



First Draft of Report #27 Human Trafficking and Related Statutes

SUBMITTED FOR ADVISORY GROUP REVIEW
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrdc.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. 27, *Human Trafficking and Related Statutes* 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 No. 27. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC Chapter 16. Human Trafficking and Related Offenses.

- § 22A-1601. Human Trafficking Definitions.
- § 22A-1602. Limitations on Liability and Sentencing for RCC Chapter 16 Offenses.
- § 22A-1603. Forced Labor or Services.
- § 22A-1604. Forced Commercial Sex.
- § 22A-1605. Trafficking in Labor or Services.
- § 22A-1606. Trafficking in Commercial Sex.
- § 22A-1607. Sex Trafficking of Minors.
- § 22A-1068. Benefitting from Human Trafficking.
- § 22A-1609. Misuse of Documents in Furtherance of Human Trafficking.
- § 22A-1610. Sex Trafficking Patronage.
- § 22A-1611. Forfeiture.
- § 22A-1612. Reputation or Opinion Evidence.
- § 22A-1613. Civil Action.

RCC § 22A-1601 HUMAN TRAFFICKING DEFINITIONS.

For the purposes of this chapter, the term:

- (1) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, joint stock, trust, and any legal entity through which business is conducted.
- (2) “Coercion” means threatening that any person will do any one of, or a combination of, the following:
 - (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 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 business 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.
- (3) “Commercial sex act” means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.
- (4) “Debt bondage” means the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where:

- (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;
 - (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or
 - (C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.
- (5) “Labor” means work that has economic or financial value, other than a commercial sex act.
 - (6) “Service” means legal or illegal duties or work done for another, whether or not compensated, other than a commercial sex act.
 - (7) “Sexual act” shall have the same meaning as provided in RCC § 22A-1301.
 - (8) “Sexual contact” shall have the same meaning as provided in RCC § 22A-1301.

Commentary

This subsection establishes definitions for terms applicable to human trafficking offenses in Chapter 16 of the Revised Criminal Code (RCC), unless otherwise specified. Each definition is discussed separately below.

- (1) “Business” means any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, holding company, joint stock, trust, and any legal entity through which business is conducted.**

Explanatory Note. RCC chapter 16 defines “business” as consisting of several legal entities. The definition is used in RCC chapter 16 when specifying who may commit offenses. Offenses under RCC chapter 16 may be committed by natural persons, or by businesses as defined under this subsection.

“Business” is currently defined in D.C. Code § 22-1831(2) for human trafficking statutes. The RCC definition of “business” replaces the current definition of “business” in D.C. Code § 22-1831(2) and is used in the revised definition of “coercion,”¹ as well as in the revised versions of the forced labor or services statute,² the forced commercial sex statute³; the trafficking in labor or services statute⁴; the trafficking in commercial sex statute⁵; the sex trafficking of minors statute⁶; the benefitting from human trafficking statute⁷; the misuse of documents statute⁸; the forfeiture statute⁹; and the reputation or opinion evidence statute.¹⁰

¹ RCC § 22A-1601(2).

² RCC § 22A-1603.

³ RCC § 22A-1604.

⁴ RCC 22A-1605.

⁵ RCC§22A-1606.

⁶ RCC § 22A-1607.

⁷ RCC § 22A-1608.

⁸ RCC § 22A-1609.

⁹ RCC § 22A-1611.

¹⁰ RCC § 22A-1612.

Relation to Current Law. The definition of “business” is identical to the definition provided under current law¹¹, and does not substantively change current District law.

- (2) **“Coercion” means threatening that any person will do any one of, or a combination of, the following:**
- (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. RCC Chapter 16 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.¹²

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.¹³

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 regulation need not be criminal.¹⁴ 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,

¹¹ D.C. Code § 22-1831(2).

¹² 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.

¹³ For example, threatening to commit a controlled substance offense would not constitute coercion.

¹⁴ 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.

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 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 limit 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.¹⁵ In addition, harms that may constitute coercion when used to compel certain conduct may not necessarily constitute coercion when used to compel different conduct.¹⁶

"Coercion" is currently defined in D.C. Code § 22-1831 (3) for human trafficking statutes. The RCC definition of "coercion" replaces the current definition of "coercion" in D.C. Code § 22-1831 (3) and is used in the revised versions of the forced labor or services statute,¹⁷ the forced commercial sex statute¹⁸; the trafficking in labor or services statute¹⁹; and the trafficking in commercial sex statute.²⁰

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

¹⁵ 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.

¹⁶ 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.

¹⁷ RCC § 22A-1603.

¹⁸ RCC § 22A-1604.

¹⁹ RCC 22A-1605.

²⁰ RCC§22A-1606.

trafficking offenses includes “fraud or deception.”²¹ 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 person in that person’s circumstance to believe that he or she is the property of a person or business.”²² 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,²³ when it is the sole form of wrongdoing,²⁴ 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.²⁵ 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,²⁶ 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.²⁷ These changes improve the clarity and proportionality of the revised statute.

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

²¹ D.C. Code § 22-1831 (3)(D).

²² D.C. Code § 22-1831 (3)(G).

²³ E.g., using deception to cause another person to provide labor is punishable under the RCC’s revised fraud statute. RCC § 22A-2201.

²⁴ 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.

²⁵ 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.

²⁶ 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.

²⁷ 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.

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,”²⁸ 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.”²⁹ The current definition of “coercion” also includes “serious harm or threats of serious harm,”³⁰ 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.”³¹ 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 consistency³² 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 persons³³, 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 constitute “serious harm” as that term is used in the current human trafficking offenses,³⁴ or may constitute “[t]he abuse or threatened abuse of law or legal process” which is included in the current coercion definition.³⁵ 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.

²⁸ D.C. Code § 22-1831 (3)(A).

²⁹ D.C. Code § 22-1831 (3)(E).

³⁰ D.C. Code § 22-1831 (3)(B).

³¹ D.C. Code § 22-1831 (7).

³² See, sex offenses RCC §§ 22A-1301-1309; and extortion § 22A-2301.

³³ Force and physical restraint could constitute assault, kidnapping, or criminal restraint.

³⁴ D.C. Code § 22-1831 (3)(B); D.C. Code § 22-1831 (7).

³⁵ D.C. Code § 22-1831 (3)(C).

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.³⁶ 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.”³⁷ 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.³⁸ 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.³⁹

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 definition is intended to include threats of all harms that constitute threats of “serious harm” under current law.⁴⁰

³⁶ 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).

³⁷ D.C. Code § 22-1831 (3)(C).

³⁸ 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.

³⁹ Force, threats of force, physical restraint, or threats of physical restraint could constitute assault, criminal threats, kidnapping, or criminal restraint.

⁴⁰ 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

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.⁴¹

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 part⁴² (reformed jurisdictions), only six define “coercion” for use in their respective human trafficking offenses.⁴³ Of the jurisdictions that define “coercion,” half do not include fraud or deception.⁴⁴ 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.⁴⁵ However, none of these jurisdictions define “coercion” to include facilitating or controlling a person’s access to addictive substance generally.

(3) “Commercial sex act” means any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.

Explanatory Note. RCC Chapter 16 defines “commercial sex act” to include any sexual act or sexual contact for which anything of value is given to, promised, or received by any person. “Anything of value” may include tangible property, as well as intangible property, services, or any other financial or economic benefit.⁴⁶

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).

⁴¹ 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.

⁴² 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.

⁴³ 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.

⁴⁴ Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

⁴⁵ 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.

⁴⁶ For example, a sex act performed in exchange for paying off a debt constitutes a commercial sex act.

“Commercial sex act” is currently defined in D.C. Code § 22-1831(4) for human trafficking statutes. The RCC definition of “commercial sex act” replaces the current definition of “commercial sex act” in D.C. Code § 22-1831 and is used in the revised definitions of “labor”⁴⁷ and “services”⁴⁸; the forced commercial sex statute⁴⁹; the trafficking in commercial sex statute⁵⁰; the sex trafficking in minors statute⁵¹; misuse of documents statute.⁵²

“Business” is currently defined in D.C. Code § 22-1831(2) for human trafficking statutes. The RCC definition of “business” replaces the current definition of “business” in D.C. Code § 22-1831(2) and is used in the revised definition of “coercion,”⁵³ as well as in the revised versions of the forced labor or services statute,⁵⁴ the forced commercial sex statute⁵⁵; the trafficking in labor or services statute⁵⁶; the trafficking in commercial sex statute⁵⁷; the sex trafficking of minors statute⁵⁸; the benefitting from human trafficking statute⁵⁹; the misuse of documents statute⁶⁰; and the forfeiture statute.⁶¹

Relation to Current District Law. *The definition of “commercial sex act” makes one main change that constitutes a substantive change to current District law that improves the clarity and consistency of the revised criminal code.*

The revised definition of “commercial sex act” is identical to the definition in the current D.C. Code except for the omission of a sentence providing that a “commercial sex act includes a violation of § 22-2701, § 22-2704, §§ 22-2705 to 22-2712, §§ 22-2713 to 22-2720, and § 22-2722.” These statutes in Chapter 27 of the D.C. Code concern a variety of crimes related to prostitution and pandering.⁶² In at least some instances, the conduct proscribed by these statutes

⁴⁷ RCC § 22A-1601 (5).

⁴⁸ RCC § 22A-1601 (6).

⁴⁹ RCC §22A- 1604.

⁵⁰ RCC § 22A-1606.

⁵¹ RCC § 22A-1607

⁵² RCC § 22A-1609.

⁵³ RCC § 22A-1601(2).

⁵⁴ RCC § 22A-1603.

⁵⁵ RCC § 22A-1604.

⁵⁶ RCC 22A-1605.

⁵⁷ RCC§22A-1606.

⁵⁸ RCC § 22A-1607.

⁵⁹ RCC § 22A-1608.

⁶⁰ RCC § 22A-1609.

⁶¹ RCC § 22A-1611.

⁶² These statutory provisions criminalize: Engaging in prostitution or soliciting prostitution, D.C. Code § 22-2701; Abducting or enticing child from his or her home for purposes of prostitution; harboring such child, D.C. Code § 22-2704; Pandering; inducing or compelling an individual to engage in prostitution, D.C. Code § 22-2705; Compelling an individual to live life of prostitution against his or her will, D.C. Code § 22-2706; Procuring; receiving money or other valuable thing for arranging assignation, D.C. Code § 22-2707; Causing spouse or domestic partner to live in prostitution, D.C. Code § 22-2708; Detaining an individual in disorderly house for debt there contracted, D.C. Code § 2709; Procuring for house of prostitution, D.C. Code § 22-2710; Procuring for third persons, D.C. Code § 22-2711; Operating house of prostitution, D.C. Code § 22-2712; Premises occupied for lewdness, assignation, or prostitution declared nuisance, D.C. Code § 22-2713; Abatement of nuisance under § 22-2713 by injunction — Temporary injunction, D.C. Code § 22-2714; Abatement of nuisance under § 22-2713 by injunction — Trial; dismissal of complaint; prosecution; costs, D.C. Code § 22-2715; Violation of injunction granted under § 22-2714, D.C. Code § 22-2716; Order of abatement; sale of property; entry of closed premises punishable as contempt, D.C. Code § 22-2717; Disposition of proceeds of sale, D.C. Code 22-2718; Bond for abatement; order for delivery of

does not require a “commercial sex act” as otherwise required by the current D.C. Code definition of that term.⁶³ There is no DCCA case law interpreting these provisions. By contrast, under the revised definition, violation of these statutory provisions does not constitute a commercial sex act except to the extent that such a violation involves a sexual act or contact on account of which anything of value is given to, promised, or received by any person. This change clarifies the revised definition and ensures that human trafficking liability is consistently applied only to conduct involving the exchange of sex for something of value.

Relation to National Legal Trends. *The above discussed change to current District is supported by national legal trends.*

Omitting cross-references to various prostitution offenses from the definition of “commercial sex act” is supported by state criminal codes. A majority of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the Model Penal Code (MPC) and have a general part⁶⁴ (reformed jurisdictions) define “commercial sex act,”⁶⁵ and none include the commission of prostitution and related offenses.

- (4) “Debt bondage” means the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where:**
- (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt;**
 - (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or**
 - (C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.**

Explanatory Note. RCC Chapter 16 defines “debt bondage” as the status or condition of a person who provides labor, services, or commercial sex acts for real or alleged debt under one of three specified circumstances where such a transaction is unfair.

“Debt bondage” is currently defined in D.C. Code § 22-1831(5) for human trafficking statutes. The RCC definition of “debt bondage” replaces the current definition of “debt bondage” in D.C. Code § 22-1831 and is used the revised versions of the forced labor or services

premises; effect of release, D.C. Code § 22-2719; Tax for maintaining such nuisance, D.C. Code § 22-2720; Keeping bawdy or disorderly houses, D.C. Code §22-2722.

⁶³ *E.g.*, D.C. Code § 22-2705(a)(3), provides liability for forcing someone into a marriage without reference to a sexual act or contact.

⁶⁴ *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007) (listing 34 jurisdictions, six of which— Florida, Georgia, Iowa, Nebraska, New Mexico, and Wyoming—do not have general parts analogous to the Model Penal Code General Part). However, Tennessee reformed its criminal code after the publication of this article and is included in the 29 reformed jurisdictions.

⁶⁵ Alaska Stat. Ann. § 11.41.360; Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Ind. Code Ann. § 35-42-4-4; Ky. Rev. Stat. Ann. § 529.010; Me. Rev. Stat. tit. 17-A, § 851; Mo. Ann. Stat. § 566.200; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; N.H. Rev. Stat. Ann. § 633:6; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3001; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.01; Wash. Rev. Code Ann. § 9A.40.010; Wis. Stat. Ann. § 940.302.

statute⁶⁶; the forced commercial sex statutes⁶⁷; the trafficking in labor or services statute⁶⁸; and the trafficking in commercial sex statutes.⁶⁹

Relation to Current District Law. The RCC’s definition of “debt bondage” is identical to the definition under current law.

(5) “Labor” means work that has economic or financial value, other than a commercial sex act.

Explanatory Note. RCC Chapter 13 defines “labor” as any work that has economic or financial value. However, commercial sex acts are specifically excluded.

“Labor” is currently defined in D.C. Code § 22-1831(6) for human trafficking statutes. The RCC definition of “labor” replaces the current definition of “labor” in D.C. Code § 22-1831(6) and is used in the revised the revised versions of the forced labor or services statute,⁷⁰ the trafficking in labor or services statute⁷¹; the benefitting from human trafficking statute⁷²; the misuse of documents statute.⁷³

Relation to Current District Law. *The definition of “labor” makes one change that may constitute a substantive change to current District law that improves the clarity of the revised criminal code.*

The current D.C. Code definition of “labor” makes no reference to commercial sex acts, referring generally only to acts that have “economic or financial value.” Neither DCCA case law nor legislative history address whether “labor” includes commercial sex acts.⁷⁴ However, it is notable that the current human trafficking statutes sometimes appear to use the term “labor” as if it did not include commercial sex acts.⁷⁵ The RCC’s “labor” definition explicitly excludes commercial sex acts from the definition of “labor.” Separates statutes address sex trafficking

⁶⁶ RCC § 22A-1603.

