776] Ala. Code § 13A-6-69; Ariz. Rev. Stat. Ann. § 13-3554; Ark. Code Ann. § 5-14-110(a)(1); Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Kan. Stat. Ann. § 22-5508; Me. Rev. Stat. Ann. tit. 17-A, § 259-A; Mo. Ann. Stat. § 566.151; Mont. Code Ann. § 45-5-625(1)(c); Minn. Stat. Ann. § 609.352(2); N.D. Cent. Code Ann. § 12.1-20-05; Ohio Rev. Code Ann. § 2907.07; S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[777] Ariz. Rev. Stat. Ann. § 13-3554; Colo. Rev. Stat. Ann. § 18-3-305; Del. Code Ann. tit. 11, § 1112A(a)(1); 720 Ill. Comp. Stat. Ann. 5/11-6(a); Ind. Code Ann. § 35-42-4-6; Mo. Ann. Stat. § 566.151; Minn. Stat. Ann. § 609.352(2); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

[778] S.D. Codified Laws § 22-24A-5(1); Tenn. Code Ann. § 39-13-528; Wis. Stat. Ann. § 948.07.

RCC § 22A-1308. ARRANGING FOR SEXUAL CONDUCT WITH A MINOR.

(a) *Arranging for Sexual Conduct with a Minor*. An actor commits the offense of arranging for sexual conduct with a minor when that actor:
  (1) Knowingly arranges for a sexual act or sexual contact between:
    (A) The actor and the complainant; or
    (B) A third person and the complainant; and
  (2) The actor and any third person, in fact, are at least 18 years of age and at least four years older than the complainant; and
  (3) The actor recklessly disregards that:
    (A) The complainant is under 16 years of age;
    (B) The complainant is under 18 years of age, and the actor knows that he or she or the third person is in a position of trust with or authority over the complainant; or
    (C) The complainant purports to be a person under 16 years of age, while, in fact, the complainant a law enforcement officer.

(b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, sexually suggestive contact with a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(c) *Definitions*. The terms "knowingly" and "recklessly" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207; and the terms "sexual act," "sexual contact," "law enforcement officer" and "position of trust with or authority over" have the meanings specified in § 22A-1001.

Commentary

Explanatory Note. *The RCC arranging for sexual conduct with a minor offense prohibits an actor from arranging for sexual conduct between the actor and certain complainants under the age of 18 years or between a third party and certain complainants under the age of 18 years. The offense has a single penalty gradation. The revised arranging for sexual conduct with a minor offense replaces the current arranging for a sexual contact with a real or fictitious child statute.*[779] *The revised arranging for sexual conduct with a minor offense also replaces in relevant part two distinct provisions for the sexual abuse offenses: the attempt statute*[780] *and the aggravating sentencing factors.*[781]

Subsection (a)(1)(A) specifies part of the prohibited conduct—arranging for a "sexual act" or "sexual contact." "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person. "Sexual contact" is a defined term in RCC § 22A-1301 that means touching the specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. Per subsection (a)(1)(A) and subsection (a)(1)(B), the sexual act or sexual contact must be between the actor and the complainant or a third person and the complainant. Subsection (a)(1) specifies a culpable mental state of "knowingly" for the prohibited conduct. Per the rule of construction in RCC § 22A-207, the "knowingly" culpable mental state applies

[779] D.C. Code § 22-3010.02.
[780] D.C. Code § 22-3018.
[781] D.C. Code § 22-3020.

to the prohibited conduct in subsection (a)(1)(A) and (a)(1)(B). "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be practically certain that his or her conduct will arrange for a "sexual act" or "sexual contact" between the actor and the complainant or between the actor and a third person.

Subsection (a)(2) requires that the actor or the third person, if applicable, are "in fact" is at least 18 years of age and at least four years older than the complainant. "In fact" is a defined term that means no culpable mental state is required for a given element. Per the rule of construction in RCC § 22A-207, "in fact" applies to both the age of the actor, the age of the third person, and the four year age gap. There is no culpable mental state required for any of these elements.

Subsection (a)(2)(A), subsection (a)(2)(B), and subsection (a)(2)(C) specify the requirements for the complainant. Each subsection requires that the actor "recklessly disregard" the required age or purported age of the complainant. "Recklessly" is a defined term in RCC § 22A-206 that means the actor was aware of a substantial risk that the complainant was the required age. For subsection (a)(2)(A), the actor must "recklessly disregard" that the complainant is under the age of 16 years. The actor must be aware of a substantial risk that the complainant is under the age of 16 years. For subsection (a)(2)(B), the actor must "recklessly disregard" that the complainant is under the age of 18 years. The actor must be aware of a substantial risk that the complainant is under the age of 18 years. Subsection (a)(2)(B) also requires that the actor be in a "position of trust with or authority over" the complainant. "Position of trust with or authority over" is a defined term in RCC § 22A-1301 that includes individuals such as parents, siblings, school employees, and coaches. Subsection (a)(2)(B) requires a "knowingly" culpable mental state for the "position of trust with or authority over" element. "Knowingly" is a defined term in RCC § 22A-206 that means the actor must be practically certain that the he or she is in a "position of trust with or authority over" the complainant.

Finally, subsection (a)(2)(C) requires the actor to "recklessly disregard" that the complainant purports to be a person under 16 years of age. The actor must be aware of a substantial risk that the complainant purports to be a person under 16 years of age. The complainant, in fact, must be a law enforcement officer. "In fact" is a defined term that means there is no culpable mental state required for the fact that the complainant is a law enforcement officer. [LEO definition]

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

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

Relation to Current District Law. *The revised arranging for sexual conduct with a minor 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 arranging for sexual conduct with a minor statute includes sexual conduct with "real" (i.e., not fictitious) complainants under the age of 18 years. The current, closely-related enticing a child statute includes "real" complainants under the age of 18 years when the actor is in a "significant relationship" with the complainant,[782] but the current arranging for a sexual contact with a real or fictitious child statute (current arranging statute) is

[782] D.C. Code §§ 22-3010(a); 22-3001(5A) (defining "minor" as "a person who has not yet attained the age of 18 years.").

limited to complainants under the age of 16 years.[783] In contrast, the revised arranging for sexual conduct with a minor statute (revised arranging statute) includes "real" complainants under the age of 18 years when the actor is at least four years older than the complainant and in a "position of trust with or authority over" the complainant. There is no apparent reason to criminalize enticing complainants under the age of 18 years to whom one has a special obligation, but to not criminalize arranging a sexual act or sexual contact with these complainants. This change improves the consistency of and reduces an unnecessary gap in the revised offense.

Second, the revised arranging statute requires a "knowingly" culpable mental state for the element "position of trust with or authority over." The current arranging statute is limited to complainants under the age of 16 years,[784] and does not specify a culpable mental state as to that age. In contrast, the revised arranging statute requires a "knowingly" culpable mental state for the new element "position of trust with or authority over." As noted immediately above, there is no apparent reason to criminalize enticing complainants under the age of 18 years to whom one has a special obligation, but to not criminalize arranging a sexual act or sexual contact with these complainants. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle[785] and it is consistent with the revised sexual abuse of a minor statute (RCC § 22A-1304), the revised sexually suggestive conduct with a minor statute (RCC § 22A-1306), and the revised enticing a minor statute (RCC § 22A-1307). This change improves the clarity and consistency of the revised offense.

