First Draft of Report #28:
Stalking

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

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report No. 28, *Stalking*, is December 19, 2018 (twelve weeks from the date of issue). Oral comments and written comments received after December 19, 2018, will not be reflected in the Second Draft of Report No. 28. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 22A-1801. STALKING.

(a) *Stalking.* A person commits stalking when that person:
  (1) Purposely engages in a pattern of conduct directed at a specific individual that consists of any combination of the following:
    (A) Physically following or physically monitoring;
    (B) Communicating to the individual, by use of a telephone, mail, delivery service, electronic message, in person, or any other means, after knowingly having received notice from the individual, directly or indirectly, to cease such communication; or
    (C) In fact: committing a threat as defined in § 22A-1204, a predicate property offense, a comparable offense in another jurisdiction, or an attempt to commit any of these offenses;
  (2) Either:
    (A) With intent to cause that individual to:
      (i) Fear for his or her safety or the safety of another person; or
      (ii) Suffer significant emotional distress; or
    (B) Negligently causing that individual to:
      (i) Fear for his or her safety or the safety of another person; or
      (ii) Suffer significant emotional distress.

(b) *Penalty*. Stalking 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, one or more of the following is proven:
  (1) The person, in fact, was subject to a court order or condition of release prohibiting contact with the specific individual;
  (2) The person, in fact, has one prior conviction in any jurisdiction for stalking any person within the previous 10 years;
  (3) The person recklessly disregarded that the individual was under 18 years of age and the actor was, in fact, 18 years of age or older and at least 4 years older than the individual; or
  (4) The person caused more than $2,500 in financial injury.

(d) *Definitions*. In this section:
  (1) The terms "purposely", "with intent", "recklessly", and "negligently" have the meanings specified in § 22A-206; the term "in fact" has the meaning specified in § 22A-207;
  (2) The term "comparable offense" means a criminal offense committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of the corresponding District criminal threat offense or predicate property offense;
  (3) The term "pattern of conduct" means conduct on two or more separate occasions, with continuity of purpose. Where conduct is of a continuing nature, each 24-hour period constitutes one occasion.

(4) The term "financial injury" means the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the specific individual, a member of the specific individual's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the specific individual and includes:
  (A) The costs of replacing or repairing any property that was taken or damaged;
  (B) The costs of clearing the specific individual's name or his or her credit, criminal, or any other official record;
  (C) Medical bills;
  (D) Relocation expenses;
  (E) Lost employment or wages; and
  (F) Attorney's fees.

(5) The term "physically monitoring" means being in the immediate vicinity of the specific individual's residence, workplace, or school to detect the individual's whereabouts or activities;

(6) The term "predicate property offense" means:
  (A) Theft as defined in § 22A-2101;
  (B) Unauthorized use of property as defined in § 22A-2102;
  (C) Forgery as defined in § 22A-2204;
  (D) Identity theft as defined in § 22A-2205;
  (E) Arson as defined in § 22A-2501;
  (F) Damage to property as defined in § 22A-2503;
  (G) Graffiti as defined in § 22A-2504;
  (H) Trespass as defined in § 22A-2601; or
  (I) Trespass of motor vehicle as defined in § 22A-2602;

(7) The term "safety" means ongoing security from unlawful intrusions on one's bodily integrity or bodily movement; and

(8) The term "significant emotional distress" means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling.

(e) *Exclusions from Liability.*

(1) Nothing in this section shall be construed to prohibit conduct permitted by the U.S. Constitution or the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al.

(2) A person shall not be subject to prosecution under this section for a communication that:
  (A) Is directed to a government official, candidate for elected office, or employee of a business that serves the public;
  (B) While that person is involved in their official duties; and
  (C) Expresses an opinion on a political or public matter.

(3) A person shall not be subject to prosecution under this section for conduct, if:

(A) The person is a journalist, law enforcement officer, licensed private investigator, attorney, process server, *pro se* litigant, or compliance investigator; and

(B) Is acting within the reasonable scope of his or her official duties.

(f) *Defenses*.

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

(A) A parent, legal guardian, or other person who has assumed the obligations of a parent engaged in conduct constituting stalking of the person's minor child;

(B) The conduct constituting stalking was for the purpose of exercising discipline; and

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

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

COMMENTARY

Explanatory Note. *This section establishes the stalking offense for the Revised Criminal Code (RCC). The offense prohibits patterns of behavior that significantly intrude on a person's privacy or autonomy and threaten a long-lasting impact on a person's quality of life. The offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 – 3135.*

Subsection (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a specific person. "Purposely" a term defined in RCC § 22A-206, here requires a conscious desire to cause a *pattern* of misconduct. "Pattern of conduct" is defined in subsection (d)(4) to mean conduct on two or more separate occasions, with continuity of purpose.[1] A pattern does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[2] and must consist of one or more of the activities listed in subsections (a)(1)(A), (a)(1) (B), and (a)(1)(C). The behavior must be directed at a specific person, not merely be disturbing to the general public.[3] The pattern may be established by any combination of conduct described in subsections (a)(1)(A), (a)(1) (B), and (a)(1) (C).