⁶⁷ RCC § 22A-1604.

⁶⁸ RCC § 22A-1605.

⁶⁹ RCC § 22A-1606.

⁷⁰ RCC § 22A-1603.

⁷¹ RCC § 22A-1605.

⁷² RCC § 22A-1608.

⁷³ RCC § 22A-1609.

⁷⁴ However, at least one federal circuit court interpreting a similar federal provision has held that “labor” includes sexual activity. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008).

⁷⁵ E.g., D.C. Code § 22-1833, entitled “Trafficking in labor or commercial sex acts” includes as an element that, “Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act”. The specification of both “labor” and “commercial sex act” in the offense suggests the former does not include the latter. In addition, the current code defines “debt bondage” as “the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where: (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or (C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.” D.C. Code § 22-1831 (emphasis added). The inclusion of the words labor and commercial sex act may suggest that labor does not include commercial sex acts.

and trafficking in labor or services in the RCC⁷⁶ (and the current D.C. Code⁷⁷). This change may reduce unnecessary overlap between and clarifies the revised offenses.⁷⁸

Relation to National Legal Trends. The above discussed change to current District has mixed support in national legal trends.

Defining “labor” to exclude commercial sex acts 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 part⁷⁹ (reformed jurisdictions), only seven statutorily define “labor.”⁸⁰ None of these seven jurisdictions’ definitions of “labor” explicitly exclude sexual activity, and one explicitly includes sexual activity.⁸¹ The remaining jurisdictions’ definitions of “labor” do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines “labor”, but does not specify whether commercial sex acts are included.⁸²

(6) “Service” means legal or illegal duties or work done for another, whether or not compensated, other than a commercial sex act.

Explanatory Note. RCC Chapter 13 defines “service” as any legal or illegal duties or work, compensated or not. However, commercial sex acts are specifically excluded.

“Service” is currently defined in D.C. Code § 22-1831(8) for human trafficking statutes. The RCC definition of “service” replaces the current definition of “services” in D.C. Code § 22-

⁷⁶ RCC § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606.

⁷⁷ D.C. Code §§ 22-1832, 22-1833.

⁷⁸ E.g., D.C. Code § 22-1833, entitled “Trafficking in labor or commercial sex acts” includes as an element that, “Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act”. The specification of both “labor” and “commercial sex act” in the offense suggests the former does not include the latter. The current code also defines “debt bondage” as “the status or condition of a person who provides labor, services, or commercial sex acts, for a real or alleged debt, where: (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or (C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.” D.C. Code § 22-1831 (emphasis added). The inclusion of the words service and commercial sex act may suggest that services do not include commercial sex acts.

⁷⁹ 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.

⁸⁰ Ark. Code Ann. § 5-18-102; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01; 18 Pa. Stat. Ann. § 3001.

⁸¹ Del. Code Ann. tit. 11, § 787.

⁸² UNIFORM ACT ON PREVENTION AND REMEDIES FOR HUMAN TRAFFICKING, National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines “labor” as “work of economic or financial value.” However, commentary to the Department of Justice model act notes that “labor” includes “work activities which would, but for the coercion, be otherwise legitimate and legal. The legitimacy or legality of the work is to be determined by focusing on the job, rather than on the legal status or work authorization status of the worker.” Department of Justice Model State Anti-Trafficking Criminal Statute. This implies that “labor” does not include commercial sex acts to the extent that commercial sex acts are otherwise illegal.

1831(8) and is used in the revised the revised versions of the forced labor or services statute,⁸³ the trafficking in labor or services statute⁸⁴; the benefitting from human trafficking statute⁸⁵; the misuse of documents statute.⁸⁶

Relation to Current District Law. *The definition of “service” makes one change that may constitute a substantive change to current District law that improves the clarity of the revised criminal code.*

The RCC’s “service” definition explicitly excludes commercial sex acts. It is unclear whether excluding commercial sex acts from the revised “service” definition changes current law. Neither the current statute nor DCCA case law specifies whether commercial sex acts are included in the current definition of “service.”⁸⁷ The current D.C. Code definition of “service” makes no reference to commercial sex acts, referring generally only to “legal or illegal duties or work done for another.” However, it is notable that the D.C. Code human trafficking statutes sometimes appear to use the term “services” as if it did not include commercial sex acts.⁸⁸ The RCC’s “service” definition resolves this ambiguity by explicitly excluding commercial sex acts from the definition of “service.” This change improves the clarity of the revised statutes.

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

Defining “services” to exclude commercial sex acts 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 part⁸⁹ (reformed jurisdictions), only a minority of reformed jurisdictions define the term “services.”⁹⁰ Of these states one explicitly includes sexual activity in the definition of “services”⁹¹ and one explicitly excludes sexual activity from the definition of “services.”⁹² The remaining jurisdictions’ definitions of

⁸³ RCC § 22A-1603.

⁸⁴ RCC § 22A-1605.

⁸⁵ RCC § 22A-1608.

⁸⁶ RCC § 22A-1609.

⁸⁷ However, at least one federal circuit court interpreting a similar federal provision has held that “labor” includes sexual activity. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008).

⁸⁸ *E.g.*, D.C. Code § 22-1833, entitled “Trafficking in labor or commercial sex acts” includes as an element that, “Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act”. The specification of both “labor” and “commercial sex act” in the offense suggests the former does not include the latter. The current code also defines “debt bondage” as “the status or condition of a person who provides labor, services, *or commercial sex acts*, for a real or alleged debt, where: (A) The value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; (B) The length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or (C) The amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.” D.C. Code § 22-1831 (emphasis added). The inclusion of the words service and commercial sex act may suggest that services do not include commercial sex acts.

⁸⁹ 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.

⁹⁰ Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ky. Rev. Stat. Ann. § 529.010; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

⁹¹ 720 Ill. Comp. Stat. Ann. 5/10-9.

⁹² Haw. Rev. Stat. Ann. § 707-780.

“service” do not specify whether commercial sex acts or other sexual activity is included. In addition, the Uniform Act on Prevention and Remedies for Human Trafficking defines “services”, and specifies that “commercial sexual activities and sexually explicit performances shall be considered ‘services.[.]’”⁹³

(7) “Sexual act” shall have the same meaning as provided in RCC § 22A-1301.

Explanatory Note. RCC Chapter 13 defines “sexual act” to have the same meaning as under RCC § 22A-1301.

“Sexual act” is currently defined in D.C. Code § 22-1831(9) for human trafficking statutes. The RCC definition of “sexual act” replaces the current definition of “sexual act” in D.C. Code § 22-1831(9) and is used in the revised the revised definition of “commercial sex act.”⁹⁴

Relation to Current District Law. The current D.C. Code defines a “sexual act” for purposes of the human trafficking statutes the same as it does for the District’s sexual abuse offenses. The RCC definitions of “sexual act” in the human trafficking and sex assault offenses are similarly identical to one another. As the definition of “sexual act” in RCC § 22A-1301 differs slightly from that in the current D.C. Code the definition for the RCC human trafficking statutes also differs slightly from those in the D.C. Code. For discussion on possible changes to law, see the Commentary to RCC § 22A-1301.

Relation to National Legal Trends: See Commentary to RCC § 22A-1301.

(8) “Sexual contact” shall have the same meaning as provided in RCC § 22A-1301.

Explanatory Note. RCC Chapter 13 defines “sexual contact” to have the same meaning as under RCC § 22A-1301.

“Sexual contact” is currently defined in D.C. Code § 22-1831(10) for human trafficking statutes. The RCC definition of “sexual contact” replaces the current definition of “sexual contact” in D.C. Code § 22-1831(10) and is used in the revised the revised definition of “commercial sex act.”⁹⁵

Relation to Current District Law. The current D.C. Code defines a “sexual contact” for purposes of the human trafficking statutes the same as it does for the District’s sexual abuse offenses. The RCC definitions of “sexual contact” in the human trafficking and sex assault offenses are similarly identical to one another. As the definition of “sexual contact” in RCC § 22A-1301 differs from that in the current D.C. Code the definition for the RCC human

⁹³ Uniform Act on Prevention and Remedies for Human Trafficking. National Conference of Commissioners on Uniform State Laws. The U.S. Department of Justice also drafted a model trafficking statute, which defines “services” to include “commercial sexual activity and sexually-explicit performances[.]”

⁹⁴ RCC § 22A-1601 (7).

⁹⁵ RCC § 22A-1601 (7).

trafficking statutes also differs from those in the D.C. Code. For discussion on possible changes to law, see the Commentary to RCC § 22A-1301.

Relation to National Legal Trends: See Commentary to RCC § 22A-1301.

RCC § 22A-1602. LIMITATIONS ON LIABILITY AND SENTENCING FOR RCC CHAPTER 16 OFFENSES.

- (a) *Merger.* Multiple convictions for two or more offenses in Chapter 16 arising from the same course of conduct shall merge in accordance with the rules and procedures established in RCC § 212(d)-(e).
- (b) *Exceptions to Liability.* Any parent, legal guardian, or other person who has assumed the obligations of a parent who requires his or her child under the age of 18 to perform common household chores under threat of typical parental discipline shall not be liable for such conduct under sections 22A-1603, 22A-1605, and 22A-1609 of this Chapter, provided that the threatened discipline did not include:
 - (1) Burning, biting, or cutting;
 - (2) Striking with a closed fist;
 - (3) Shaking, kicking, or throwing; or
 - (4) Interfering with breathing.

Commentary

Explanatory Note. The *Limitations on Liability and Sentencing for RCC Chapter 16 Offenses* (“limitations on liability statute”) prohibits a defendant from being convicted of two or more Chapter 16 offenses that arise from a single act or course of conduct. This statute prevents the imposition of multiple punishments for the commission of substantively similar, overlapping human trafficking offenses in order to improve sentencing proportionality. The RCC statute concerns only the sentencing stage of criminal proceedings and does not preclude a defendant from being charged with, or a jury being instructed on, two or more offenses under Chapter 16. If more than one Chapter 16 offense arise from a single act or course of conduct, the offenses shall merge in accordance with the rules and procedures established under RCC § 212 (d)-(e). The limitations on liability statute also provides an exception to liability when the accused is a parent, legal guardian, or other person who has assumed the obligations of a parent who uses typical parental discipline to compel his or her child to perform common household chores.

RCC § 22A-1602 (a) creates a statutory requirement of merger for human trafficking offenses. This requirement is categorical, barring multiple convictions for any combination of offenses in Chapter 16 whenever they arise from the same course of conduct.⁹⁶ This provision supersedes the general merger principles set forth by RCC § 212(a),⁹⁷ although the merger provided for in this section is subject to the rules and procedures established in RCC § 212(d)-(e). Whenever two or more convictions for Chapter 16 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.⁹⁸ Additionally, RCC § 22A-1602 only limits—in accordance with RCC §

⁹⁶ 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.

⁹⁷ See also, RCC § 212(b) (establishing that merger is ultimately a matter of legislative intent).

⁹⁸ 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).

212(e)—the entry of a final judgment of liability. This means that a person may be found guilty of two or more Chapter 16 offenses that merge under this section.⁹⁹ 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.¹⁰⁰

Subsection (b) provides an exception to liability under the revised forced labor or services, trafficking in labor or services, and misuse of documents offenses. This subsection specifies that these offenses do not criminalize the conduct of a parent, legal guardian, or person who has assumed the obligations of a parent requiring that his or her child perform ordinary household chores, even when such conduct involves coercion.¹⁰¹ The term “person who has assumed the obligations of a parent” reflects District case law describing persons standing *in loco parentis*.¹⁰² However, the exception does not apply if the parent, guardian, or person who has assumed the obligations of a parent employs coercion that involves the threat of conduct listed under subsections (b)(i)-(iv).

Relation to Current District Law. *The limitations on liability and sentencing for RCC Chapter 16 offenses statute changes current District law in two main ways that improve the proportionality of penalties.*

First, the RCC’s limitations on liabilities statute changes current law by categorically barring convictions for offenses under Chapter 16 that arise from a single act or course of conduct. The current human trafficking statutes do not have a general statutory provision that addresses merger. The current code prohibits consecutive sentences for violations of the trafficking in labor or commercial sex¹⁰³ and sex trafficking of children statutes¹⁰⁴ that arise from a single incident, but does not address multiple convictions or consecutive sentences for any other offenses under chapter 16.¹⁰⁵ There is no DCCA case law on whether any of the current human trafficking related offenses merge when they arise from a single act or course of conduct. However, it is likely that under the court’s current test for determining whether offenses merge,

⁹⁹ RCC § 22A-1602 should not be construed as in any way constraining the number of Chapter 16 offenses over which the fact finder may deliberate.

¹⁰⁰ 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.”)

¹⁰¹ For example, a parent who demands that his child clean dirty dishes under threat of a spanking would not be guilty of forced labor or services.

¹⁰² *Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (finding that there was no evidence that appellant stood in loco parentis with his 13-year-old cousin because the record reflected “at best . . . that appellant helped on occasion with the basic running of the household,” that disciplinary authority over the cousin had never been “specifically delegated” to appellant, and appellant had not “assumed any obligations (such as financial support) that would be ‘associated with one standing as a natural parent to a child.’”) (emphasis in original) (quoting *Fuller v. Fuller*, 135 U.S. App. D.C. 353 (1969)). The court in *Martin* stated that “in loco parentis refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation. . . . It embodies the ideas of both assuming the parental status and discharging the parental duties.” *Martin*, 452 A.2d at 362 (internal citations omitted). The court noted that in loco parentis involves “more than a duty to aid or assist . . . It arises only when one is willing to assume all the obligations and to receive all the benefits associated with one standing as a natural parent to a child.” *Id.* (emphasis in original) (internal citations omitted).

¹⁰³ D.C. Code § 22-1833.

¹⁰⁴ D.C. Code § 22-1834.

¹⁰⁵ D.C. Code § 22-1837. For example, the current code does not explicitly prohibit multiple convictions or consecutive sentences for forced labor and trafficking in labor that arise from a single act or course of conduct.

at least some current human trafficking offenses would *not* merge.¹⁰⁶ The revised statute eliminates the possibility of receiving multiple convictions under chapter 16 based on a single act or course of conduct which, even if sentenced to run concurrently, may lead to unnecessary collateral consequences. This change improves the proportionality of the revised statutes.

Second, the revised statute clearly prohibits criminal liability in cases in which parents, legal guardians, and persons who have assumed the obligations of a parent employ reasonable disciplinary measures to compel their children to perform ordinary household chores. The D.C. Code does not provide a defense or exception to liability for parents who use coercive threats to get their children to perform ordinary chores. There is no case law on point. In contrast, the revised statute exempts from liability parents and similarly positioned people who engage in coercive conduct as part of their ordinary, reasonable care for a child. Such conduct by a parent does not warrant criminalization as a major felony under the human trafficking offenses. This change improves the proportionality of the revised statutes.