Third, the revised arranging statute applies a culpable mental state of "recklessly" to the age of the complainant. The current arranging statute does not specify any culpable mental states[786] and there is no DCCA case law on this issue. Applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[787] and legal experts[788] for any non-regulatory crimes, although "statutory rape" laws are often an exception.[789] Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[790]

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[783] D.C. Code § 22-3010.02.

[784] D.C. Code § 22-3010.02.

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

[786] D.C. Code § 22-3010.02.

[787] *Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015) ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).").

[788] *See* § 5.5(c)Pros and cons of strict-liability crimes, 1 Subst. Crim. L. § 5.5(c) (3d ed.) ("For the most part, the commentators have been critical of strict-liability crimes. 'The consensus can be summarily stated: to punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of a criminal conviction without being morally blameworthy. Consequently, on either a preventive or retributive theory of criminal punishment, the criminal sanction is inappropriate in the absence of *mens rea*.'") (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup.Ct.Rev. 107, 109).

[789] *See, e.g.*, Joshua Dressler, Understanding Criminal Law § 12.03(b) (3d ed. 2001) ("A few non-public-welfare offenses are characterized as 'strict liability' because they do not require proof that the defendant possessed a *mens rea* regarding a material element of the offense. Perhaps the most common example is statutory rape, i.e., consensual intercourse by a male with an underage female.")

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

However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[791] In contrast, the revised arranging statute applies a "recklessly" culpable mental state to the age of complainants. A "recklessly" culpable mental state in the revised arranging statute is consistent with the culpable mental state required in parts of the sexual exploitation of an adult statute (RCC § 22A-1305), the sexually suggestive conduct with a minor statute (RCC § 22A-1307), and the nonconsensual sexual conduct statute (RCC § 22A-1308). This change improves the consistency and proportionality of the revised offense.

Fourth, the revised arranging statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict lability for this element. The current arranging statute[792] does not specify any requirements for the age of the actor. DCCA case law does not address the point. In contrast, the revised arranging statute requires that the actor be 18 years of age or older and, by use of the phrase "in fact," requires strict liability for this element. Requiring the actor to be 18 years of age or older ensures that the arranging offense is reserved for adults who engage in predatory behavior of complainants under the age of 18 years.[793] While an actor presumably will know his or her own age, it is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[794] Requiring that the actor be 18 years of age or older and applying strict liability to this element also is consistent with the revised sexually suggestive contact with a minor statute (RCC § 22A-1306), third degree and sixth degree of the revised sexual abuse of a minor statute (RCC § 22A-1304), and the revised enticing a minor statute (RCC § 22A-1307). This change improves the consistency and proportionality of the revised offense.

Fifth, only the general penalty enhancements in subtitle I of the RCC apply to the revised arranging statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[795] DCCA case law suggests that the age-based sex offense

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[791] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[792] D.C. Code § 22-3010.02(a).

[793] For example, under the revised arranging statute, a 17 year old actor would not be guilty of arranging sexual intercourse between a 12 year old complainant and a 16 year old third party, or between a 12 year old complainant and a significantly older third party, such as a 30 year old. However, depending on the facts of the case, the 17 year old could be guilty of attempted first degree sexual abuse of a minor (RCC § 22A-1304) and if sexual intercourse actually occurs, the 17 year old actor could be guilty of first degree sexual abuse of a minor.

[794] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

[795] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

aggravators may not apply to certain sex offenses because they overlap with elements of the offense.[796] In contrast, the revised arranging statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[797] are not necessary in the arranging statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised arranging statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

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

First, the revised arranging statute requires a four year age gap between the actor and the complainant and between any third person and the complainant. It is unclear in the current arranging statute whether a four year age gap is required between the actor and the complainant, as well as between the complainant and any third party with whom the sexual conduct is arranged.[798] There is no DCCA case law on this issue. The revised arranging statute resolves this ambiguity by requiring a four year age gap between both the actor and the complainant and, when a third person is involved, between the third person and the complainant. The age gap requirement matches the requirement in the revised sexual abuse of a minor statute (RCC § 22A-1304) and revised sexually suggestive conduct with a minor statute (RCC § 22A-1306) and ensures that the offense is reserved for adults who engage in predatory behavior of complainants under the age of 18 years.[799] Accomplice or attempt liability for other RCC sex offenses may

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[796] DCCA case law in the context of the District's current assault with a dangerous weapon offense (ADW) suggests that the age-based sex offense aggravators and age-based penalty enhancements may not be applied to the current sexual abuse of a child statutes, sexual abuse of a minor statutes, misdemeanor sexual abuse of a child or minor statute, enticing statute, or arranging statute because they overlap with elements of these offenses. The DCCA has held that ADW may not be enhanced with the current "while armed" enhancement in D.C. Code § 22-4502(a)(1) because each provision requires the use of a "dangerous weapon." *McCall v. United States*, 449 A.2d 1095, 1096 (D.C. 1982) ("The government concedes that [current D.C. Code § 22-4502(a)(1)] may not apply to ADW since [ADW] provides for enhancement and is a more specific and lenient provision."); *see also Gathy v. United States*, 754 A.2d 912, 916 n.5 (D.C. 2000) ("In *McCall* we held that section [current D.C. Code § 22-4502(a)(1)] could not be applied to a charge of ADW because the use of 'a dangerous weapon' is already included as an element of *that* offense, so that 'ADW while armed'-*i.e.*, assault with a dangerous weapon while armed with a dangerous weapon-would be redundant.").

[797] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[798] The ambiguity arises from the multiple references to a "person" in the current arranging statute. D.C. Code § 22-3010.02(a) ("It is unlawful *for a person* to arrange to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child at least 4 years younger than the person, or to arrange for another person to engage in a sexual act or sexual contact with an individual (whether real or fictitious) who is or who is represented to be a child of at least 4 years younger *than the person*.") (emphasis added).

[799] The four year age gap precludes liability when the sexual encounter that is being arranged is legal. For example, under the revised sexual abuse of a minor statute (RCC § 22A-1304), it is legal for a 19 year old actor to engage in consensual sexual intercourse with a 15 year old complainant. Under the revised arranging statute, it is also legal for the 19 year actor to arrange for consensual sexual intercourse with a 15 year old complainant. In the case of an actor who arranges for a sexual encounter between a complainant under the age of 18 years and a third party, the same principle applies. For example, a 20 year old actor that arranges for a sexual encounter between two consenting 15 year olds. The encounter is legal under the revised sexual abuse of a minor statute (RCC § 22A-1304) and absent force, fraud, coercion, or similar behavior, is legal under the other RCC sex offenses as well.

exist where the actor arranges for a sexual encounter, but there is force, fraud, coercion, or other similar behavior. This change improves the clarity and consistency of the offense.

Second, the revised arranging statute, by use of the phrase "in fact," requires strict liability for the age gap between the actor and complainant. The current arranging statute[800] does not specify any culpable mental state requirements for the required age gap between the actor and the complainant. There is no DCCA case law on this issue. Instead of this ambiguity, the revised arranging statute, by use of the phrase "in fact," requires strict liability for this age gap. It is generally recognized that a person may be held strictly liable for elements of an offense that do not distinguish innocent from guilty conduct.[801] Strict liability for this element also is consistent with the revised sexual abuse of a minor statute (RCC § 22A-1304), revised sexually suggestive conduct with a minor statute (RCC § 22A-1306), and revised enticing statute (RCC § 22A-1307). This change improves the clarity and consistency of the revised offense.