Relation to National Legal Trends. *The above discussed changes to current District law are not supported by national legal trends.*

The Supreme Court and lower courts broadly recognize that a criminal conviction, even if concurrent to a more serious conviction, is a separate punishment that has collateral consequences beyond the sentence.¹⁰⁷ However, whether concurrent sentencing is or is not deemed appropriate for multiple offenses committed as part of the same act or course of conduct varies widely across jurisdictions.

The Model Penal Code (MPC) bars multiple convictions not only where one offense is a lesser included offense of another or includes inconsistent elements, but also, more generally, “where the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.”¹⁰⁸ Several states have followed the MPC in codifying such a bar to multiple offense liability.¹⁰⁹

¹⁰⁶ The DCCA currently applies the *Blockburger* “elements test” to determine if two offenses that arise from a single act or course of conduct should merge. *Byrd v. United States*, 598 A.2d 386 (D.C. 1991). Under this approach, if it is possible to commit one offense without necessarily committing the other, the offenses do not merge. Using this test, it is likely that at least some offenses under current human trafficking offenses would not merge. For example, the current forced labor offense requires that the defendant use coercion or debt bondage to cause a person to provide labor or services. D.C. Code § 22-1832. Trafficking in labor or commercial sex acts requires that the defendant traffic a person, with recklessness as to whether the complainant coercion or debt bondage is being used *or will be used* to cause the person to provide labor. D.C. Code §22-1833. There is no requirement under the trafficking offense that the defendant anyone actually uses coercion to compel a person to provide labor. Therefore, it is possible to commit trafficking in labor or commercial sex acts without necessarily committing forced labor or services. Under the DCCA’s current merger analysis, it is likely that a person could be convicted of both forced labor and trafficking in labor or commercial sex acts based on a single act or course of conduct.

¹⁰⁷ See, *Ball v. United States*, 470 U.S. 856, 865 (1985) (“[A] separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant’s eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant’s credibility and certainly carries the societal stigma accompanying any criminal conviction.”) (emphasis in original).

¹⁰⁸ Model Penal Code 1.07(1) (“Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if: (a) one offense is included in the other, as defined in Subsection (4) of this Section; or (b) one offense consists only of a conspiracy or other form of preparation to commit the other; or (c) inconsistent findings of fact are required to establish the commission of the offenses; or (d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and

Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part¹¹⁰ (reformed jurisdictions), none have specific statutory provisions that explicitly bar multiple convictions for human trafficking related offenses. However, given the variety of states' approaches to merger, it is unclear¹¹¹ how many jurisdictions permit multiple convictions for overlapping human trafficking offenses that arise from a single act or course of conduct.

Second, exempting the use of reasonable disciplinary measures to compel a child to perform household chores is not supported by other states' criminal codes. Only two reformed jurisdiction statutorily exempts the use of reasonable disciplinary measures to compel children to perform household chores from human trafficking offenses.¹¹² Case law on this point in other jurisdictions was not researched. Several states have codified general defenses that apply when a parent, guardian, or school official uses reasonable force to maintain discipline or to promote the welfare of a child or incompetent person.¹¹³ It is unclear whether these general defenses would limit liability for forced labor or other human trafficking offenses.

the other to prohibit a specific instance of such conduct; or (e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.”)

¹⁰⁹ Multiple offense limitations 1 Crim. L. Def. § 68 (“Ala. Code § 13A-1-8(b)(4) (1982); Colo. Rev. Stat. § 18- 1-408(1)(d) (1978); Ga. Code Ann. § 16-1-7(a)(2) (Michie 1982); Hawaii Rev. Stat. § 701-109(1)(d) (1976); Mo. Ann. Stat. § 556.041(3) (Vernon 1979); Mont. Code Ann. § 46-11-502(4) (1983); N. J. Stat. Ann. § 2C:1-8(a)(4) (West 1982); Okla. Stat. Ann. tit. 21, § 11 (West 1983).”).

¹¹⁰ 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.

¹¹¹ Case law on this point in other jurisdictions was not researched.

¹¹² Ariz. Rev. Stat. Ann. § 13-1308; N.H. Rev. Stat. Ann. § 633:7 (b).

¹¹³ E.g., Ala. Code § 13A-3-24; Ariz. Rev. Stat. Ann. § 13-403; Conn. Gen. Stat. Ann. § 53a-18; Haw. Rev. Stat. Ann. § 703-309.

RCC § 22A-1603 FORCED LABOR OR SERVICES.

- (a) *Offense Definition.* An actor or business commits the offense of forced labor or services when that actor or business:
- (1) Knowingly causes another person to engage in labor or services;
 - (2) By means of coercion or debt bondage.
- (b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, forced labor or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *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, one or more of the following is proven:
- (1) The person or business was reckless that the complainant was under 18 years of age; or
 - (2) The complainant was held or provides services for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in RCC § 22A-206. The terms “business,” “labor,” “services,” “coercion” and “debt bondage” have the meanings specified in § 22A-1601.
- (e) *Exclusions from Liability.* An actor or business shall not be subject to prosecution under this section for threats of ordinary and legal employment actions, such as threats of termination, demotion, reduced pay or benefits, or scheduling changes, in order to compel an employee to provide labor or services.

Commentary

***Explanatory Note.** This section establishes the forced labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes a person or business knowingly causing another person to engage in labor or services either by means of coercion or debt bondage, as defined in this chapter. This offense replaces the forced labor offense in the current D.C. Code,¹¹⁴ and attempt and penalty provisions relevant to that offense which are separately codified in the current D.C. Code.¹¹⁵*

Subsection (a)(1) specifies that forced labor or services requires that an actor or business knowingly causes another person to engage in labor or services. The subsection specifies that a “knowingly” culpable mental state applies, a defined term¹¹⁶ which requires that the accused was practically certain that he or she would cause another person to engage in labor or services. The terms “labor” and “services” are defined under RCC § 22A-1601.¹¹⁷

Subsection (a)(2) specifies that forced labor or services requires that the accused cause another person to engage in labor or services either by means of coercion or debt bondage. “Coercion” is defined under RCC § 22A-1601, and is comprised of seven different forms of threats. “Debt bondage” is also defined under RCC § 22A-1601, and requires that the person

¹¹⁴ D.C. Code § 22-1832.

¹¹⁵ D.C. Code § 22-1837.

¹¹⁶ RCC § 22A-206(b).

¹¹⁷ For further discussion on these terms, see Commentary to RCC § 22A-1601.

perform labor or services to pay off a real or alleged debt under one of three specified circumstances.¹¹⁸ Per the rule of construction under RCC § 22A-207, the “knowingly” culpable mental state also applies to this element. The accused must be practically certain both that he or she is engaged in debt bondage or coercion, and that the coercion or debt bondage *causes* the other person to engage in labor or services.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) specifies penalty enhancements applicable to this offense. If a person commits forced labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,¹¹⁹ here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, if the complainant was held or provides services for more than 180 days, the offense classification may be increased in severity by one class. Even if both penalty enhancements are proven, the most the penalty can be increased is one class.

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

Subsection (e) specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. Such threats, which otherwise might satisfy the requirement of coercion, may be a sufficient basis for other human trafficking offenses.

Relation to Current District Law. *The revised forced labor or services statute makes three main substantive changes to current District law that improve the clarity and proportionality of the offense, and eliminate overlap with other offenses.*

First, by reference to the RCC’s “coercion” definition, the forced labor or services statute does not provide liability for causing another to provide labor or services by fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”¹²⁰ and by extension the current forced labor or services statute includes using fraud or deception to cause a person to provide labor or services. By contrast, the RCC’s “coercion” definition does not include fraud or deception,¹²¹ and such conduct is not a sufficient basis for forced labor or services liability. A person who uses deception or fraud to cause another person to engage in labor or services has not committed forced labor or services unless that person also uses one of the other coercive means listed in the RCC’s definition or holds another person in debt bondage.¹²² While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for

¹¹⁸ Debt bondage requires that complainant provides labor, services, or commercial sex acts to satisfy a debt and one of the following conditions apply: 1) the value of the labor, services, or commercial sex acts, as reasonably assessed, is not applied toward the liquidation of the debt; 2) the length and nature of the labor, services, or commercial sex acts are not respectively limited and defined; or 3) the amount of the debt does not reasonably reflect the value of the items or services for which the debt was incurred.

¹¹⁹ RCC § 22A-206 (d).

¹²⁰ D.C. Code § 22-1831 (3)(D).

¹²¹ RCC § 22A-1601.

¹²² Forced labor may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who initially lures a laborer with the false promise of high wages, and then coerces the laborer to provide labor or services under threat of bodily injury could be convicted under the RCC’s forced labor statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

common employment disputes.¹²³ Rather, a person who causes another to provide labor or services through fraud or deception may still be liable under the RCC's revised fraud¹²⁴ statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Second, by reference to the RCC's "coercion" definition, the revised forced labor or services offense criminalizes *limiting* another person's access to a *controlled substance*. The current statutory definition of "coercion" provides liability for "facilitating or controlling" a person's access to any controlled substance or addictive substance. By contrast, the revised forced labor or services offense only provides liability for threatening to limit a person's access to controlled substances or prescription medication.¹²⁵ This change eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,¹²⁶ and precludes arguments that an employer's attempts to limit an employee's access to legal and readily available addictive substances like tobacco or alcohol constitute forced labor or services.¹²⁷ Eliminating the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.¹²⁸ These changes improve the clarity and proportionality of the revised statute.

Third, the revised forced labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current forced labor offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but forced labor is not currently listed in the definition of a "crime of violence."¹²⁹ By contrast, the revised forced labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

Three other changes to the forced labor statute may constitute a substantive change to current District law.

First, by reference to the RCC's definitions of "labor" and "services", the revised forced labor or services offense specifically excludes causing a person to engage in commercial sex

¹²³ For instance, under the current statutory definition of "coercion," a person may be liable for forced labor or services, subject to a [] year maximum imprisonment, for falsely stating the terms of an employee's advancement eligibility or scope of work duties at the time of hiring.

¹²⁴ RCC §22A-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22A-2001(20).

¹²⁵ A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

¹²⁶ For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

¹²⁷ For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance.

¹²⁸ For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes 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 thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

¹²⁹ D.C. Code § 22-1331 (4).

acts. The current D.C. Code forced labor statute and relevant definitions refer generally to labor and services without specifying whether commercial sex acts are included. Neither DCCA case law nor legislative history addresses the matter.¹³⁰ However, it is notable that the D.C. Code human trafficking statutes sometimes appear to use the term “labor” as if it did not include commercial sex acts.¹³¹ By contrast, the revised definitions of “labor” and “services” explicitly exclude commercial sex acts, and the revised forced labor or services statute’s use of those definitions explicitly excludes the use of coercion or debt bondage to cause another to engage in commercial sex acts. Such conduct instead is criminalized under the RCC’s forced commercial sex offense.¹³² This change improves the clarity and consistency of the revised offenses, and reduces unnecessary overlap.

Second, by reference to the RCC’s definition of “coercion,” forced labor or services includes causing a person to engage in labor or services by threatening that any person will “commit any criminal offense against persons” or “property offense[.]”¹³³ The current “coercion” definition does not explicitly include threats to “commit any criminal offense against persons” but does include threats of “force” and “threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault, kidnapping, or criminal restraint. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “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 perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”¹³⁴ The revised definition of “coercion” and the RCC crime of forced labor or services together specify that a threat to commit any criminal offense against persons is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute “serious harm” under the residual clause in subsection (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Third, the revised statute specifies that threats of ordinary and legal employment actions are not a basis for liability under the forced labor or services statute. The current D.C. Code “coercion” definition includes “serious harm,” which is defined as “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 perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”¹³⁵ There is no relevant DCCA case law as to whether legal employment actions could be sufficient to compel a reasonable person to perform labor or services. The revised statute prevents liability for forced labor or services where the coercion consists only of ordinary and legal employer demands. Such

¹³⁰ At least one federal circuit court has held that the federal forced labor statute includes coercing another person into engaging in commercial sex acts. *United States v. Kaufman*, 546 F.3d 1242, 1260 (10th Cir. 2008) (holding that the term “labor” as used in the federal forced labor statute includes induced nudity and sexual acts recorded on video).

¹³¹ *E.g.*, D.C. Code § 22-1833, entitled “Trafficking in labor or commercial sex acts” includes as an element that, “Coercion will be used or is being used to cause the person to provide labor or services or to engage in a commercial sex act”. The specification of both “labor” and “commercial sex act” in the offense suggests the former does not include the latter.

¹³² RCC § 22A-1604.

¹³³ RCC § 22A-1601.

¹³⁴ D.C. Code § 22-1831 (7).

¹³⁵ *Id.*

conduct does not warrant criminalization as a serious felony. This change improves the clarity and proportionality of the revised statutes.

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

First, omitting causing a person to provide labor or services by means of fraud or deception from the forced labor or services offense is not supported by state criminal codes. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the MPC and have a general part¹³⁶ (reformed jurisdictions), a majority of those jurisdictions that have codified an analogous forced labor offense include causing a person to provide labor or services by means of fraud or deception.¹³⁷ Ten reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by means of fraud or deception.¹³⁸

Second, revising forced labor to exclude causing a person to provide labor or services by facilitating access to addictive or controlled substances is not supported by national legal trends. A majority of the reformed jurisdictions' that have codified an analogous forced labor offense include controlling or facilitating access to a controlled substance.¹³⁹ Six reformed jurisdictions' analogous forced labor or services offenses do not include causing a person to provide labor or services by any means involving controlled substances.¹⁴⁰ However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by state criminal codes. None of the reformed jurisdictions' that have codified an analogous forced labor offense include limiting, facilitating, or controlling a person's access to addictive substances other than controlled substances.¹⁴¹

Third, authorizing enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age has mixed support in other states' criminal codes. Half

¹³⁶ 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.

¹³⁷ Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

¹³⁸ Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502, Colo. Rev. Stat. Ann. § 18-3-503; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-701, Mont. Code Ann. § 45-5-703; N.Y. Penal Law § 135.35; Or. Rev. Stat. Ann. § 163.264; Or. Rev. Stat. Ann. § 163.263; Tenn. Code Ann. § 39-13-307.

¹³⁹ Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.

¹⁴⁰ Conn. Gen. Stat. Ann. § 53a-192a, Conn. Gen. Stat. Ann. § 53a-192; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; Mo. Ann. Stat. § 566.203; Or. Rev. Stat. Ann. § 163.263, Or. Rev. Stat. Ann. § 163.264.

¹⁴¹ Ala. Code § 13A-6-152; Ariz. Rev. Stat. Ann. § 13-1306; Del. Code Ann. tit. 11, § 787; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3012; Tenn. Code Ann. § 39-13-307.

of the reformed jurisdictions’ that have codified an analogous forced labor offense allow for enhanced penalties when the complainant was under the age of 18.¹⁴²

RCC § 22A-1604 FORCED COMMERCIAL SEX.

- (a) *Forced Commercial Sex.* A person or business commits the offense of forced commercial sex when that person or business:
- (1) Knowingly causes another person to engage in a commercial sex act;
 - (2) By means of coercion or debt bondage.
- (b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, forced commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *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, one or more of the following is proven:
- (1) The person or business was reckless that the complainant was under 18 years of age; or
 - (2) The complainant was held or provides commercial sex acts for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in § 22A-206. The terms “business,” “commercial sex act,” “coercion,” and “debt bondage” have the meanings specified in RCC § 22A-1601.

Commentary

***Explanatory Note.** This section establishes the forced commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes a person or business knowingly causing another person to engage in a commercial sex act by means of coercion as defined in this chapter, or through debt bondage. There is no analogous offense under the current human trafficking chapter, although conduct constituting forced commercial sex may violate the current forced labor statute. This offense also replaces aspects of several offenses in chapter 27 of the current D.C. Code, including: conduct to “compel” or attempt to compel a person into prostitution under the pandering statute¹⁴³; compelling an individual to live life or prostitution*

¹⁴² Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; Minn. Stat. Ann. § 609.281; Mont. Code Ann. § 45-5-703; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.

¹⁴³ D.C. Code §22-2705. The pandering statute makes it a crime to “cause, compel . . . or attempt to cause or compel . . . any individual . . . to engage in prostitution[.]” The precise effect on D.C. law is unclear, as the D.C. Court of Appeals has not clearly defined what constitutes “compelling” a person to engage in prostitution. It is possible that some coercive means that would constitute “compelling” under the pandering statute do not fall within the revised “coercion” definition. In addition, the pandering statute provides for enhanced penalties when the person caused or compelled to engage in prostitution is under the age of 18. D.C. Code §22-2705 (2). The penalty provision under the RCC’s forced commercial sex statute replaces this provision in the current pandering statute.

against his or her will;¹⁴⁴ and causing a spouse or domestic partner “by force, fraud, coercion, or threats...to lead a life of prostitution.”¹⁴⁵

Subsection (a)(1) specifies that forced commercial sex requires that a person or business knowingly causes another person to engage in a commercial sex act. The subsection specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would cause another person to engage in a commercial sex act. The term “commercial sex act” is defined under RCC § 22A-1601.¹⁴⁶

Subsection (a)(2) specifies that forced commercial sex requires that the accused cause another person to engage in a commercial sex act by means of coercion or debt bondage. “Coercion” is defined under RCC § 22A-1601 and is comprised of seven different forms.¹⁴⁷ “Debt bondage” is also defined under RCC § 22A-1601 and requires that the person perform labor or services to pay off a real or alleged debt under one of three specified circumstances.¹⁴⁸ Per the rule of construction under RCC § 22A-207, the “knowingly” culpable mental state also applies to this element. The accused must be practically certain both that he or she is engaged in coercion or debt bondage, and that the coercion or debt bondage would cause the other person to engage in a commercial sex act.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. If a person commits forced commercial sex and was reckless as to the complainant being under 18 years of age, or that the complainant was held or provides commercial sex acts for more than 180 days, the offense classification may be increased in severity by one class. Even if both penalty enhancements are proven, the most the penalty can be increased is one class.

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

Relation to Current District Law. *The RCC’s forced commercial sex act offense makes one substantive change to current District law that improves the consistency and proportionality of the revised offense.*

The RCC forced commercial sex act creates a standardized penalty and enhancements for coercing or using debt bondage to cause a person to engage in a commercial sexual act. Conduct constituting forced commercial sex could be charged under several current Chapter 27 offenses, with maximum sentences ranging from five years¹⁴⁹ to twenty years.¹⁵⁰ In contrast, the revised

¹⁴⁴ D.C. Code § 22-2706. This statute makes it a crime to “by threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.” This conduct may also be criminalized under the RCC’s kidnapping statute, RCC § 22A-1402 or criminal restraint statute, RCC § 22A-1404.

¹⁴⁵ D.C. Code § 22-2708. This statute makes it a crime to “by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]” This conduct will be criminalized under the RCC’s forced commercial sex statute. However, the RCC’s forced commercial sex statute is narrower than § 22-2708. The forced commercial sex statute does not criminalize causing another person to provide commercial sex acts by means of deception or fraud.

¹⁴⁶ For further discussion of these terms, see Commentary to RCC § 22A-1601.

¹⁴⁷ For further discussion of this term, see Commentary to RCC § 22A-1601.

¹⁴⁸ For further discussion of this term, see Commentary to RCC § 22A-1601.

¹⁴⁹ D.C. Code § 22-2705.

¹⁵⁰ D.C. Code § 22-2706.

forced commercial sex act provides a single penalty, with applicable enhancements. This change improves the consistency and proportionality of the revised statutes.

Six other changes to the forced commercial sex statute may constitute a substantive change to current District law that improve the clarity, consistency, and proportionality of the revised offense, and eliminate overlap with other offenses.

First, by reference to the RCC's definition of "coercion," the forced commercial sex statute does not provide liability for causing another to engage in commercial sex by fraud or deception. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"¹⁵¹ and "coercion" is defined to include "fraud or deception."¹⁵² If commercial sex acts fall within the definition of "labor or services," then under current law using fraud or deception to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The RCC's "coercion" definition does not include fraud or deception,¹⁵³ and such conduct is not a sufficient basis for forced commercial sex liability. A person who uses deception or fraud to cause another person to engage in commercial sex has not committed forced commercial sex unless that person also uses one of the other coercive means listed in the RCC's definition or holds another person in debt bondage.¹⁵⁴ While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for what amount to employment disputes.¹⁵⁵ Rather, a person who causes another to engage in commercial sex through fraud or deception may still be liable under the RCC's revised fraud¹⁵⁶ statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised statutes.

Second, by reference to the RCC's "coercion" definition, the revised forced commercial sex offense criminalizes *limiting* another person's access to a *controlled substance*. The current forced labor offense criminalizes using "coercion to cause person to provide labor or services"¹⁵⁷ and "coercion" is defined to include "facilitating or controlling" a person's access to any "addictive or controlled substance."¹⁵⁸ If commercial sex acts fall within the definition of "labor or services," then under current law facilitating or controlling access to an addictive substance to cause a person to engage in commercial sex acts constitutes forced labor. However, the current code does not specify whether "labor or services" includes commercial sex acts, and there is no relevant DCCA case law. The revised forced commercial sex offense only provides liability for

¹⁵¹ D.C. Code § 22-1832.

¹⁵² D.C. Code § 22-1831.

¹⁵³ RCC § 22A-1601.

¹⁵⁴ Forced commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, if a person initially lures a sex worker with the false promise of high wages, and then coerces the person to provide labor under threat of bodily injury could be convicted under the RCC's forced commercial sex statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

¹⁵⁵ For instance, under the current statutory definition of "coercion," a person would coerce another if he or she causes that person to engage in a commercial sex act by a lie about how much would be paid.

¹⁵⁶ RCC §22A-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22A-2001(20).

¹⁵⁷ D.C. Code § 22-1832.

¹⁵⁸ D.C. Code § 22-1831.

threatening to limit a person's access to controlled substances or prescription medication.¹⁵⁹ This change eliminates liability for compensating someone with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction.¹⁶⁰ Including facilitating access to any addictive substance as a form of coercion creates the possibility of criminalizing relatively less coercive conduct.¹⁶¹ These changes to current law improve the clarity and proportionality of the revised statute.

Third, by reference to the RCC's definition of "coercion," the forced commercial sex offense includes causing a person to engage in a commercial sex act by causing threatening that any person will "commit any criminal offense against persons" or "property offense[.]"¹⁶² The current "coercion" definition does not explicitly include threats to "commit any criminal offense against persons" but does include threats of "force, threats of force, physical restraint, or threats of physical restraint," conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of "coercion" generally includes "serious harm or threats of serious harm," which broadly covers "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 perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm."¹⁶³ The revised definition of "coercion" and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear whether the crime would constitute "serious harm" under the residual clause in subsection (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

Fourth, by reference to the revised definitions of "coercion" and "debt bondage," the RCC forced commercial sex act offense specifies what types of conduct constitute a crime when used to compel a person to engage in prostitution. Various offenses under Chapter 27 of the current D.C. Code make it a crime to "compel" a person to "engage in prostitution"¹⁶⁴; "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"¹⁶⁵; to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact"¹⁶⁶; or to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of prostitution, or to lead a life of prostitution[.]"¹⁶⁷ The current D.C. Code

¹⁵⁹ A person can satisfy this subsection by providing a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

¹⁶⁰ For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

¹⁶¹ For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes 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 thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means as compared to controlled substances.

¹⁶² RCC § 22A-1604.

¹⁶³ D.C. Code § 22-1831 (7).

¹⁶⁴ D.C. Code § 22-2705.

¹⁶⁵ D.C. Code § 22-2706.

¹⁶⁶ *Id.*

¹⁶⁷ D.C. Code § 22-2708.

does not define the terms “threats,” “duress,” “detain,” “force,” “fraud,” or “intimidation” for the human trafficking statutes and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC forced commercial sex act offense precisely defines the meaning of coercion or debt bondage, and clearly defines what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of the revised statutes.

Fifth, the RCC forced commercial sex act offense requires a person to act with a “knowing” culpable mental state. Statutes under Chapter 27¹⁶⁸ that are replaced in whole or in part by the RCC’s forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.¹⁶⁹ This change improves the clarity, consistency, and proportionality of the revised statutes.

Sixth, the RCC forced commercial sex act offense requires only a single commercial sexual act for liability. Offenses under Chapter 27 criminalize detaining a person “for the purpose of prostitution,”¹⁷⁰ or compelling a person to “lead a life or prostitution,”¹⁷¹ and make no reference to the number of occasions in which a person is compelled to engage in prostitution. There is no relevant DCCA case law on the unit of prosecution for these offenses, and it appears that compelling a person to engage in prostitution numerous times may constitute only a single violation of these statutes. In addition, it is possible that coercing a person to engage in a commercial sex act may constitute forced labor under the current statute.¹⁷² However, the current forced labor statute does not specify whether commercial sex acts constitute labor or services, and if they do, whether multiple commercial sex acts may be prosecuted as more than one instance of forced labor. In contrast, the RCC forced commercial sex act offense provides liability for each separate commercial sexual act. This change improves the clarity and proportionality of the revised statutes.¹⁷³

Two changes to the forced commercial sex offense statute are clarificatory in nature and not intended to substantively change current District law.

First, the forced commercial sex offense explicitly criminalizes as a human trafficking offense causing a person to engage in commercial sex acts by means of coercion. It is unclear whether the current forced labor statute criminalizes the use of coercion to cause a person to engage in commercial sex acts. The current forced labor offense requires that the accused “use coercion to cause a person to provide labor or services” or to “keep any person in debt

¹⁶⁸ D.C. Code § 22-2705; D.C. Code § 22-2706; D.C. Code 22-2708.

¹⁶⁹ See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[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)”).

¹⁷⁰ D.C. Code § 22-2706.

¹⁷¹ *Id.*

¹⁷² D.C. Code § 22-1832.

¹⁷³ Under the revised offense, a person who uses coercion or debt bondage to compel another person to engage in more than one commercial sex act may be convicted for multiple counts of forced commercial sex. However, whether multiple convictions are permitted in a given case is governed by the merger analysis set for under RCC § 22A-212.

bondage.”¹⁷⁴ However, the current D.C. Code does not specify whether “labor or “services” include commercial sex acts. “Labor” is currently defined as “work that has economic or financial value,” and “services” is currently defined as “legal or illegal duties or work done for another, whether or not compensated.”¹⁷⁵ There is no relevant D.C. Court of Appeals (DCCA) case law. The current D.C. Code, however, contains several prostitution-related offenses that do appear to criminalize coercing a person to engage in commercial sex acts.¹⁷⁶ The revised statute, however, specifies that the use of coercion to cause a person to engage in commercial sex is not only criminal, but a human trafficking offense. There is no clear justification for distinguishing the harm of using coercion to cause a person perform commercial sex when the complainant is a person who other times chooses to engage in commercial sex work from someone who has not engaged in such work. This change improves the clarity, organization, and proportionality of the revised statutes.

Second, the RCC defines a “commercial sex act” as “any sexual act or sexual contact on account of which or for which anything of value is given to, promised to, or received by any person.”¹⁷⁷ Chapter 27 defines prostitution as “a sexual act or contact with another person in return for giving or receiving anything of value.”¹⁷⁸ The RCC’s definition of “commercial sexual act” definition is essentially equivalent to the current Chapter 27 definition of prostitution. The RCC’s definition of “commercial sex act” is not intended to differ in any substantive way from the current code’s definition of “prostitution.”

Relation to National Legal Trends. *It is unclear whether the above discussed changes to current District law are supported by national legal trends.*

First, explicitly criminalizing forced commercial sex acts is consistent with state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part¹⁷⁹ (hereinafter “reformed jurisdictions”) that have a forced labor offense, half explicitly criminalize forced commercial sex acts either as part of the forced labor offense¹⁸⁰, or through a separate offense.¹⁸¹ The remaining states do not explicitly criminalize forced commercial sex acts, but similar to the current D.C. Code, are ambiguous as to whether forced labor includes forced commercial sex acts.¹⁸²

Second, it is unclear whether the possible changes to current Chapter 27 offenses are consistent with state criminal codes. Staff has not reviewed analogous prostitution offenses and relevant case law in other jurisdictions to determine when compelling another person to engage in commercial sex acts constitutes a prostitution offense, and how such conduct is penalized.

¹⁷⁴ D.C. Code § 22-1832.

¹⁷⁵ D.C. Code § 22-1831.

¹⁷⁶ D.C. Code §22-2705; D.C. Code §22-2706; D.C. Code §22-2708.

¹⁷⁷ RCC § 22A-1601.

¹⁷⁸ D.C. Code § 22-2701.01 (3).

¹⁷⁹ 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.

¹⁸⁰ Del. Code Ann. tit. 11, § 787; Ala. Code § 13A-6-151; Conn. Gen. Stat. Ann. § 53a-192a; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.010; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012.

¹⁸¹ N.D. Cent. Code Ann. § 12.1-41-04.

¹⁸² Ark. Code Ann. § 5-18-103; Ariz. Rev. Stat. Ann. § 13-1306; 720 Ill. Comp. Stat. Ann. 5/10-9; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.203; Mont. Code Ann. § 45-5-703; Tenn. Code Ann. § 39-13-307; Tex. Penal Code Ann. § 20A.02.

RCC § 22A-1605 TRAFFICKING IN LABOR OR SERVICES.

- (a) *Offense Definition.* A person or business commits the offense of trafficking in labor or services when that person or business:
- (1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;
 - (2) With recklessness that the person is being caused, or will be caused to provide labor or services;
 - (3) By means of coercion or debt bondage.
- (b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in labor or services is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *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, one or more of the following is proven:
- (1) The person or business was reckless that the complainant was under 18 years of age; or
 - (2) The complainant was held or provides services for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in § 22A-206. The terms “business,” “coercion,” and “debt bondage” have the meanings specified in § 22A-1601.