Third, the revised arranging statute requires a "knowingly" culpable mental state for causing the complainant to engage in or submit to a sexual act or sexual contact. The current arranging statute does not specify any culpable mental state for arranging the sexual conduct[802] and there is no DCCA case law on this issue. The revised sexual abuse of a minor statute resolves this ambiguity by requiring a "knowingly" culpable mental state for arranging the sexual conduct. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[803] This change improves the clarity and consistency of the revised statutes.

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

First, the revised arranging statute requires that the actor be "at least four years older" than the complainant. The current arranging statute phrases the required age gap as "at least 4 years younger,"[804] whereas the current sexual abuse of a child statutes[805] and current enticing statute phrase the required age gap as "at least 4 years older."[806] Despite the different wording, the current enticing statute and the current arranging statute appear to require the same age gap.[807] For clarification, the revised arranging statute consistently requires that the actor be "at least four years older" than the complainant. Consistently wording the age gap requirement improves the clarity and consistency of the revised offense without changing current District law.

Second, the revised arranging statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018

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[800] D.C. Code § 22-3012(a).

[801] *See Elonis v. United States*," 135 S. Ct. 2001, 2010, 192 L.Ed.2d 1 (2015). ("When interpreting federal criminal statutes that are silent on the required mental state, we read into the statute 'only that mens rea which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) (quoting *X–Citement Video*, 513 U.S., at 72, 115 S.Ct. 464).")

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

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

[804] D.C. Code § 22-3010.02(a).

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

[806] D.C. Code § 22-3010(a), (b).

[807] For example, if a complainant is 15 years and 364 days old, and an actor is 19 years and 364 days old, the actor is at least four years older than the complainant (required in the current enticing statute) and the complainant is at least four years younger than the actor (required in the current arranging statute).

provides a separate attempt statute applicable to all current sexual offenses.[808] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[809] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[810] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[811] In the revised enticing statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties for the arranging offense, consistent with other offenses. While a separate attempt statute for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised arranging offense.

Relation to National Legal Trends. None of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[812] ("reformed jurisdictions") appear to have a specific offense that is comparable to the District's current[813] or revised arranging statute. The reformed jurisdictions may have offenses that prohibit arranging for a complainant under the age of 18 years to engage in a commercial

[808] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[809] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[810] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[811] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current arranging statute would have a maximum term of imprisonment of 180 days.

[812] *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.

[813] D.C. Code § 22-3010.02.

sex act[814] or traveling within a state to engage in sexual conduct with such a complainant,[815] but they do not appear to have offenses prohibit merely arranging for any sexual conduct to occur.

[814] *See, e.g.*, Colo. Rev. Stat. Ann. § 18-6-404 ("Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another p-erson a child for the purpose of sexual exploitation of a child commits procurement of a child for sexual exploitation, which is a class 3 felony."), 18-6-403(3) ("A person commits sexual exploitation of a child if, for any purpose, he or she knowingly: (a) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material; or (b) Prepares, arranges for, publishes, including but not limited to publishing through digital or electronic means, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (b.5) Possesses or controls any sexually exploitative material for any purpose; except that this subsection (3)(b.5) does not apply to law enforcement personnel, defense counsel personnel, or court personnel in the performance of their official duties, nor does it apply to physicians, psychologists, therapists, or social workers, so long as such persons are licensed in the state of Colorado and the persons possess such materials in the course of a bona fide treatment or evaluation program at the treatment or evaluation site; or (c) Possesses with the intent to deal in, sell, or distribute, including but not limited to distributing through digital or electronic means, any sexually exploitative material; or (d) Causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the purpose of producing a performance.").

[815] *See, e.g.*, Mont. Code Ann. § 45-5-625(1)("A person commits the offense of sexual abuse of children if the person . . . knowingly travels within, from, or to this state with the intention of meeting a child under 16 years of age or a person the offender believes to be a child under 16 years of age in order to engage in sexual conduct, actual or simulated."); Ark. Code Ann. § 5-27-305(a) ("A person commits the offense of transportation of a minor for prohibited sexual conduct if the person transports, finances in whole or part the transportation of, or otherwise causes or facilitates the movement of any minor, and the actor: (1) Knows or has reason to know that prostitution or sexually explicit conduct involving the minor will be commercially exploited by any person; and (2) Acts with the purpose that the minor will engage in: (A) Prostitution; or (B) Sexually explicit conduct.").

RCC § 22A-1309. NONCONSENSUAL SEXUAL CONDUCT.

(a) *First Degree Nonconsensual Sexual Conduct.* An actor commits the offense of first degree nonconsensual sexual conduct when that actor recklessly causes the complainant to engage in or submit to a sexual act without the complainant's effective consent.

(b) *Second Degree Nonconsensual Sexual Conduct.* An actor commits the offense of second degree nonconsensual sexual contact when that actor recklessly causes the complainant to engage in or submit to sexual contact without the complainant's effective consent.

(c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:

(1) First degree nonconsensual sexual conduct of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree nonconsensual sexual conduct of an adult is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(d) *Definitions*. The term "recklessly" has the meaning specified in § 22A-206; the terms "sexual act," and "sexual contact," and "effective consent" have the meanings specified in § 22A-1001.

(e) *Exclusion from Liability.* An actor shall not be subject to prosecution under this section for a use of deception to induce the complainant to consent to the sexual act or sexual contact. An actor may be subject to prosecution under this section for a use of deception as to the nature of the sexual act or sexual contact.

Commentary

Explanatory Note. *The RCC nonconsensual sexual conduct offense prohibits causing a complainant to engage in or submit to a sexual act or sexual contact without the complainant's effective consent. The penalty gradations are based on the nature of the sexual conduct. The revised nonconsensual sexual conduct offense replaces the current misdemeanor sexual abuse statute.*[816] *The revised nonconsensual sexual conduct offense also replaces in relevant part three distinct provisions for the sexual abuse offenses: the consent defense,*[817] *the attempt statute,*[818] *and the aggravating sentencing factors.*[819]

Subsection (a) specifies the prohibited conduct for first degree nonconsensual sexual conduct. The actor must "recklessly" cause the complainant to engage in or submit to a "sexual act" without the complainant's effective consent. Per the rule of construction in RCC § 22A-207, the "recklessly" culpable mental state applies to each element in subsection (a). "Recklessly" is a defined term in RCC § 22A-206 that means the actor must be aware of a substantial risk that the actor's conduct will result in a "sexual act" without the complainant's effective consent. "Sexual act" is a defined term in RCC § 22A-1301 that means penetration of the anus or vulva of any person or contact between the mouth of any person and the specified body parts of any person, with intent to sexually degrade, arouse, or gratify any person. "Effective consent" is a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception.

[816] D.C. Code § 22-3006.
[817] D.C. Code § 22-3007.
[818] D.C. Code § 22-3018.
[819] D.C. Code § 22-3020.