Commentary

***Explanatory Note.** This section establishes the trafficking in labor or services offense for the Revised Criminal Code (RCC). This offense criminalizes a person or business knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining another person, with recklessness that anyone will cause that person to provide labor or services by means of coercion or debt bondage. Trafficking persons for commercial sex acts is criminalized under the separate trafficking in commercial sex offense. The RCC’s trafficking in labor or services offense, along with the RCC’s trafficking in commercial sex offense¹⁸³, replaces the trafficking in labor or commercial sex acts statute¹⁸⁴ under the current D.C. Code.*

Subsection (a)(1) specifies that trafficking in labor or services requires that a person or business knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person. The words entice, harbor, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. Subsection (a)(1) specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would entice, harbor, transport, provide, obtain, and maintain another person.

Subsection (a)(2) specifies that the person must have acted with recklessness that the trafficked person is being caused or will be caused to provide labor or services. This subsection can be satisfied if the trafficked person is either currently providing labor or services or will provide labor or services in the future. The subsection specifies that a “recklessness” culpable

¹⁸³ RCC § 22A-1606.

¹⁸⁴ D.C. Code § 22-1833.

mental state applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is being caused or will be caused to provide labor or services.

Subsection (a)(3) specifies that the accused must have been reckless as to whether the trafficked person provides or will provide labor or services by means of coercion or debt bondage. This subsection can be satisfied if the trafficked person is providing labor or services by means of coercion or debt bondage or will provide labor or services by means of debt bondage in the future. The subsection specifies that a culpable mental state of “recklessness” applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is being caused or will be caused to provide labor or services by means of coercion or debt bondage.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. If a person commits trafficking in labor or services and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,¹⁸⁵ here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively if the complainant was held or provides services for more than 180 days, the offense classification may be increased in severity by one class. Even if both penalty enhancements are proven, the most the penalty can be increased is one class.

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

Relation to Current District Law. *The trafficking in labor or services offense makes four main substantive changes to current District law that improve the clarity and proportionality of the offense, and clearly describe all elements that must be proven, including culpable mental states.*

First, by reference to the RCC’s definitions of “labor” and “services”, the revised offense excludes liability for trafficking persons who will engage in commercial sex acts. The current trafficking in labor or commercial sex acts offense criminalizes trafficking persons who will engage in labor, services, *or* commercial sex acts.¹⁸⁶ In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses. This change improves the organization of the revised offense.

Second, by reference to the RCC’s “coercion” definition, the trafficking in labor or services statute does not provide liability for trafficking a person who is or will be caused to provide labor or services by fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”¹⁸⁷ and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide labor or service. By contrast, the RCC’s “coercion” definition does not include fraud or deception,¹⁸⁸ and trafficking a person who is only being tricked into performing labor or services is not a sufficient basis for liability under the revised trafficking in labor or services offense. The revised offense only provides liability for trafficking a person who is being or will be caused to provide labor or services under threat of one of the means listed in the RCC’s definition of “coercion” applies, or

¹⁸⁵ RCC § 22A-206 (d).

¹⁸⁶ D.C. Code § 22-1833.

¹⁸⁷ D.C. Code § 22-1831 (3)(D).

¹⁸⁸ RCC § 22A-1601.

the person trafficked is or will be subject to debt bondage.¹⁸⁹ While using deception to cause another to engage in labor or services is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for common employment disputes and those engaged in such schemes.¹⁹⁰ Rather, a person who encourages or assists a person who causes another to provide labor or services through fraud or deception may still be liable as an accessory¹⁹¹ under the RCC's revised fraud¹⁹² statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offense.

Third, by reference to the RCC's "coercion" definition, the revised trafficking in labor or services offense criminalizes trafficking when the coercion at issue is *limiting* another person's access to a *controlled substance*. The current statutory definition of "coercion" provides liability for "facilitating or controlling" a person's access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to provide labor or service. By contrast, the revised trafficking in labor or services offense only provides liability for trafficking a person who is being or will be caused to provide labor or services under threat of limitation of access to controlled substances or prescription medication.¹⁹³ This change eliminates liability for trafficking someone knowing that they will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,¹⁹⁴ and precludes arguments that trafficking an employee knowing that an employer's seeks to limit the employee's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in labor or commercial sex acts.¹⁹⁵ Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.¹⁹⁶ These changes improve the clarity and proportionality of the revised statute.

¹⁸⁹ Trafficking in labor or services may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that he or she was initially lured with the false promise of high wages, and will be coerced into providing labor under threat of bodily injury could be convicted under the RCC's trafficking in labor or services statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

¹⁹⁰ For instance, under the current statutory definition of "coercion," a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

¹⁹¹ RCC § 22A-210.

¹⁹² RCC §22A-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term "property" is defined as "anything of value" including "services[.]" RCC § 22A-2001(20).

¹⁹³ A person's conduct may constitute "limiting" a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

¹⁹⁴ For example, compensating a person with a controlled substance may constitute "facilitation" under the current forced labor statute due to the definition of "coercion."

¹⁹⁵ For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

¹⁹⁶ For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

Fourth, the revised trafficking in labor or services offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for “crimes of violence” committed against persons under the age of 18, but trafficking in labor is currently not a “crime of violence.”¹⁹⁷ By contrast, the revised trafficking in labor or services offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

In addition, the revised trafficking in labor offense makes one other change that may constitute a substantive change to current District law.

By reference to the RCC’s definition of “coercion,” trafficking in labor or services includes causing a person to engage in labor or services by threatening that any person will “commit any criminal offense against persons” or any “property offense.”¹⁹⁸ The current “coercion” definition does not explicitly include threats to “commit any criminal offense against persons” but does include threats of “force, threats of force, physical restraint, or threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “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 perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”¹⁹⁹ The revised definition of “coercion” and the RCC crime of trafficking in labor or services together specify that trafficking a person with recklessness that any person will use threat to commit any criminal offense against persons to compel labor or services is categorically a basis for liability, even if it would otherwise be unclear whether the threat would constitute “serious harm” under the residual clause in subsection (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised statutes.

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

First, criminalizing sex trafficking under a separate offense has mixed support from state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part²⁰⁰ (hereafter “reformed jurisdictions”) that have a forced labor offense, a majority criminalize trafficking in labor or services and in commercial sex acts under the same statute.²⁰¹ However, three of those states’

¹⁹⁷ D.C. Code § 22-1331 (4).

¹⁹⁸ RCC § 22A-1694.

¹⁹⁹ D.C. Code § 22-1831 (7).

²⁰⁰ 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.

²⁰¹ Ala. Code § 13A-6-153; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; In. St. 35-42-3.5-1; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. § 3011; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

statutes provide for higher maximum sentences when trafficking in commercial sex.²⁰² A minority of reformed jurisdictions' codes include a separate trafficking in commercial sex acts offense.²⁰³

Second, changing the trafficking in labor or services offense to exclude trafficking a person with recklessness that he or she is or will be caused to provide labor or services by means of fraud or deception is not supported by state criminal codes. A majority of the reformed jurisdictions' that have codified an analogous trafficking in labor or services offense include causing a person to provide labor or services by means of fraud or deception.²⁰⁴

Third, changing the trafficking in labor and services offense to exclude trafficking a person who is or will be caused to provide labor or services by means of facilitating access to a controlled substance or addictive substance has mixed support from state criminal codes. A majority of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense include trafficking a person who will be caused to provide labor or services by means of controlling or facilitating access to a controlled substance.²⁰⁵ However, excluding threats to limit another person's access to addictive substances that are not controlled substances is supported by national legal trends. None of the reformed jurisdictions that have codified an analogous trafficking in services or labor offense include trafficking a person who will be caused to provide labor or serves by means of limiting, facilitating, or controlling that person's access to addictive substances other than controlled substances.

Fourth, authorizing enhanced penalties if the trafficked person is under the age of 18, or was held for 180 days or more has mixed support from state criminal codes. Nearly half of the reformed jurisdictions that have codified an analogous trafficking in labor or services offense authorize enhanced penalties when the trafficked person is under the age of 18.²⁰⁶

²⁰² Ark. Code Ann. § 5-18-103; Mont. Code Ann. § 45-5-702; Or. Rev. Stat. Ann. § 163.266.

²⁰³ Mo. Ann. Stat. § 566.209; N.Y. Penal Law § 230.34; Tenn. Code Ann. § 39-13-309.

²⁰⁴ Ala. Code § 13A-6-152; Ark. Code Ann. § 5-18-103; Conn. Gen. Stat. Ann. § 53a-192a; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; N.H. Rev. Stat. Ann. § 633:7; 18 Pa. Stat. Ann. § 3012; Tex. Penal Code Ann. § 20A.02.

²⁰⁵ Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; Ind. Code Ann. § 35-42-3.5-1; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; N.Y. Penal Law § 135.35; 18 Pa. Stat. Ann. § 3011; Tenn. Code Ann. § 39-13-308; Wis. Stat. Ann. § 940.302.

²⁰⁶ Ark. Code Ann. § 5-18-103; Colo. Rev. Stat. Ann. § 18-3-503; Del. Code Ann. tit. 11, § 787; Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; 18 Kan. Stat. Ann. § 21-5426; 18 Ky. Rev. Stat. Ann. § 529.100; Minn. Stat. Ann. § 609.282; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; 18 S.D. Codified Laws § 22-49-2; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308.5.

RCC § 22A-1606 TRAFFICKING IN COMMERCIAL SEX.

- (a) *Offense Definition.* A person or business commits the offense of trafficking in commercial sex when that person or business:
- (1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;
 - (2) With recklessness that the person is being caused, or will be caused to engage in a commercial sex act;
 - (3) By means of coercion or debt bondage.
- (b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *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, one or more of the following is proven:
- (1) The person or business was reckless that the complainant was under 18 years of age; or
 - (2) The complainant was held or provides commercial sex acts for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in § 22A-206. The terms “business,” “coercion,” “debt bondage,” and “commercial sex act” have the meanings specified in § 22A-1601.

Commentary

Explanatory Note. This section establishes the trafficking in commercial sex offense for the Revised Criminal Code (RCC). This offense criminalizes a person or business knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining another person, with recklessness that the trafficked persons is providing, or will provide, a commercial sex act by means of coercion or debt bondage. The RCC’s trafficking in commercial sex offense, along with the RCC’s trafficking in labor or services offense²⁰⁷, replaces the trafficking in labor or commercial sex acts statute²⁰⁸ under the current D.C. Code. The revised offense also replaces portions of the pandering statute²⁰⁹ the compelling an individual to live life or prostitution

²⁰⁷ RCC § 22A-1605.

²⁰⁸ D.C. Code § 22-1833.

²⁰⁹ D.C. Code §22-2705. The pandering statute makes it a crime for “any parent, guardian, or other person having legal custody of the person of an individual, to consent to the individual’s being taken, detained, or used by any person, for the purpose of prostitution or a sexual act or sexual contact.” This conduct will be criminalized under the RCC’s trafficking in commercial sex statute.

against his or her will statute,²¹⁰ and the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute²¹¹ in chapter 27 of the current D.C. Code.

Subsection (a)(1) specifies that trafficking in commercial sex requires that a person or business knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person. The words entice, harbor, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. Subsection (a)(1) specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would entice, harbor, transport, provide, obtain, or maintain another person.

Subsection (a)(2) specifies that the person or business must have been reckless as to whether the trafficked person is providing or will provide a “commercial sex act,” a defined term.²¹² This subsection can be satisfied if the trafficked person is either currently providing a commercial sex act or will provide a commercial sex act in the future. The subsection specifies that a “recklessness” culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that the trafficked persons are providing or will provide a commercial sex act.

Subsection (a)(3) specifies that the person or business must have been reckless as to whether the trafficked person provides or will provide a commercial sex act by means of coercion or debt bondage. “Coercion” and “debt bondage” are defined terms.²¹³ This subsection can be satisfied if the trafficked person is providing a commercial sex act by means of coercion or debt bondage or will provide a commercial sex act by means of debt bondage in the future. The subsection specifies that a culpable mental state of “recklessness” applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is or will be caused to engage in a commercial sex act by means of coercion or debt bondage.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides penalty enhancements applicable to this offense. If a person commits trafficking in commercial sex and was reckless as to the complainant being under 18 years of age, an enhancement of one penalty class applies. “Reckless” is a defined term,²¹⁴ here requiring that the defendant was aware of a substantial risk that the complainant was under 18 years of age and such conduct deviated from a reasonable standard of care. Alternatively, if the complainant was held or provides commercial sex acts for more than 180 days, the offense penalty may be increased in severity by one class. Even if both penalty enhancements are proven, the most the penalty can be increased is one class.

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

Relation to Current District Law. *The trafficking in commercial sex statute makes seven main substantive changes to current District law that improve the proportionality of penalties.*

First, the RCC trafficking in commercial sex offense is codified in a separate and distinct manner from the offense of trafficking in labor or services. The D.C. Code currently

²¹⁰ D.C. Code § 22-2706. This statute makes it a crime to “by threats or duress, to detain any individual against such individual’s will, for the purpose of prostitution or a sexual act or sexual contact, or to compel any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact.” This conduct may also be criminalized under the RCC’s kidnapping statute, RCC § 22A-1402 or criminal restraint statute, RCC § 22A-1404.

²¹¹ D.C. Code § 22-2704.

²¹² RCC § 22A-1601.

²¹³ *Id.*

²¹⁴ RCC § 22A-206(d)

criminalizes in one statute trafficking persons who will engage in labor, services, *or* commercial sex acts.²¹⁵ In contrast, the RCC re-organizes the current trafficking in labor or commercial sex acts into two separate offenses and clarifies that commercial sex acts are not part of the revised definitions of “labor” and “services.” This change improves the organization of the revised offenses.

Second, by reference to the RCC’s “coercion” definition, the trafficking in commercial sex statute does not provide liability for trafficking a person who is or will be caused to engage in a commercial sex act by means of fraud or deception. The current statutory definition of “coercion” includes “fraud or deception,”²¹⁶ and by extension the current trafficking in labor or commercial sex acts statute references using fraud or deception to cause a person to provide commercial sex. By contrast, the RCC’s “coercion” definition does not include fraud or deception,²¹⁷ and trafficking a person who is being or will be tricked into performing commercial sex is not a sufficient basis for liability under the revised trafficking in commercial sex offense. The revised offense only provides liability for trafficking a person who is being or will be caused to engage in a commercial sex act under threat of one of the means listed in the RCC’s definition of “coercion,” or the person trafficked is or will be subject to debt bondage.²¹⁸ In the revised offense, liability for trafficking in commercial sex only attaches if one of the means listed in the RCC’s definition of “coercion” applies, or the person trafficked is or will be subject to debt bondage.²¹⁹ While using deception to cause another to engage in commercial sex is wrongful, it does not warrant equal punishment to using other means of coercion or debt bondage and could provide major felony liability for employment-type disputes and those engaged in such schemes.²²⁰ Rather, a person who encourages or assists a person who causes another to provide commercial sex through fraud or deception may still be liable as an accessory²²¹ under the RCC’s revised fraud²²² statute, a property offense with penalties based on the economic harm suffered. This change improves the penalty proportionality of the revised offenses.

Third, by reference to the RCC’s “coercion” definition, the revised trafficking in commercial sex offense criminalizes trafficking when the coercion involves *limiting* another person’s access to a *controlled substance*. The current statutory definition of “coercion” provides liability for “facilitating or controlling” a person’s access to any addictive substance, and by extension the current trafficking in labor or commercial sex acts statute references facilitating or controlling access to addictive substances to cause a person to engage in

²¹⁵ D.C. Code § 22-1833.