Subsection (b) specifies the prohibited conduct for second degree nonconsensual sexual conduct. The actor must "recklessly" cause the complainant to engage in or submit to a "sexual contact" without the complainant's effective consent. Per the rule of construction in RCC § 22A-207, the "recklessly" culpable mental state applies to each element in subsection (a). "Recklessly" is a defined term in RCC § 22A-206 that means the actor must be aware of a substantial risk that the actor's conduct will result in "sexual contact" without the complainant's effective consent. "Sexual contact" is a defined term in RCC § 22A-1301 that means touching specified body parts, such as genitalia, of any person with intent to sexually degrade, arouse, or gratify any person. "Effective consent" is a defined term in RCC § 22A-1001 that excludes consent obtained by means coercion or deception.

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

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

Subsection (e) excludes from liability for nonconsensual sexual conduct an actor's use of deception to induce[820] the complainant to consent, notwithstanding the fact that such deception may otherwise negate the complainant's effective consent. However, subsection (e) also specifies that the use of deception as to the nature[821] of the sexual act or sexual contact may constitute a deception that negates the complainant's effective consent and subject's the actor to liability.

Relation to Current District Law. *The revised nonconsensual sexual conduct 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 nonconsensual sexual conduct statute is comprised of two gradations, based on whether a "sexual act" or "sexual contact" was committed. The current misdemeanor sexual abuse (MSA) statute prohibits committing either a "sexual act" or "sexual contact" without distinction in penalty, with both types of conduct subject to the same maximum imprisonment of 180 days.[822] In contrast, first degree of the nonconsensual sexual conduct statute prohibits a "sexual act" without effective consent and second degree prohibits "sexual contact" without effective consent. Differentiating the penalties for a "sexual act" and "sexual contact" is consistent with the grading in other current D.C. Code and RCC sex offenses.[823] The change improves the consistency and proportionality of the revised offense.

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. The District's current assault offense, D.C. Code § 22-404, does not specifically refer to sexual touching. However the DCCA has held that a simple assault per D.C. Code § 22-404(a)(1) includes non-violent sexual touching,[824] and

[820] Examples of deception to induce a sexual act or sexual contact include: a false statement about one's feelings for the complainant; a false assertion that one is a celebrity; and a false promise to perform a future action in return for the sexual conduct.

[821] Examples of deception as to the nature of the sexual act or sexual contact include deceptions as to: the object or body part that is used to penetrate the other person; a person's current use of birth control (e.g. use of a condom or IUD); and a person's health status (e.g. having a sexually transmitted disease).

[822] D.C. Code § 22-3006.

[823] The other current sexual abuse statutes grade offenses involving a "sexual act" more severely than offense involving a "sexual contact." *Compare* D.C. Code §§ 22-3002, 22-3003, 22-3008, 22-3009.01, 22-3013, 22-3015 (first degree sexual abuse offenses prohibiting a "sexual act") *with* §§ 22-3004, 22-3006, 22-3009, 22-3009.02, 22-3014, 22-3016 (second degree sexual abuse offenses prohibiting "sexual contact.").

[824] The District's current assault statute does not state the elements of the offense. D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount

that such an assault is a lesser included offense of the current MSA statute.[825] DCCA case law also suggests that a simple assault in D.C. Code § 22-404(a)(1) also likely requires a culpable mental state of recklessness.[826] In contrast, in the RCC, second degree nonconsensual sexual conduct generally replaces liability for the non-violent sexual touching form of assault. RCC § 22-1205, the offensive physical contact offense, provides even more general liability for offensive touching (regardless whether there is an intent to sexually degrade, arouse, or gratify),[827] and in some circumstances a non-consensual sexual touching may satisfy the elements of more serious RCC sex offenses.[828] However, in general, second degree nonconsensual sexual conduct is the crime in the RCC which covers non-consensual sexual touching. This change reduces unnecessary overlap between offenses and improves the proportionality and consistency of the revised offense.

Third, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to engaging in the sexual act or contact. The current MSA statute does not specify any culpable mental state for engaging in a sexual act or sexual contact, although the

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set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both."). DCCA case law, however, recognizes that assault includes non-violent touching. *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 246 (D.C. 2001) ("Non-violent sexual touching assault . . . is committed by the voluntary touching of another in a sexually sensitive or private area without consent. Sexual touching need only consist of a touching that could offend a person of reasonable sensibility.") (quotations and citations omitted).

[825] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act."). However, the sexual conduct at issue in *Mungo* was a "sexual contact." *Mungo*, 772 A.2d at 242. Consequently, the *Mungo* decision that non-consensual sexual touching forms of assault are a lesser included of MSA may only be *dicta* with respect to sexual acts, even though the DCCA's holding in *Mungo* did not differentiate between an MSA conviction based on a "sexual act" and an MSA conviction based on "sexual contact." *Id.* at 246 ("[W]e conclude that non-violent sexual touching assault is a lesser included offense" of MSA). Instead, the court was focused on the parts of the current definitions of "sexual act" and "sexual contact" that require an extra intent to gratify or arouse that simple assault does not. *Id.* ("When prosecuting MSA based on an alleged sexual contact or an alleged sexual act [based on subsection (C) of the current definition], the government must therefore prove an element of intent, i.e., the intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[826] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[827] However, the general merger provision in RCC § 22A-212 would likely prohibit an actor from receiving a conviction for both offensive physical contact and nonconsensual sexual conduct based on the same course of conduct, which would be consistent with current case law on assault and MSA. *See, e.g.*, *Mattete v. United States*, 902 A.2d 113, 117-18 (agreeing with appellant and the government that appellant's assault conviction merges into the conviction for MSA and remanding the case to the trial court for the purpose of vacating the assault conviction).

[828] For example, a non-consensual sexual touching of a person who is unconscious may constitute fourth degree sexual assault in the RCC.

statutory definition of "sexual contact" requires an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[829] The DCCA has characterized the current first degree and third degree sexual abuse statutes, which concern a "sexual act," as "general intent" crimes. However, it is not clear what specific culpable mental state must be proven for such "general intent" crimes—e.g., knowledge or recklessness.[830] In contrast, the revised nonconsensual sexual conduct statute requires a "recklessly" culpable mental state in each gradation for causing the complainant to engage in or submit to a sexual act or sexual contact. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[831] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[832] In addition, the current assault statute,[833] which has been interpreted by the DCCA to include liability for nonconsensual sexual touching,[834] also likely requires a culpable mental state of recklessness.[835] This change improves the clarity and consistency of the revised offense.

Fourth, the revised nonconsensual sexual conduct offense requires a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The current MSA statute requires that an actor "should have knowledge or reason to know that the act was committed without that other person's permission."[836] There is no case law describing the

[829] D.C. Code § 22-3001(9) (defining "sexual contact."). Despite this additional intent element the definition of "sexual contact" requires, the DCCA has sustained a conviction for second degree child sexual abuse when the jury instructions required that the actor "knowingly" touched the complainant and erroneously omitted "with intent to abuse, humiliate, harass, degrade, or arouse or gratify." *Green v. United States*, 948 A.2d 554, 558, 561 (D.C. 2008) (affirming appellant's conviction for second degree child sexual abuse when the jury instructions required that the appellant "knowingly" touched the complainant and omitted the "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person" requirement because "no rational jury could have found that appellant touched [the complainants] in a way consistent with the trial court's jury instruction . . . without also finding the requisite intent.").

[830] See commentary to RCC § 22A-1303, Sexual assault, for further discussion.

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

[832] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.).