²¹⁶ D.C. Code § 22-1831 (3)(D).

²¹⁷ RCC § 22A-1601.

²¹⁸ Trafficking in commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a worker knowing that he or she was initially lured with the false promise of high wages, and will also be coerced into engaging in commercial sex acts under threat of bodily injury may be convicted under the RCC’s trafficking in commercial sex statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

²¹⁹ Trafficking in commercial sex may involve deceptive or fraudulent conduct *in addition* to other coercive means. For example, a person who traffics a laborer knowing that they were initially lured with the false promise of high wages, and will be coerced the person to provide labor under threat of bodily injury could be convicted under the RCC’s trafficking in labor or services statute. *E.g., United States v. Bradley*, 390 F.3d 145 (1st Cir. 2004).

²²⁰ For instance, under the current statutory definition of “coercion,” a person may be liable for trafficking in labor or commercial sex acts, subject to a [] year maximum imprisonment, for transporting a laborer to a job, knowing that the employer at the time of hire falsely stated the rate of pay or work duties that will be expected.

²²¹ RCC § 22A-210.

²²² RCC §22A-2201. The revised fraud statute criminalizes taking property of another by means of deception. The term “property” is defined as “anything of value” including “services[.]” RCC § 22A-2001(20).

commercial sex acts. By contrast, the revised trafficking in commercial sex offense only provides liability for trafficking a person being threatened with limitation of their access to controlled substances or prescription medication.²²³ This change eliminates liability for trafficking someone knowing that he or she will be compensated with a controlled substance or prescription medication as part of an otherwise clear and consensual transaction,²²⁴ and precludes arguments that trafficking a commercial sex worker knowing that an employer seeks to limit that worker's access to legal and readily available addictive substances like tobacco or alcohol constitutes trafficking in commercial sex.²²⁵ Eliminating liability for trafficking where the harm is the facilitation of access to any addictive substance as a form of coercion prevents the possibility of criminalizing relatively less coercive conduct.²²⁶ These changes improve the clarity and proportionality of the revised statute.

Fourth, the revised trafficking in commercial sex offense authorizes enhanced penalties if the accused was reckless as to whether the complainant was under 18 years of age. The current trafficking in labor or commercial sex acts offense does not authorize enhanced penalties based on the age of the complainant. The D.C. Code includes a general penalty enhancement for "crimes of violence" committed against persons under the age of 18, but trafficking in labor or commercial sex acts is not currently not a "crime of violence."²²⁷ By contrast, the revised trafficking in commercial sex offense provides a penalty enhancement based on the complainant being a minor. This change improves the consistency and proportionality of the revised statutes.

Fifth, by reference to the revised definitions of "coercion" and "debt bondage," the RCC trafficking in commercial sex offense specifies what types of conduct are sufficient to "compel" a person to engage in prostitution.²²⁸ The current code makes it a crime "by threats or duress, to detain any individual against such individual's will for the purpose of prostitution or a sexual act or sexual contact"²²⁹ or to "compel any individual, to reside with him or her or with any other person for the purposes of prostitution or a sexual act or sexual contact,"²³⁰ or to "forcibly abduct a child under 18 from his or her home or usual abode, or from the custody and control of the child's parents or guardian."²³¹ The current code also makes it a crime to use "force, fraud, intimidation, or threats" to "place[] or leave[] . . . a spouse or domestic partner in a house of

²²³ A person's conduct may constitute "limiting" a controlled substance, so long as that person explicitly or implicitly threatens that his or her access to those substances will be limited. For example, a person can behave coercively by giving heroin to a heroin addict to compel him to behave in a particular way if the person causes the addict to fear that his access to heroin will be limited in the future.

²²⁴ For example, compensating a person with a controlled substance may constitute "facilitation" under the current trafficking in labor or commercial sex acts statute due to the definition of "coercion."

²²⁵ For example, an employer who predicates a person's employment on not smoking tobacco or drinking alcohol may be liable for "controlling" the employee's access to the substance, and a person knowingly recruiting an employee into such circumstances may be liable for trafficking.

²²⁶ For example, under current law inducing a person who is a regular tobacco user to perform any service by offering cigarettes in exchange arguably constitutes coercion, and knowingly recruiting a person into such employment an offense punishable by up to [] years imprisonment. In addition, although alcohol is an addictive substance, it is not a controlled substance and thus is readily available. Facilitating a person's access to alcohol is not inherently coercive, as it is relatively easy for a person to obtain alcohol by other means, as compared to controlled substances.

²²⁷ D.C. Code § 22-1331 (4).

²²⁸ D.C. Code § 22-2706.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ D.C. Code §22-2704.

prostitution, or to lead a life of prostitution[.]”²³² The current code does not define the terms “threats,” “duress,” “detain,” “force,” “forcibly,” “fraud,” or “intimidation,” and there is no relevant D.C. Court of Appeals (DCCA) case law interpreting these terms. In contrast, the RCC trafficking in commercial sex act offense precisely defines the meaning of coercion or debt bondage, and clearly define what means of compelling a person to engage in a commercial sex act constitutes a criminal offense. This change improves the clarity and consistency of revised statutes.

Sixth, the RCC trafficking in commercial sex offense requires a person to act with a “knowing” culpable mental state. Statutes under Chapter 27²³³ that are replaced in whole or in part by the RCC’s forced commercial sex offense do not specify culpable mental states, and there is no relevant DCCA case law on this issue. In contrast, the RCC forced commercial sex act offense specifies one consistent, defined culpable mental state of knowing. Applying a knowledge or intent requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.²³⁴ This change improves the clarity and consistency of the criminal code, and improves the proportionality of penalties.

Seventh, the RCC trafficking in commercial sex offense creates a standardized penalty and enhancements. The offenses under Chapter 27 that are replaced by the RCC’s trafficking in commercial sex offense allow for a variety of penalties. Depending on which Chapter 27 offense a defendant was prosecuted under, conduct that would constitute trafficking in commercial sex could be subject to maximum penalties ranging from five years²³⁵ to 20 years.²³⁶ In contrast, the RCC forced commercial sex offense applies a consistent penalty and enhancements. This change improves the consistency of the criminal code, and proportionality of the revised statutes.

Beyond these seven changes to current District law, one other aspect of the revised trafficking in commercial sex acts may constitute a substantive change to current District law.

By reference to the RCC’s definition of “coercion,” trafficking in commercial sex includes trafficking a person, with recklessness as to whether that person will engage in labor or services by threatening that any person will “commit any criminal offense against persons . . . or property offenses[.]”²³⁷ The current “coercion” definition does not explicitly include threats to commit any offenses against persons or property offenses but does include threats of “force, threats of force, physical restraint, or threats of physical restraint,” conduct that appears to constitute the criminal offenses of assault or kidnapping. In addition, the current statutory definition of “coercion” generally includes “serious harm or threats of serious harm,” which broadly covers “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 perform or to continue to perform labor, services, or commercial sex acts to avoid incurring that harm.”²³⁸ The revised definition of “coercion” and the RCC crime of forced commercial sex together specify that a threat to commit any criminal offense against persons or property offense is categorically a basis for liability, even if it would otherwise be unclear

²³² D.C. Code § 22-2708.

²³³ D.C. Code § 22-2704; D.C. Code § 22-2705; D.C. Code 22-2706.

²³⁴ See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[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)”).

²³⁵ D.C. Code § 22-2705.

²³⁶ D.C. Code § 22-2704.

²³⁷ RCC § 22A-1694.

²³⁸ D.C. Code § 22-1831 (7).

whether the crime would constitute “serious harm” under the residual clause in subsection (2)(G) of the coercion definition. This change improves the clarity and consistency of the revised offenses.

Relation to National Legal Trends. The above discussed changes have mixed support from national legal trends.

First, criminalizing sex trafficking under a separate offense is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part²³⁹ (hereinafter “reformed jurisdictions”) that have a trafficking in labor or services offense, a majority criminalize trafficking in labor or services and trafficking commercial sex acts under the same statute.²⁴⁰ However, three those states’ statutes provide for higher maximum sentences when trafficking in commercial sex.²⁴¹ A minority of reformed jurisdictions’ codes include a separate trafficking in commercial sex acts offense.²⁴²

Second, changes to the trafficking in commercial sex offense made by incorporating the revised definition of coercion have mixed support in state criminal codes. Excluding fraud or deception or causing another to believe he or she is property of another from the definition of “coercion” has mixed support from national legal trends. Only six reformed jurisdictions define “coercion” for use in their respective human trafficking offenses.²⁴³ Of the jurisdictions that define “coercion,” half do not include fraud or deception.²⁴⁴ None of the jurisdictions that define “coercion” include causing a person to believe that he or she is property of a person or business.

Third, 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. Of the jurisdictions that define “coercion” all but one include controlling access to a controlled substance.²⁴⁵ However, none of these jurisdictions define “coercion” to include facilitating or controlling a person’s access to addictive substance generally.

Fourth, authorizing enhanced penalty for trafficking in commercial sex when the trafficked person is under the age of 18 is not supported by state criminal codes. Of the reformed

²³⁹ 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.

²⁴⁰ Alaska Stat. Ann. § 11.41.360; Ark. Code Ann. § 5-18-103; Del. Code Ann. tit. 11, § 787; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.110; Mont. Code Ann. § 45-5-702; N.D. Cent. Code Ann. § 12.1-41-02; Ohio Rev. Code Ann. § 2905.32; Or. Rev. Stat. Ann. § 163.266; 18 Pa. Stat. Ann. § 3011; Tex. Penal Code Ann. § 20A.02; Utah Code Ann. § 76-5-308; Wash. Rev. Code Ann. § 9A.40.100.

²⁴¹ Kan. Stat. Ann. § 21-5426; Mont. Code Ann. § 45-5-702 (heightened penalty if trafficking involves sexual intercourse without consent); Or. Rev. Stat. Ann. § 163.266.

²⁴² Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-309.

²⁴³ 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.

²⁴⁴ Ala. Code § 13A-6-151; Ind. Code Ann. § 35-42-3.5-0.5; Wash. Rev. Code Ann. § 9A.40.010.

²⁴⁵ Ala. Code § 13A-6-151; Del. Code Ann. tit. 11, § 787; IN ST 35–42–3.5–0.5; Mont. Code Ann. § 45-5-701; N.D. Cent. Code Ann. § 12.1-41-01.

jurisdictions that have codified an analogous trafficking in commercial sex acts offense, five include an enhancement if the trafficked person is under the age of 18.²⁴⁶

Finally, it is unclear whether changes made to the Chapter 27 offenses are supported by state criminal codes. Staff did not comprehensively research prostitution offenses in other jurisdictions to determine which specific coercive means of compelling a person to engage in commercial sex acts constitute a criminal offense. However, some reformed jurisdictions do not codify any forms of coerced or compelled prostitution offenses, and instead criminalize such conduct under human trafficking offenses.²⁴⁷

²⁴⁶ Del. Code Ann. tit. 11, § 787; Kan. Stat. Ann. § 21-5426; Ky. Rev. Stat. Ann. § 529.100; Ky. Rev. Stat. Ann. § 529.010; N.D. Cent. Code Ann. § 12.1-41-03; Tenn. Code Ann. § 39-13-307.

²⁴⁷ *E.g.*, Alaska Stat. Ann. §§ 11.66.100, 11.66.110, 11.66.120, 11.66.130, 11.66.135; Haw. Rev. Stat. Ann. §§ 712-1200, 712-1201, 712-1202; Ky. Rev. Stat. Ann. §§ 529.020, 529.040, 529.100.

RCC § 22A-1607 SEX TRAFFICKING OF MINORS.

- (a) A person or business commits the offense of sex trafficking of minors when that person or business:
 - (1) Knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person;
 - (2) Who will be caused to engage in a commercial sex act;
 - (3) With recklessness as to the complainant being under the age of 18.
- (b) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (c) of this section, trafficking in commercial sex is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (c) *Offense Penalty Enhancements.* The penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, the complainant was held or provides commercial sex acts for more than 180 days.
- (d) *Definitions.* The terms “knowingly,” and “recklessly” have the meanings specified in § 22A-206. The term “commercial sex act” has the meaning specified in § 22A-1601.

Commentary

***Explanatory Note.** This section establishes the sex trafficking of minors offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly recruiting, enticing, harboring, transporting, providing, obtaining, or maintaining another person, who will be caused to engage in a commercial sex act, with recklessness as to that person being under the age of 18. The revised sex trafficking in minors offense replaces the current sex trafficking of children statute²⁴⁸ and part of the abducting or enticing a child from his or her home for purposes of prostitution; harboring such child statute.²⁴⁹*

Subsection (a)(1) specifies that sex trafficking of minors requires that a person knowingly recruits, entices, harbors, transports, provides, obtains, or maintains by any means, another person. The words entice, harbor, transport, provide, obtain, and maintain by any means are intended to have the same meaning as under current law. Subsection (a)(1) specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would entice, harbor, transport, provide, obtain, and maintain another person.

Subsection (a)(2) specifies that sex trafficking of minors requires that the trafficked person would be caused to engage in a commercial sex act. Per the rule of construction under RCC § 22A-207, the “knowingly” culpable mental state also applies to this element. The accused must be practically certain that he or she is trafficking a person who will be caused to engage in a commercial sex act. There is no requirement that coercion or debt bondage cause that person to engage in a commercial sex act.

Subsection (a)(3) specifies that sex trafficking of minors requires that the accused was reckless as to the trafficked person being under the age of 18. This subsection specifies that a

²⁴⁸ D.C. Code § 22-1834.

²⁴⁹ D.C. Code § 22-2704.

“reckless” culpable mental state applies, which requires that the accused consciously disregarded a substantial risk that the trafficked person is under the age of 18.

Subsection (b) specifies relevant penalties for the offense.

Subsection (c) provides a penalty enhancement applicable to this offense. If the complainant was held or provides commercial sex acts for more than 180 days, the offense classification may be increased in severity by one class.

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

***Relation to Current District Law.** The RCC’s sex trafficking of minors offense does not make any substantive changes to current District law with respect to the current sex trafficking of minors offense. However, to the extent it replaces current D.C. Code § 22-2704, the revised sex trafficking of minors offense makes at least three substantive changes to current District law that improve the clarity and proportionality of the offense, and clearly describe all elements that must be proven, including culpable mental states.*

First, the revised sex trafficking of minors statute specifies that a “knowingly” mental state applies to result elements of the offense. A knowing culpable mental state already is required for the similar sex trafficking of children offense.²⁵⁰ However, D.C. Code § 22-2704 also makes it a crime to “secrete” or “harbor” a child under the age of 18 “for the purposes of prostitution.”²⁵¹ The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of minors statute specifies that the accused must knowingly recruit, entice, harbor, transport, provide, obtain, or maintain by any means, another person. This change improves the clarity and consistency of the revised statutes.