[833] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[834] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[835] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[836] D.C. Code § 22-3006.

meaning of these mental state terms.[837] However, District case law[838] and District practice[839] have consistently construed the culpable mental state regarding the lack of permission as "know or should have known," without discussion of the discrepancy with the statutory language. In contrast, the nonconsensual sexual conduct offense requires a "recklessly" culpable mental state as to the lack of effective consent. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[840] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[841] The current assault statute[842] that has been interpreted by the DCCA to include liability for nonconsensual sexual touching[843] also likely requires a culpable mental state of recklessness.[844] This change improves the clarity and consistency of the revised sexual assault statute.

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[837] The current "should have knowledge or reason to know" language may suggest a culpable mental state akin to negligence. However, negligence is disfavored as a basis for criminal liability. *DiGiovanni v. United States*, 580 A.2d 123, 126–27 (D.C. 1990) (J. Steadman, concurring) (referencing "the principle that neither simple negligence nor naivete ordinarily forms the basis of felony liability.") (quoting *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("[C]rime . . . generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand"). In addition, with respect to the similar phrase "knowing or having reason to believe" in the District's current receiving stolen property offense, D.C. Code § 22-3232, the DCCA held that the culpable mental state still required a subjective awareness by the defendant as to the offense element. *See Owens v. United States*, 90 A.3d 1118, 1123 (D.C. 2014) (noting that jury instructions "improperly focused on what a reasonable person would have believed without emphasizing the jury's duty to determine appellant's subjective knowledge").

[838] *See, e.g.*, *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001) (stating that the "essential elements" of MSA are "(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact.") (citing the Criminal Jury Instructions for the District of Columbia, No. 460A (4th ed. 1993 & Supp. 1996)); *Harkins v. United States*, 810 A.2d 895, 900 (D.C. 2002) (stating that MSA "occurs when an individual 'engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission," citing the MSA statute, but also stating that "there are two essential elements to [MSA]: "'(1) that the defendant committed a 'sexual act' or 'sexual contact' . . . and (2) that the defendant knew or should have known that he or she did not have the complainant's permission to engage in the sexual act or sexual contact." (quoting *Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001)).

[839] D.C. Crim. Jur. Instr.§ 4.400 at 4-116 (jury instruction stating the culpable mental state in the MSA statute as "knew or should have known.")

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

[841] *Elonis v. United States*," 135 S. Ct. 2001, 2015, 192 L.Ed.2d 1 (2015) (J. Alito, concurring) ("There can be no real dispute that recklessness regarding a risk of serious harm is wrongful conduct. In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[842] D.C. Code § 22-404(a)(1) ("Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than the amount set forth in § 22-3571.01 or be imprisoned not more than 180 days, or both.").

[843] In *Mungo v. United States*, the DCCA held that non-violent sexual touching assault is a lesser included offense of MSA. *Mungo*, 772 A.2d at 246. The DCCA stated that the *actus reus* of non-violent sexual touching assault can be "less intimate" than the conduct the MSA prohibits, but "the fundamental difference" between the offenses is the culpable mental state requirement. *Id.* ("Misdemeanor sexual abuse requires an intent to do the acts; in addition, in this case, it requires an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. Simple assault requires only an intent to do the proscribed act.").

[844] Simple assault is a lesser included offense of offenses such as ADW, assault with significant bodily injury, and aggravated assault. *See Williams v. United States*, 106 A.3d 1063, 1065 & n.5 (D.C. 2015) (referring to simple assault as a lesser included offense of ADW); *Woods v. United States*, 65 A.3d 667, 668 (D.C. 2013) (referring to simple assault as a lesser included offense of assault with significant bodily injury); *McCloud v. United States*, 781 A.2d 744, 746 (D.C. 2001) (referring to simple assault as a lesser included of aggravated assault). The lesser included offense relationship between simple assault and ADW and simple assault and aggravated assault suggests that recklessness should suffice for simple assault because proof of recklessness or extreme recklessness satisfies

Fifth, the revised nonconsensual sexual conduct offense requires proof that the actor lacked effective consent and does not provide for a separate consent defense. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission."[845] "Permission," unlike "consent,"[846] is undefined in the current sexual abuse statutes. DCCA case law has not specifically addressed the definition of "permission," although it has used the terms "permission" and "consent" interchangeably in discussing the MSA statute.[847] The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[848] In contrast, the nonconsensual sexual conduct offense requires proof of lack of "effective consent" and eliminates the consent defense for the MSA statute. RCC § 22A-1001 defines "effective consent" as "consent obtained by means other than the use of physical force, coercion, or deception," and appears to be consistent with the current definition of "consent" for sex abuse offenses.[849] Elimination of a separate consent defense to RCC nonconsensual sexual conduct does not change the scope of the statute because if a complainant gives effective consent, that negates an element of the offense, and the actor is not guilty. The elimination of a consent defense, moreover, avoids unconstitutionally shifting the burden of proof for an element of the offense to the actor.[850] These changes improve the clarity, consistency and legality of the revised offense.

Sixth, only the general penalty enhancements in subtitle I of the RCC apply to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[851] In contrast, the revised nonconsensual sexual

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these greater offenses. *See Vines v. United States*, 70 A.3d 1170, 1180 (D.C. 2013), *as amended* (Sept. 19, 2013) ("[I]t is clear that a conviction for ADW can be sustained by proof of reckless conduct alone."). However, the DCCA has recently declined to state that recklessness, versus a higher culpable mental state, is sufficient. *Vines v. United States*, 70 A.3d 1170, 1181 (D.C. 2013), *as amended* (Sept. 19, 2013).

[845] D.C. Code § 22-3006.

[846] D.C. Code § 22-3001(4) ("'Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[847] *See, e.g.*, *Davis v. United States*, 973 A.2d 1101, 1104, 1106 (D.C. 2005) (noting in dicta that "permission" is "not specifically defined in the [MSA] statute, but in common usage, the word is a synonym for 'consent'" and holding that "if the complainant in a misdemeanor sexual abuse (or other general sexual assault) prosecution was a child at the time of the alleged offense, an adult defendant who is at least four years older than the complainant may not assert a 'consent' defense."); *Hailstock v. United States*, 85 A.3d 1277, 1280, 1281, (noting that "what was required to convict [the appellant] of the offense of attempted MSA was that he took the requisite overt steps at a time when he *should have known* that he did not have [the complainant's] consent for the acts he contemplated.") (emphasis in original).

[848] D.C. Code § 22-3007.

[849] D.C. Code § 22-3001(4), defining consent, requires that there be "words or overt actions indicating a *freely* given agreement" (emphasis added). There is no DCCA case law interpreting the "freely given" requirement in the current definition of "consent." However, the RCC definition of "effective consent" in RCC § 22A-1001 appears to cover this requirement insofar as it requires consent that is obtained by means other than physical force, coercion, or deception.

[850] *In re Winship*, 397 U.S. 358, 364 (1970) ("[The] Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."). To the extent that "permission" in the current MSA statute is the same as "consent," (see commentary above) the current consent defense may unconstitutionally shift the burden of proof to the defendant.

[851] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014),

conduct statute is subject to only the general penalty enhancements specified in subtitle I of the RCC. The current sex offense aggravators in D.C. Code § 22-3020[852] are not necessary in the revised nonconsensual sexual conduct statute because the offense is limited to sexual conduct that occurs without the use of force, threats, or coercion. Limiting the penalty enhancements in RCC subtitle I to the revised nonconsensual sexual conduct statute improves the consistency and proportionality of the revised sex offenses. [Further discussion when the revised offenses have numerical penalties assigned].