Second, the revised sex trafficking of minors statute specifies that the defendant must “know” that the trafficked person will be caused to engage in a commercial sex act. A knowing culpable mental state already is required for the similar sex trafficking of children offense.²⁵² However, D.C. Code § 22-2704 requires that the accused secrete or harbor another person “for the purposes of prostitution.” The current code does not specify any culpable mental state for these elements of D.C. Code § 22-2704, and there is no relevant DCCA case law. In contrast, the revised sex trafficking of minors statute specifies that the accused must know that the other person will be caused to engage in a commercial sex act. This change improves the clarity and consistency of the revised statutes.

Third, the revised sex trafficking of minors statute specifies that the defendant must be reckless as to whether the trafficked person is under the age of 18. A reckless culpable mental state already is required for the similar sex trafficking of children offense.²⁵³ However, D.C. Code § 22-2704 requires that the trafficked person is under the age of 18, but does not specify a culpable mental state for this element, and there is no relevant DCCA case law. In contrast, the revised the revised sex trafficking of minors statute specifies that the accused must be reckless as to whether the trafficked person is under the age of 18. This change improves the clarity and consistency of the criminal revised statutes.

²⁵⁰ D.C. Code § 22-1834. (“It is unlawful for an individual or a business knowingly to recruit, entice, harbor, transport, provide, obtain, or maintain by any means a person who will be caused as a result to engage in a commercial sex act knowing or in reckless disregard of the fact that the person has not attained the age of 18 years.”).

²⁵¹ D.C. Code § 22-2704 (a)(2).

²⁵² D.C. Code § 22-1834.

²⁵³ *Id.*

Fourth, the revised sex trafficking of minors statute includes a penalty enhancement if the trafficked person was held or provides commercial sex acts for more than 180 days. The similar sex trafficking of children offense contains this penalty.²⁵⁴ However, D.C. Code § 22-2704 does not provide for heightened penalties. In contrast, the revised sex trafficking in minors statute allows that the offense classification may be increased by one class if the trafficked person is held or caused to engage in commercial sex act for more than 180 days. This change improves the proportionality and consistency of the revised statutes.

Beyond these four changes to current District law, one other aspect of the revised sex trafficking of minors may constitute a substantive change to current District law.

The revised sex trafficking of minors statute requires proof that a person was reckless as to the person trafficked being under 18. The current sex trafficking of children offense requires a culpable mental state of “reckless” as to the trafficked person’s age, but does not define the term and further states “the government need not prove that the defendant knew that the person had not attained the age of 18 years” if “the defendant had a reasonable opportunity to observe the [trafficked person].”²⁵⁵ However, the RCC sex trafficking of minors statute only uses a culpable mental state of recklessness, a defined term, and omits further language about a reasonable opportunity to observe the child. Omitting this language is not intended to change current District law, as it appears that the current D.C. Code’s reference to a reasonable opportunity to observe the child is surplusage.²⁵⁶ This change improves the clarity of the revised statute.

²⁵⁴ D.C. Code § 22-1834.

²⁵⁵ D.C. Code § 22-1834 (b).

²⁵⁶ An alternative reading of the current statute sex trafficking of children is that the phrase in subsection (a) (“knowing or in reckless disregard of the fact that the person has not attained the age of 18 years”) presents two distinct means of proof and that the correct interpretation of subsection (b) of the offense (stating that knowledge needn’t be proven where there is a reasonable opportunity to observe the person trafficked) is that where there was no reasonable opportunity to observe, the requisite mental state as to age is “knowing.” Such an interpretation, if accurate, would differ from the RCC sex trafficking of minors which applies a uniform recklessness mental state to the age of the person trafficked, rather than differentiating standards based on the person’s visibility.

RCC § 22A-1608. BENEFITING FROM HUMAN TRAFFICKING.

- (a) *First Degree Benefiting from Human Trafficking.* A person or business commits the offense of first degree benefiting from human trafficking when that person or business:
- (1) Knowingly obtains any financial benefit or property;
 - (2) By participation in a group of two or more persons;
 - (3) Reckless that the group has engaged in conduct constituting forced commercial sex under RCC 22A-1604 or trafficking in commercial sex under RCC 22A-1606.
- (b) *Second Degree Benefiting from Human Trafficking.* A person or business commits the offense of second degree benefiting from human trafficking when that person or business:
- (1) Knowingly obtains any financial benefit or property;
 - (2) By participation in a group of two or more persons;
 - (3) Reckless that the group has engaged in conduct constituting forced labor or services under RCC 22A-1603 or trafficking in labor or services under RCC 22A-1605.
- (c) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808 and the offense penalty enhancement in subsection (d) of this section:
- (1) First degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree benefitting from human trafficking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (d) *Definitions.* The terms “knowingly,” and “reckless” have the meanings specified in § 22A-206.

Commentary

***Explanatory Note.** This section establishes the benefitting from human trafficking offense for the Revised Criminal Code (RCC). This offense criminalizes knowingly obtaining any benefit or property by participating, other than through the use of physical force, coercion or deception, in an association of two or more persons, with recklessness that the group is engaged in forced commercial sex, trafficking in commercial sex, forced labor, or trafficking labor or services. The offense is divided into two penalty grades, depending on whether the benefit arose from a group’s commission of forced commercial sex or sex trafficking, or forced labor or trafficking in labor or services. The benefitting from human trafficking offense replaces the benefitting financially from human trafficking statute²⁵⁷ in the current D.C. Code.*

Subsection (a)(1) specifies that first degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The terms financial benefit or property include anything of value, including services or intangible financial benefits. The subsection specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

Subsection (a)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons. The group may be comprised, at a minimum, of the accused and one other person. The group need not have a united purpose and the members need not

²⁵⁷ D.C. Code §22-1836.

reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of construction under RCC § 22A-207, the “knowingly” culpable mental state also applies to this element. The accused must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Subsection (a)(3) specifies that for first degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that constitutes either forced commercial sex under RCC 22A-1604 or trafficking in commercial sex under RCC 22A-1606. The “reckless” culpable mental state requirement requires that the accused consciously disregarded a substantial risk that the group was engaged in conduct constituting either forced commercial sex or trafficking in commercial sex. It is not required that all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.²⁵⁸ However, the accused’s participation in the group must in some way be related to the conduct that constitute forced commercial sex or trafficking in commercial sex.²⁵⁹

Subsection (b)(1) specifies that second degree benefitting from human trafficking requires that the accused knowingly obtains any financial benefit or property. The terms financial benefit or property include anything of value, including services or intangible financial benefits. The subsection specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain that he or she would obtain a financial benefit or property.

Subsection (b)(2) specifies that the accused must have obtained the property or financial benefit through participation other than through the use of physical force, coercion, or deception in a group of two or more persons. The group may be comprised, at a minimum, of the accused and one other person. The group need not have a united purpose and the members need not reach an agreement as would be required for a criminal conspiracy. The members must only be associated in fact. Per the rule of construction under RCC § 22A-207, the “knowingly” culpable mental state also applies to this element. The accused must be practically certain both that he or she is participating in a group of two or more persons, and that it is through that group association that he or she obtained the property or financial benefit.

Subsection (b)(3) specifies that for second degree benefitting from human trafficking, the accused must have been reckless as to the group engaging in conduct that constitutes either forced labor or services under RCC 22A-1603 or trafficking in labor or services under RCC 22A-1605. The subsection specifies a “reckless” culpable mental state requirement, which means that the accused consciously disregarded a substantial risk that the group was engaged in conduct constituting either forced labor or trafficking in labor or services. It is not required that

²⁵⁸ For example, if a motel owner receives payment from a customer, with recklessness that the other person is using the hotel room to coerce people into engaging in commercial sex acts, the motel owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to engage in commercial sex acts by means of coercion or debt bondage. See, *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was “associated” and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); see generally, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

²⁵⁹ For example, if A is on a bowling team with B, who engages in sex trafficking, and B uses proceeds of the sex trafficking to pay for uniforms for the bowling team, A is not guilty of benefitting from human trafficking even if he is aware that the uniforms were paid for by human trafficking. See, *United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

all members of the group, including the accused, actually engaged in conduct constituting either of these offenses.²⁶⁰ However, the accused’s participation in the group must in some way be related to the conduct that constitute forced labor or trafficking in labor or services.²⁶¹

Subsection (c) specifies the penalties applicable to this offense.

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

Relation to Current District Law. *The revised benefitting from human trafficking offense makes one main substantive change to current District law that improve the consistency and penalty proportionality of the revised offense.*

The revised benefitting from human trafficking offense is divided into two penalty grades depending on whether the group engaged in conduct constituting forced commercial sex or sex trafficking, or forced labor or trafficking in labor or services. The current benefitting financially from human trafficking offense only has one penalty grade, regardless of the predicate conduct. By contrast, the revised offense distinguishes from benefits obtained from forms of human trafficking that involve commercial sex, and those that involve labor or services. Dividing the offense into two penalty grades improves the proportionality of the revised offense. This change improves the proportionality of the revised offense.

One change to the benefitting from human trafficking offense statute is clarificatory in nature and is not intended to substantively change current District law.

The revised statute no longer refers to participation in a “venture,” and instead requires that the accused participated in a group of two or more persons. Omission of the word “venture” is clarificatory in nature and is not intended to change current District law.

Relation to National Legal Trends. *The above discussed change to District law is not supported by national legal trends.*

Dividing the benefitting from human trafficking offense into two penalty grades based on whether the accused benefitted from trafficking in labor or services, or from trafficking in commercial sex is not supported by state criminal codes. Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part²⁶² (hereinafter “reformed jurisdictions”) that have an analogous benefitting from

²⁶⁰ For example, if a building owner receives rent payment from a customer, with recklessness that the other person is using the building to run a sweatshop in which people are coerced into providing labor, the building owner could be convicted of benefitting from human trafficking even though the hotel owner did not directly cause any one to provide labor by means of coercion or debt bondage. *See, Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (motel owner was “associated” and obtained benefit when he rented a room to person who used that room to coerce women into performing commercial sex acts); *see generally*, John Cotton Richmond, *Human Trafficking: Understanding the Law and Deconstructing Myths*, 60 St. Louis U. L.J. 1, 9 (2015).

²⁶¹ For example, if A is on a bowling team with B, who engages in forced labor, B uses proceeds of the forced labor to pay for uniforms for the bowling team, A is not guilty of benefitting from human trafficking even if he is aware that the benefits are paid for by forced labor. *See, United States v. Afyare*, 632 F. App’x 272, 286 (6th Cir. 2016) (unpublished opinion) (holding that the *group* of which the accused is a part must engage in human trafficking).

²⁶² 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.

human trafficking offense, only three²⁶³ distinguish between benefitting from labor trafficking or sex trafficking.

²⁶³ Kan. Stat. Ann. § 21-5426; Mo. Ann. Stat. § 566.206; Mo. Ann. Stat. § 566.209; Tenn. Code Ann. § 39-13-308, Tenn. Code Ann. § 39-13-309.

RCC § 22A-1609. MISUSE OF DOCUMENTS IN FURTHERANCE OF HUMAN TRAFFICKING.

- (a) *Offense Definition.* A person or business commits the offense of misuse of documents in furtherance of human trafficking when that person or business:
- (1) Knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, including a passport or other immigration document of any person;
 - (2) With intent to prevent or restrict, or attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person.
- (b) *Penalty.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808, misuse of documents in furtherance of human trafficking 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 “with intent” have the meanings specified in § 22A-206. The terms “commercial sex act,” “labor,” and “service” have the meanings specified in § 22A-1601.

Commentary

***Explanatory Note.** This section establishes the misuse of documents in furtherance of human trafficking offense (“misuse of documents”) for the Revised Criminal Code (RCC). This offense requires that the accused knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document, without lawful authority, with intent to prevent or restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex act by that person. The misuse of documents in furtherance of human trafficking offense replaces the unlawful conduct with respect to documents in furtherance of human trafficking statute²⁶⁴ in the current D.C. Code.*

Subsection (a)(1) specifies that misuse of documents requires that a person knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported government identification document of another person, including a passport or other immigration document. The terms “destroys,” “conceals,” “removes,” “confiscates,” “possesses,” and “actual or purported government identification document” are intended to have the same meaning as under current law. The subsection specifies that a “knowingly” culpable mental state applies, which requires that the accused was practically certain both that an actual or purported document was involved, and that he or she would destroy, conceal, remove, confiscate, or possesses the document.

Subsection (a)(2) specifies that misuse of documents requires that the accused acted with intent to prevent or restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The accused must also lack lawful authority to do so.²⁶⁵ Misuse of documents requires that the accused intends to restrict or prevent the liberty of the same person whose identification documents were destroyed, concealed, removed, confiscated, or possessed. “Intent” is defined under RCC § 22A-206 and requires that the accused was practically certain or consciously desired to prevent or restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a

²⁶⁴ D.C. Code §22-1835.

²⁶⁵ For example, when a law enforcement officer lawfully confiscates a criminal defendant’s passport to prevent the defendant from fleeing the country, the officer has not committed misuse of documents.

commercial sex acts by that person. However, the accused need not actually succeed in preventing or restricting the persons liberty to move or travel.

Subsection (b) specifies the penalty applicable to this offense.

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

Relation to Current District Law. *Three aspects of the revised misuse of documents offense may constitute substantive changes to current District law.*

First, the revised misuse of documents offense specifies that the offense requires “knowingly” destroying, concealing, removing, confiscating, or possessing a government identification document. The current statute clearly requires that the destruction, concealing, etc. of a document be done “knowingly,” but the statute is ambiguous whether the “knowingly” mental state applies also to the nature of the document as a form of government identification. D.C. Court of Appeals (DCCA) case law does not address the issue.²⁶⁶ By contrast, the revised offense clarifies the culpable mental state as to the nature of the document. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.²⁶⁷ This change improves the clarity of the revised statute.

Second, the revised misuse of documents offense specifies that the offense requires that that the accused acted “with intent” to restrict the person’s liberty to move or travel in order to maintain the labor, services, or performance of a commercial sex acts by that person. The current statute does not specify any culpable mental state for this element, but merely requires that the accused acted “to prevent or restrict, or attempt to prevent or restrict . . . the person’s liberty to move or travel[.]”²⁶⁸ Case law does not address the issue. By contrast, the revised offense clarifies that intent is the culpable mental state as to goal of preventing or restricting movement. This change improves the clarity of the revised statute.

Third, the revised misuse of documents offense requires that the accused destroys, conceals, removes, confiscates, or possesses any actual or purported *government* identification document. The current statute is ambiguous as to whether non-government identification documents are covered, and there is no relevant DCCA case law.²⁶⁹ By contrast, the revised offense clarifies that this offense only applies to government issued identification documents.²⁷⁰ This change improves the clarity of the revised statute.

Relation to National Legal Trends. *Requiring that the revised misuse of documents offense involves a government identification document is supported by national legal trends. Of the 29 jurisdictions that have comprehensively reformed their criminal codes influenced by the*

²⁶⁶ Although the statute and DCCA case law do not specify a culpable mental state, the Redbook Jury Instruction states that defendant must have “knowingly” destroyed, concealed, removed, or possessed an identification document. D.C. Crim. Jur. Instr. § 4-513.