Beyond these six substantive changes to current District law, one other aspect of the revised nonconsensual sexual conduct statute may be viewed as a substantive change of law.

The revised nonconsensual sexual conduct statute consistently requires that the actor "causes the complainant to engage in or submit to" the sexual act or sexual contact. While all of the current sexual abuse statutes require that the actor "engages in" the sexual conduct, they vary in whether there is liability if the actor "causes" the complainant to "engage in" the sexual conduct or "causes" the complainant or "submit to" the sexual conduct.[853] This variation creates different plain language readings of the current sexual abuse statutes and suggests that the current offenses vary in scope as to the prohibited conduct and liability for involvement of a third party. There is no case law on point. However, DCCA case law addressing similar language in the District's current MSA statute suggests that the DCCA may not construe such language variations as legally significant.[854] In addition to case law, District practice does not appear to

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sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

[852] However, an actor that merely possesses a dangerous weapon or a firearm while committing sexually suggestive conduct with a minor, without using or displaying it, may face liability under the revised possession of a dangerous weapon during a crime of violence statute (RCC § 22A-XXXX) or the revised possession of a firearm during a crime of violence statute (RCC § 22A-XXXX).

[853] First degree sexual abuse, second degree sexual abuse, and sexual abuse of a ward codify "engages in" the sexual conduct, "causes" the complainant to "engage in" the sexual conduct, and "causes" the complainant to "submit to" the sexual conduct. D.C. Code §§ 22-3002 and 22-3003; 22-3013 and 22-3014. Third and fourth degree sexual abuse, child sexual abuse, sexual abuse of a minor, and sexual abuse of a secondary education student are limited to "engages in" the sexual conduct and "causes" the complainant to "engage in" the sexual conduct. D.C. Code §§ 22-3004 and 22-3005; 22-3008 and 22-3009; 22-3009.01 and 22-3009.02. Misdemeanor sexual abuse and sexual abuse of a patient or client require only "engages in." D.C. Code §§ 22-3006; 22-3015 and 22-3016.

[854] In *Pinckney v. United States*, the DCCA held that the misdemeanor sexual abuse statute includes "conduct where a person uses another to touch intimate parts of the person's own body" even though the plain language of the statute requires "engages in a sexual act or sexual contact with another person." *Pinckney v. United States*, 906 A.2d 301, 303, 306 (D.C. 2006) (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA declined "an interpretation that would exclude such an obvious means of offensive touching," in part because the legislature intended to "'strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur.'" *Id.* (quoting Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1). The DCCA stated that its interpretation of the misdemeanor sexual abuse statute "as applying to the facts of this case does not require appellant to have caused the victim to engage in or submit to sexual contact" because the appellant engaged in the prohibited sexual contact by his own actions." *Id.* However, the DCCA's reliance on the legislative intent of the Anti-Sexual Abuse Act suggests that it would broadly interpret any variations in the language of the current sexual abuse statutes.

follow the variations in statutory language.[855] Instead of these variations in language, the revised sex offenses and the revised definitions of "sexual act" and "sexual contact" consistently require that the actor "causes" the complainant to "engage in" or "submit to" the sexual conduct. Differentiating liability based on whether an actor themselves commits the sexual conduct in question, or whether the actor causes the complainant to engage in or submit to the sexual conduct, may lead to disproportionate outcomes. The revised language improves the consistency, clarity, and proportionality of the revised offenses, and reduces unnecessary gaps in liability.

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

The revised nonconsensual sexual conduct statute relies on the general attempt statute to define what conduct constitutes an attempt and the appropriate penalty. Current D.C. Code § 22-3018 provides a separate attempt statute applicable to all current sexual offenses.[856] Under the statute, if the maximum term of imprisonment for the underlying offense is life, an attempt has a maximum term of imprisonment of 15 years.[857] Otherwise the maximum term of imprisonment is "not more than 1/2 of the maximum prison sentence authorized for the offense."[858] These attempt penalties differ from the attempt penalties established under D.C. Code § 22-1803, the current general attempt statute.[859] In the revised nonconsensual sexual conduct statute, the RCC General Part's attempt provisions (RCC § 22A-301) establish the requirements to prove an attempt and applicable penalties, consistent with other offenses. While a separate attempt statute

[855] The jury instructions for third degree, fourth degree, child sexual abuse, and sexual abuse of a minor include that the actor "caused" the complainant "to engage in or submit to" a sexual act or sexual contact, even though the statutory language for those offenses does not include "causes" the complainant to "submit to." *Compare* D.C. Crim. Jur. Instr. §§ 4.400 (general sexual abuse); 4.401 (child sexual abuse); 4.402 (sexual abuse of a minor) D.C. Code §§ 22-3003 and 22-3004 (third degree and fourth degree sexual abuse statutes); 22-3008 and 22-3009 (first degree and second degree child sexual abuse statutes); 22-3009.01 and 22-3009.02 (first degree and second degree sexual abuse of a minor statutes).

[856] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01).

[857] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[858] D.C. Code § 22-3018 ("Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than 1/2 of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed 1/2 of the maximum fine authorized for the offense.").

[859] D.C. Code § 22-1803 establishes general attempt penalties for offenses that do not otherwise have an attempt penalty specified. "Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 5 years, or both." D.C. Code § 22-1803. Under this general attempt penalty statute, the current MSA statute would have a maximum term of imprisonment of 180 days, which is the same as the current penalty for the completed offense. D.C. Code § 22-3010.01.

for sex offenses may be justified in the current D.C. Code given the generally lower penalties available through the general attempt statute in D.C. Code § 22-1803, the penalties in the RCC general penalty provision provide penalties at ½ the maximum imprisonment sentence. Elimination of a separate attempt statute for sex offenses, consequently, has no substantive effect on available penalties. This change improves the consistency and proportionality of the revised nonconsensual sexual conduct offense.

Relation to National Legal Trends. *The revised nonconsensual sexual conduct offense's above-mentioned substantive changes to current District law are broadly supported by national legal trends.*[860]

First, there is strong support in other jurisdictions' criminal codes for the revised nonconsensual sexual conduct statute having two gradations, based on whether a "sexual act" or "sexual contact" was committed. Eleven of the 29 states that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part[861] ("reformed jurisdictions") have offenses that prohibit both sexual penetration and sexual contact without consent.[862] All 11 of these reformed jurisdictions penalize sexual penetration more

[860] This survey is limited to offenses that require lack of consent, without any other requirement, such as use of force or incapacity. Offenses are included even if "consent" was not statutorily defined. Parenthetical explanations in the citations exclude requirements that are extraneous to the substantive change being discussed, such as whether the offense requires that the complainant and actor are not spouses.

[861] *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.

[862] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree

severely than sexual contact. An additional reformed jurisdiction makes it a felony to engage in sexual intercourse without consent but does not appear to have a similar provision for sexual contact.[863]

Second, second degree of the revised nonconsensual sexual conduct statute generally replaces non-violent sexual touching forms of assault. A discussion of the scope of the reformed jurisdictions' assault statutes is beyond the scope of this commentary.

Third, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to engaging in the sexual act or sexual contact. The support is limited because most of the 11 reformed jurisdictions[864] with comparable

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misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[863] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[864] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse

offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes. Three of the 11 reformed jurisdictions statutorily specify a culpable mental state for engaging in the sexual activity. Of these three jurisdictions, one jurisdiction requires an "intentionally" culpable mental state,[865] one jurisdiction requires a "knowingly" culpable mental state,[866] and the third jurisdiction has a gradation for a "knowingly" culpable mental state and a gradation for a "recklessly" culpable mental state.[867]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for engaging in the sexual activity in the sex offense statute.[868]

Fourth, there is limited support for the revised nonconsensual sexual conduct offense requiring a culpable mental state of "recklessly" as to the fact that the actor lacked effective consent from the complainant. The support is limited because most of the 11 reformed jurisdictions[869] with comparable offenses do not statutorily specify a culpable mental state for engaging in the sexual activity in these sex offense statutes.

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without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[865] Me. Rev. Stat. tit. 17-A, § 255-A(1)(A), (1)(B) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact" and the complainant has not "expressly or impliedly acquiesced.). There is no culpable mental state specified for the felony gradation that is limited to a sexual act, but it is the same class of crime. Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act.").

[866] Mont. Code Ann. §§ 45-5-502(1), (2)(a) ("A person who knowingly has sexual intercourse with another person without consent" and "[a] person who knowingly subjects another person to any sexual contact without consent.");

[867] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent.").

[868] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[869] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E

Only two of these eleven reformed jurisdictions statutorily specify a culpable mental state for the without consent element. One jurisdiction requires a "knowing" culpable mental state for the sexual penetration gradation, but does not clearly specify a culpable mental state for the sexual contact gradation.[870] A second jurisdiction specifies "knows or has reason to know."[871]

The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, does not statutorily specify a culpable mental state for the lack of consent in the sex offense statute.[872]

Fifth, there is strong support in the criminal codes of reformed jurisdictions for the revised nonconsensual sexual conduct offense requiring proof that the actor lacked effective consent. The current MSA statute requires that the sexual act or sexual contact occur without the complainant's "permission,"[873] which, unlike "consent,"[874] is undefined in the current sexual abuse statutes. The current MSA statute, however, is subject to the same consent defense applicable to other sexual abuse statutes.[875] There is strong support in the criminal codes of the reformed jurisdictions for requiring that the actor lack "effective consent," as opposed to "permission," and for eliminating the consent defense. Of the 11 reformed jurisdictions[876] with

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felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[870] Mo. Ann. Stat. §§ 566.031, 566.101 (prohibiting sexual intercourse "knowing that he or she does so without that person's consent" and "purposely" subjecting another person to sexual contact without consent).

[871] Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) ("knows or has reason to know" that the complainant did not consent to the sexual penetration or the sexual contact).

[872] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[873] D.C. Code § 22-3006.

[874] D.C. Code § 22-3001(4) ("'Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.").

[875] D.C. Code § 22-3007.

[876] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Me. Rev. Stat. tit. 17-A,

comparable offenses, ten require that the actor lack "consent."[877] The remaining reformed jurisdiction requires that the complainant "has not expressly or impliedly acquiesced" to the

§§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[877] Haw. Rev. Stat. Ann. §§ 707-700, 707-731(1)(a), (2), 707-732(1)(a), (2) (making sexual penetration "by compulsion" a class B felony if done "knowingly" and a class C felony if done "recklessly" and defining "compulsion" to include "absence of consent."), 707-700 and 707-733(1)(a), (2) (making sexual contact "by compulsion" a misdemeanor and defining "compulsion" to include "absence of consent."); Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); Mont. Code Ann. §§ 45-5-501(1)(a); 45-5-503(1), (2) 45-5-502(1), (2)(a) (authorizing life imprisonment or not more than 20 years imprisonment for sexual intercourse without the complainant's consent and six months for sexual contact without the complainant's consent and defining "consent," in part, as "words or overt actions indicating a freely given agreement to have sexual intercourse or sexual contact."); N.H. Rev. Stat. Ann. §§ 632-A:2(I)(m), 632-A:4(I)(a) 632-A:10-a(1)(b) (authorizing a maximum term of imprisonment of 20 years for sexual penetration when the complainant "indicates by speech or conduct that there is not freely given consent to performance of the sexual act" and making sexual contact under this circumstance a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent

sexual act or sexual contact,[878] yet uses "consent" in other sex offenses.[879] The reformed jurisdiction that has a felony offense for sexual intercourse without consent, but no similar provision for sexual contact, requires that the actor lack "consent."[880]

A discussion of these reformed jurisdictions' defenses is beyond the scope of this commentary.

Sixth, there is strong support in the criminal codes of the reformed jurisdictions for only the general penalty enhancements in subtitle I of the RCC applying to the revised nonconsensual sexual conduct statute. Current D.C. Code § 22-3020 specifies aggravators that apply to all of the current sex offense statutes.[881] The revised nonconsensual sexual conduct statute, by contrast, is not subject to any sex-offense specific aggravators and is subject only to the general penalty enhancements in subtitle I of the RCC. There is strong support in the criminal codes of the reformed jurisdictions for so limiting the application of penalty enhancements to the revised

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results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Or. Rev. Stat. Ann. §§ 163.425(1)(a), (2), 163.415(1)(a)(A), (2) (making sexual penetration without the complainant's consent a Class C felony and sexual contact without the complainant's consent a Class A misdemeanor); 18 Pa. Stat. Ann. §§ 3124.1; 3125(a)(1), (c)(1), 3126(a)(1), (b)(1) (making sexual intercourse or sexual penetration without the complainant's consent a second degree felony and indecent contact without the complainant's consent a second degree misdemeanor); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct."); Wis. Stat. Ann. § 940.225(3)(a), (3m), (4) (making sexual intercourse "without the consent" of the complainant a Class G felony and sexual contact "without the consent" of the complainant a Class A misdemeanor and defining "consent" as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse.").

[878] Me. Rev. Stat. tit. 17-A, §§ 253(2)(M) (making a sexual act a Class C crime if the complainant "has not expressly or impliedly acquiesced to the sexual act."), 255-A(1)(A), (1)(B) (making sexual contact that includes penetration when the complainant has not "expressly or impliedly acquiesced" a Class C crime and sexual contact when the complainant has not "expressly or impliedly acquiesced" a Class D crime).

[879] Me. Rev. Stat. tit. 17-A, § 253(2)(D) ("A person is guilty of gross sexual assault if that person engages in a sexual act with another person and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual act."), § 255-A(1)(C) ("A person is guilty of unlawful sexual contact if the actor intentionally subjects another person to any sexual contact and the other person is unconscious or otherwise physically incapable of resisting and has not consented to the sexual contact.").