²⁶⁷ See, *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (“[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)”).

²⁶⁸ D.C. Code § 22-1835.

²⁶⁹ The legislative history only notes that this offense makes it illegal to destroy, conceal, etc. a person’s “official papers[.]” Council of the District of Columbia Committee on Public Safety and the Judiciary Committee Report on Bill 18-70 “Prohibition Against Human Trafficking Amendment Act of 2010” at 8. March 9, 2010.

²⁷⁰ For example, destroying a person’s employee identification badge issued by a private employer does not constitute misuse of documents.

Model Penal Code (MPC) and have a general part²⁷¹ (reformed jurisdictions), only four codify an analogous misuse of documents offense. However, all four specify that the offense must involve a *government* identification document.²⁷² In addition, nearly all of the remaining reformed jurisdictions include destroying, concealing, removing, confiscating, or possessing a *government* identification document to compel a person to provide labor or services as a form of forced labor or services.²⁷³

²⁷¹ 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.

²⁷² Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; Ohio Rev. Code Ann. § 2905.33; 18 Pa. Stat. Ann. § 3014.

²⁷³ Ala. Code § 13A-6-151; Ark. Code Ann. § 5-18-102; Ariz. Rev. Stat. Ann. § 13-1308; Colo. Rev. Stat. Ann. § 18-3-502; Del. Code Ann. tit. 11, § 787; Haw. Rev. Stat. Ann. § 707-781; 720 Ill. Comp. Stat. Ann. 5/10-9; Ind. Code Ann. § 35-42-3.5-0.5; Kan. Stat. Ann. § 21-5426; Minn. Stat. Ann. § 609.281; Mo. Ann. Stat. § 566.215; N.H. Rev. Stat. Ann. § 633:7; N.J. Stat. Ann. § 2C:13-8; Ohio Rev. Code Ann. § 2905.33; Or. Rev. Stat. Ann. § 163.263; 18 Pa. Stat. Ann. § 3014; Tenn. Code Ann. § 39-13-301; Tex. Penal Code Ann. § 20A.02; Wis. Stat. Ann. § 940.302.

RCC § 22A-1610. SEX TRAFFICKING PATRONAGE.

- (a) *First Degree Sex Trafficking Patronage.* A person commits the offense of first degree sex trafficking patronage when that person:
 - (1) Knowingly engages in a commercial sex act;
 - (2) When coercion or debt bondage was used to cause the person to submit to or engage in the commercial sex act;
 - (3) With recklessness that the complainant is under 18 years of age.
- (b) *Second Degree Sex Trafficking Patronage.* A person commits the offense of first degree sex trafficking patronage when that person:
 - (1) Knowingly engages in a commercial sex act;
 - (2) When coercion or debt bondage was used to cause the person to submit to or engage in the commercial sex act.
- (c) *Third Degree Sex Trafficking Patronage.* A person commits the offense of third degree sex trafficking patronage when that person:
 - (1) Knowingly engages in a commercial sex act;
 - (2) When the complainant was recruited, enticed, harbored, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act;
 - (3) With recklessness that the complainant is under 18 years of age.
- (d) *Penalties.* Subject to the general penalty enhancements in RCC §§ 22A-805 - 22A-808:
 - (1) First degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (2) Second degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
 - (3) Third degree sex trafficking patronage is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
- (e) *Definitions.* The terms “knowingly,” and “reckless” have the meanings specified in § 22A-206. The terms “coercion,” “commercial sex act,” “debt bondage” have the meanings specified in § 22A-1601.

Commentary

***Explanatory Note.** This section establishes the sex trafficking patronage offense for the Revised Criminal Code (RCC). The sex trafficking patronage offense is divided into three penalty gradations. All grades require that the accused knowingly engage in a commercial sex act, and the penalty grades are distinguished based on the presence of one or more additional circumstances relating to whether the other party to the commercial sex act had been coerced or trafficked, and whether the other party was under the age of 18. There is no analogous offense under current District law. The current D.C. Code does not distinctly criminalize engaging in commercial sex acts with human trafficking victims.²⁷⁴*

²⁷⁴ It is possible that some conduct that constitutes first and second degree sex trafficking patronage in the RCC could be prosecuted under the current D.C. Code as sexual abuse under an accomplice theory. Under this theory, by making a payment, the patron/accomplice would have encouraged the principal to coerce the commercial sex act, with purpose to encourage the principal to succeed in coercing the commercial sex act.

Subsection (a) establishes the elements for first degree sex trafficking patronage. Subsection (a)(1) specifies that the defendant must engage in a “commercial sex act,” a defined term.²⁷⁵ The subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁷⁶ which here requires that the defendant was practically certain that he or she would engage in a commercial sex act.

Subsection (a)(2) specifies that first degree sex trafficking patronage requires that “coercion,” or “debt bondage,” both defined terms,²⁷⁷ was used to cause the other person to engage in the commercial sex act with the accused. The subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁷⁸ which here requires that the accused was practically certain that coercion was used to cause the other person to engage in the commercial sex act.

Subsection (a)(3) specifies that first degree sex trafficking patronage requires that the accused was reckless as to whether the other person was under the age of 18. “Recklessness,” a defined term,²⁷⁹ here requires that the defendant consciously disregarded a substantial risk that the other person was under the age of 18.

Subsection (b) establishes the elements for second degree sex trafficking patronage. Subsection (b)(1) specifies that the defendant must engage in a commercial sex act. The subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁸⁰ which here requires that the defendant was practically certain that he or she would engage in a commercial sex act.

Subsection (b)(2) specifies that second degree sex trafficking patronage requires that “coercion,” or “debt bondage,” both defined terms²⁸¹, was used to cause the other person to engage in the commercial sex act with the accused. The subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁸² which here requires that the accused was practically certain that coercion was used to cause the other person to engage in the commercial sex act.

Subsection (c) establishes the elements for third degree sex trafficking patronage. Subsection (c)(1) specifies that the defendant must engage in a commercial sex act. The

It also is possible that some conduct that constitutes third degree sex trafficking patronage in the RCC could also be prosecuted under the current D.C. Code as either first or second degree child sexual abuse, or first or second degree sexual abuse of a minor. A patron who engages in a commercial sex act with a person under 16 years of age would be guilty of either first degree child sexual abuse (if a sexual act) or second degree child sexual abuse (if a sexual contact). A patron who engages in a commercial sex act with a person 16 or 17 years of age would be guilty of sexual abuse of a minor, however, only if he or she is in a “significant relationship” (e.g. a teacher, religious leader, or uncle) to the minor. Conduct constituting third degree sex trafficking patronage may also be prosecuted under a variety of other sex offenses (e.g. misdemeanor sexual abuse of a child or minor; sexual abuse of a secondary education student) in the current D.C. Code in some circumstances.

However, no current D.C. Code offenses distinctly account for the fact that a minor who engaged in commercial sex was trafficked, or that a person of any age engaged in commercial sex was trafficked by means of coercion,

²⁷⁵ RCC § 22A-1601 (2).

²⁷⁶ RCC § 22A-206 (b).

²⁷⁷ RCC § 22A-1601 (2).

²⁷⁸ RCC § 22A-206 (b).

²⁷⁹ RCC § 22A-206 (d).

²⁸⁰ RCC § 22A-206 (b).

²⁸¹ RCC § 22A-1601.

²⁸² RCC § 22A-206 (b).

subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁸³ which here requires that the defendant was practically certain that he or she would engage in a commercial sex act.

Subsection (c)(2) specifies that third degree sex trafficking patronage requires that the other person had been recruited, enticed, harbored, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act. The subsection specifies that a “knowingly” culpable mental state applies, a defined term²⁸⁴ which here requires that the defendant was practically certain that the other person had been recruited, enticed, harbored, transported, provided, obtained, or maintained for the purpose of causing the person to submit to or engage in the commercial sex act.

Subsection (c)(3) specifies that third degree sex trafficking patronage requires that the accused was reckless as to whether the other person was under the age of 18. This subsection specifies that a “recklessness” culpable mental state applies, which requires that the defendant consciously disregarded a substantial risk that the other person was under the age of 18.

Relation to Current District Law. *The sex trafficking patronage offense changes District law in one main way, by criminalizing the knowing patronage of victims of trafficking in commercial sex and forced commercial sex.*

This offense fills a gap in current District law. Under the current D.C. Code, engaging in commercial sex acts with another, with knowledge that the other person has been coerced into engaging in the commercial sex act, or was trafficked for the purposes of engaging in commercial sex acts, is not distinctly criminalized.

Relation to National Legal Trends. *Codifying a sex trafficking patronage offense is not supported by national legal trends.*

Of the twenty-nine states that have comprehensively reformed criminal codes influenced by the Model Penal Code (MPC) and have a general part²⁸⁵ only five have codified an analogous sex trafficking patronage offense.²⁸⁶ The American Law Institute’s September 2018 draft proposal for human trafficking offenses includes a sex trafficking patronage offense.²⁸⁷

²⁸³ RCC § 22A-206 (b).

²⁸⁴ *Id.*

²⁸⁵ 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.

²⁸⁶ Ark. Code Ann. § 5-18-104; Mont. Code Ann. § 45-5-705; N.D. Cent. Code Ann. § 12.1-41-05; S.D. Codified Laws § 22-49-4; Tenn. Code Ann. § 39-13-309.

²⁸⁷ Model Penal Code: Sexual Assault and Related Offenses. Preliminary Draft No. 9, September 14, 2018. Section 213.9(2). The ALI project to revise the Model Penal Code’s sex offenses is an ongoing project and its drafts may be subject to change.

RCC § 22A-1611. FORFEITURE.

- (a) In imposing sentence on any individual or business convicted of a violation of this chapter, the court shall order, in addition to any sentence imposed, that the individual or business shall forfeit to the District of Columbia:
 - (1) Any interest in any property, real or personal, that was used or intended to be used to commit or to facilitate the commission of the violation; and
 - (2) Any property, real or personal, constituting or derived from any proceeds that the individual or business obtained, directly or indirectly, as a result of the violation.
- (b) The following shall be subject to forfeiture to the District of Columbia and no property right shall exist in them:
 - (1) Any property, real or personal, used or intended to be used to commit or to facilitate the commission of any violation of this chapter.
 - (2) Any property, real or personal, which constitutes or is derived from proceeds traceable to any violation of this chapter.

Commentary

***Explanatory Note.** This section establishes forfeiture rules for property involved in violations of offenses under this chapter. In addition to any penalties authorized by statutes in this chapter, a court shall order any persons or businesses convicted of an offense under this chapter to forfeit property used or intended to be used to commit or facilitate commission of an offense under this chapter, or any property obtained as a result of commission of an offense under this chapter.*

***Relation to Current District Law.** This subsection is identical to current D.C. Code § 22-1838, and is not intended to change current District law.*

RCC § 22A-1612. REPUTATION OR OPINION EVIDENCE.

In a criminal case in which a person or business is accused of trafficking in commercial sex, as prohibited by § 22A-1606; sex trafficking of minors, as prohibited by § 22A-1607; or benefitting from human trafficking, as prohibited by § 22A-1608; reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. Evidence of an alleged victim's past sexual behavior other than reputation or opinion evidence also is not admissible, unless such evidence other than reputation or opinion evidence is admitted in accordance with § 22-3022(b), and is constitutionally required to be admitted.

Commentary

***Explanatory Note.** This section establishes evidentiary rules that prohibits the use of reputation or opinion evidence of past sexual behavior of an alleged victim in prosecutions for trafficking in commercial sex, as prohibited by § 22A-1606; sex trafficking of minors, as prohibited by § 22A-1607; or benefitting from human trafficking, as prohibited by § 22A-1608. This section is nearly identical to current D.C. Code § 22-1839.*

***Relation to Current District Law.** One aspect of the revised reputation or opinion evidence statute may constitute a substantive change to current District law.*

The revised statute states that when a “person or business” is accused of an offense listed in the statute, reputation or opinion evidence of the past sexual behavior of the alleged victim is not admissible. The current statute only refers to a *person* being accused of an offense, and does not explicitly apply to businesses accused of human trafficking offenses. By contrast, the revised statute clarifies that the reputation or opinion evidence rules apply when a business is accused of offenses listed under the statute. It is unclear whether revising the statute to explicitly include businesses, as the term “person” as used in the current statute is undefined.²⁸⁸ The statute does not specify whether the term “person” includes both natural and legal persons, and there is no relevant D.C. Court of Appeals case law on point.

One change to the revised statute is clarificatory in nature and is not intended to substantively change District law. The current statute cross references statutes in the current D.C. Code. The revised statute changes the cross references other statutory provisions to match the revised human trafficking offenses in the RCC. The RCC evidentiary rule applies to RCC §§ 22A-1606, 22-1607, and 22-1608, instead of current D.C. Code §§ 22-1833, 22-1834, and 22-1836. This is a technical change that does not otherwise change the reputation or opinion evidence statute.

²⁸⁸ Cf. D.C. Code §22-3201 (2A). “‘Person’ means an individual (whether living or dead), trust, estate, fiduciary, partnership, company, corporation, association, organization, union, government department, agency, or instrumentality, or any other legal entity.”

RCC § 22A-1613. CIVIL ACTION.

- (a) An individual who is a victim of an offense prohibited by § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 may bring a civil action in the Superior Court of the District of Columbia. The court may award actual damages, compensatory damages, punitive damages, injunctive relief, and any other appropriate relief. A prevailing plaintiff shall also be awarded attorney's fees and costs. Treble damages shall be awarded on proof of actual damages where a defendant's acts were willful and malicious.
- (b) Any statute of limitation imposed for the filing of a civil suit under this section shall not begin to run until the plaintiff knew, or reasonably should have known, of any act constituting a violation of § 22A-1603, § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1607, § 22A-1608, or § 22A-1609 or until a minor plaintiff has reached the age of majority, whichever is later.
- (c) If a person entitled to sue is imprisoned, insane, or similarly incapacitated at the time the cause of action accrues, so that it is impossible or impracticable for him or her to bring an action, then the time of the incapacity is not part of the time limited for the commencement of the action.
- (d) A defendant is estopped to assert a defense of the statute of limitations when the expiration of the statute is due to conduct by the defendant inducing the plaintiff to delay the filing of the action.

Commentary

***Explanatory Note.** This section authorizes victims of offenses under RCC § 22A-1604, § 22A-1605, § 22A-1606, § 22A-1606, § 22A-1607, § 22A-1608, § 22A-1609 to bring a civil action in D.C. Superior Court for damages and injunctive relief. This section is nearly identical to current D.C. Code § 22-1840.*

***Relation to Current District Law.** One change to the revised statute is clarificatory in nature and is not intended to substantively change District law.*

The revised statute changes cross references to other statutory provisions to match the revised human trafficking offenses in the RCC. The current statute cross references statutes in the current D.C. Code. The revised statute authorizes victims of offenses defined under RCC §§ 22A-1603, 22A-1604, 22A-1605, 22A-1606, 22A-1607, 22A-1608, and 22A-1609 to bring civil actions. This is a technical change that does not otherwise change the civil action statute.