[880] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

[881] The relevant sex offense statutes addressed in RCC Chapter 13 are: First degree through fourth degree sexual abuse (D.C. Code §§ 22-3002 through 22-3005), misdemeanor sexual abuse (D.C. Code § 22-3006), child sexual abuse (D.C. Code §§ 22-3008 and 22-3009), sexual abuse of a minor (D.C. Code §§ 22-3009.01 and 22-3009.02), sexual abuse of a secondary education student (D.C. Code §§ 22-3009.03 and 22-3009.04), misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01), sexual abuse of a ward (D.C. Code §§ 22-3013 and 22-3014), sexual abuse of a patient or client (D.C. Code §§ 22-3015 and 22-3016), enticing a minor (D.C. Code § 22-3010), and arranging for sexual contact with a real or fictitious child (D.C. Code § 22-3010.01). Two of the six possible aggravators are age-based. D.C. Code § 22-3020(a)(1) (victim under 12 years of age); D.C. Code § 22-3020(a)(2) (victim under 18 years of age and in a "significant relationship" with actor). Three of the six possible aggravators concern circumstances indicating the presence of greater force, fraud, or coercion. D.C. Code § 22-3020(a)(3) (victim sustained "serious bodily injury."); D.C. Code § 22-3020(a)(4) (accomplices aided the crime); D.C. Code § 22-3020(a)(6) (defendant was armed with a deadly or dangerous weapon). The remaining aggravator, D.C. Code § 22-3020(a)(5) concerns repeat offenders.

nonconsensual sexual conduct statute. Fifteen[882] of the 29 reformed jurisdictions have sex-offense specific penalty enhancements, or incorporate enhancements as elements in the higher gradations of the sex offenses. An additional reformed jurisdiction incorporates causing serious bodily injury into a higher gradation of the sex offenses.[883]

Of these 16 reformed jurisdictions, five have statutes that prohibit conduct that is comparable to the current MSA statute,[884] including the jurisdiction that only prohibits sexual penetration without consent.[885] These jurisdictions take a variety of approaches to grading the MSA comparable offense and for the purpose of this analysis, the commentary will discuss only the comparable penetration offenses. Two of these jurisdictions apply the penalty enhancements to the comparable penetration offense, but also define sexual assault as sexual intercourse

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[882] This survey was limited penalty enhancements and gradations in the reformed jurisdictions that match the enhancements in the revised sexual assault statute—the use of a dangerous weapon or imitation dangerous weapon, acting with accomplices, causing any bodily injury (because "serious bodily injury" would satisfy bodily injury), complainants of a specified age, or complainants that are vulnerable adults. A jurisdiction was considered to have an age-based penalty enhancement if the penalty for the general sexual assault offense is increased based on the age of the complainant. The many jurisdictions that make the age of the complainant an element of the general sexual assault offense have separate offenses for sexual assault of a complainant under the age of 18 years were not considered to have age-based penalty enhancements.

Parentheticals are limited to identifying the type of enhancement. Ariz. Rev. Stat. Ann. § 13-1406 (B) (age), (D) (serious bodily injury); Colo. Rev. Stat. Ann. § 18-3-402(5)(a) (accomplices, serious bodily injury, dangerous weapon); Conn. Gen. Stat. Ann. §§ 53a-70(b)(2) (age), 53a-70a(a) (dangerous weapon, serious bodily injury, accomplices), (b)(2) (age); Del. Code Ann. tit. 11, § 773(a)(1), (a)(3), (a)(4), (serious physical, mental, or emotional injury, dangerous weapon, accomplices); 720 Ill. Comp. Stat. Ann. 5/11-1.30(a)(1), (a)(2), (a)(8) (dangerous weapon, bodily harm, firearm); Ind. Code Ann. § 35-42-41 (b)(2), (b)(3) (dangerous weapon, serious bodily injury); Mo. Ann. Stat. §§ 566.010(1)(a), (1)(b), (1)(c) (serious bodily injury, dangerous weapon, accomplices), 566.030(1), (2), (3) (age); Minn. Stat. Ann. § 609.342(1)(d), (1)(e), (1)(f) (dangerous weapon, personal injury, accomplices); N.J. Stat. Ann. § 2C:14-2(a)(4), (a)(5), (a)(6) (dangerous weapon, accomplices, serious bodily injury); N.Y. Penal Law § 130.95(1) (serious physical injury, dangerous weapon); Tex. Penal Code Ann. § 22.021(a)(2)(A)(i), (a)(2)(A)(iv), (a)(2)(A)(v) (serious bodily injury, dangerous weapon, accomplices); Tenn. Code Ann. § 39-13-502(a) (dangerous weapon, bodily injury, accomplices); Utah Code Ann. § 76-5-405(1)(a)(i), (1)(a)(iii) (dangerous weapon, accomplices); Wash. Rev. Code Ann. § 9A.44.045(1)(a), (1)(c) (dangerous weapon, serious bodily injury); Wis. Stat. Ann. § 940.225(1) (serious bodily injury, dangerous weapon, accomplices).

[883] Alaska Stat. Ann. § 11.41.410(2).

[884] Mo. Ann. Stat. §§ 566.031, 566.101 (making sexual intercourse without the complainant's consent a class D felony and sexual contact without the complainant's consent a class A misdemeanor); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (making sexual intercourse without the complainant's consent a class E felony in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.05(2)(c) 130.55 (making sexual contact without the complainant's consent a class B misdemeanor in the offense of third degree sexual abuse and stating that for "sexual abuse" lack of consent results from "any circumstances . . . in which the victim does not expressly or impliedly acquiesce in the actor's conduct."); Tenn. Code Ann. §§ 39-13-503(a)(2), (b), 39-13-505(a)(2), (c) (making sexual penetration "without the consent" of the complainant a Class B felony and sexual contact "without the consent" of the complainant a Class E felony); Utah Code Ann. §§ 76-5-402(1), (3), 76-5-404(1)()2)(a), 76-5-406(1) (making sexual intercourse without the complainant's consent a first degree felony and sexual contact without the complainant's consent a second degree felony and stating "without consent" includes "the victim expresses lack of consent through words or conduct.").

[885] Wash. Rev. Code Ann. §§ 9A.44.060(1)(a), (2); 9A.44.010(7) (making sexual intercourse "where the victim did not consent . . . to sexual intercourse with the perpetrator and such lack of consent was clearly expressed by the victim's words or conduct" a Class C felony and defining "consent" as "actual words or conduct indicating freely given agreement to have sexual intercourse.").

without consent.[886] In these jurisdictions, applying the penalty enhancements to the offense appears to distinguish a "forcible" sexual assault from a non-forcible sexual assault. The remaining three jurisdictions do not apply the penalty enhancements to the comparable penetration offense.[887]

[886] Utah Code Ann. §§ 76-5-402(1), (3), 76-5-406(1) (defining rape as sexual intercourse without the complainant's consent and stating "without consent" includes "the victim expresses lack of consent through words or conduct."), 76-5-405(1)(a)(i), (1)(a)(iii) (applying the penalty enhancements for a dangerous weapon and accomplices to the offense of rape); Tenn. Code Ann. §§ 39-13-503(a)(2), (b) (including sexual penetration "without the consent" in the offense of rape), Tenn. Code Ann. § 39-13-502(a) (applying penalty enhancements for a dangerous weapon, bodily injury, or accomplices to "unlawful sexual penetration.").

[887] Mo. Ann. Stat. §§ 566.031 (making sexual intercourse without the complainant's consent a class D felony, without any sentencing provision for an "aggravated sexual offense."), 566.010(1)(a), (1)(b), (1)(c) (defining "aggravated sexual offense" as one that involves serious bodily injury, a dangerous weapon, or accomplices); N.Y. Penal Law §§ 130.05(2)(d), 130.25(3) (including sexual intercourse without the complainant's consent in third degree rape "where such lack of consent is by reason of some factor other than incapacity to consent" and stating that for third degree rape that "lack of consent results from . . . the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances."), 130.95(1) (applying penalty enhancements for serious physical injury or a dangerous weapon to rape in the first degree).