Subsection (a)(1)(A) provides that one means of committing stalking is physically following or physically monitoring a specific individual. The term "physically

[1] In addition, where conduct is of a continuing nature, each 24-hour period constitutes one occasion. RCC § 22A-1801(d)(4).

[2] The common purpose does not have to be nefarious. For example, a person might persistently follow someone with the goal of winning their affection.

[3] Conduct in a public place that causes a person to reasonably fear a crime is likely to occur may be punishable as disorderly conduct. RCC § 22A-4001.

following" means maintaining close proximity to a person as they move from one location to another.[4] "Physically monitoring" is defined in subsection (d)(5) and means appearing in the immediate vicinity of someone's residence, workplace, or school, to detect the person's whereabouts or activities. Such following or monitoring may be accomplished by means of a third party,[5] however the revised stalking statute does not reach unauthorized electronic surveillance.[6] Per the rule of construction in RCC § 22A-207, the "purposely" culpable mental state also applies to this element. The accused must consciously desire to physically follow or monitor the specific individual.[7]

Subsection (a)(1)(B) provides that another means of committing stalking is to persistently communicate to someone after receiving notice to stop. Per the rule of construction in RCC § 22A-207, the "purposely" culpable mental state requires that the accused must consciously desire to communicate to the specified individual. The method of communication is irrelevant, whether it be in person speech, electronic correspondence, or messages sent through a third party.[8] The government must prove that the accused previously received notice, directly or indirectly, to cease such communication and that the offender purposely disregarded that directive.[9] A person may convey their desire to not be contacted either directly, by telling the person to stop, or indirectly through an attorney or government entity.[10] In some instances, blocking electronic communications may also suffice to notify to the accused that further communication is unwelcome.[11] The directive must be to cease all communication by the specified means,[12] not merely to cease offensive contact.[13] The accused must know, a defined term requiring practical certainty,[14] that he or she had previously received notice to cease such communication. Subsection (a)(1)(B) does not reach communications *about* the specific individual to other (third) persons.[15] This restriction on

[4] Examples include walking near the person on the street and driving near the person in a vehicle.

[5] See RCC § 22A-211 (Liability for causing crime by an innocent or irresponsible person).

[6] [Unauthorized electronic surveillance will be addressed in a separate RCC provision.] *See also* D.C. Code § 22-3531, Voyeurism, which makes it unlawful to secretly monitor a person who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity.

[7] For example, the accused must act with the purpose of appearing at the target's home, office, or school and with the purpose of watching them. A person who does not know the location is one that the target frequents or who knowing but not purposely frequents a location where the target is does not commit a stalking offense.

[8] Consider, for example, Person A contacts Person B's family, friends, coworkers, and neighbors to complain about unpaid alimony. If Person A simply voices a negative opinion about Person B, that speech will not amount to stalking. However, if Person A repeatedly instructs Person B's friends to relay a message to Person B, with the intent or effect of frightening Person B, Person A has committed the offense of stalking.

[9] Consider, for example, Person A calls a phone number intending to reach Person B and Person C unexpectedly answers the phone. Person A did not purposely engage in a pattern of stalking conduct.

[10] For example, the Federal Trade Commission maintains a Do Not Call registry.

[11] On some communication platforms, electronic blocking is obvious to the person who has been blocked. On other platforms, the user's profile may appear to vanish. On others, the blocking (or muting) is not made apparent to the person who was blocked at all.

[12] E.g., "Do not call me again."

[13] E.g., "Do not call me 'a jerk' again."

[14] RCC § 22A-206.

[15] For example, a person who posts disparaging remarks about a former spouse on her own Facebook page, without tagging the subject of the post, does not commit stalking. *But see Matter of Welfare of A.J.B.*, 910

communication is content-neutral, and prohibits all communications after receiving notice to stop, irrespective of tenor and tone.

Subsection (a)(1)(C) provides that a third means of committing stalking is to engage in a specified crime. The specified crimes include a criminal threat as defined in the RCC and "predicate property offenses," a defined term referring to various property offenses in the RCC or comparable offenses in other jurisdictions. An attempt to commit any of the listed crimes also satisfies subsection (a)(1)(C). "In fact," a defined term, is used to indicate that there is no culpable mental state requirement as to whether the accused committed one of the specified offenses. The use of "in fact" does not change the culpable mental states required in the specified offenses.

Subsection (a)(2) requires that the conduct described in subsection (a)(1) have either the intent or the effect of causing the victim to experience fear or distress. Under (a)(2)(A), a person commits stalking when they act with intent to cause someone fear or significant distress, even if the target is unaffected.[16] "With intent" is a defined term that here means the actor believes that the pattern of conduct is practically certain to cause the target to suffer emotional harm.[17] Under (a)(2)(B), a person commits stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[18] "Negligently" is a defined term and means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[19] and grossly deviates from the standard of care that a reasonable person would observe in that situation.[20] Subsections (a)(2)(A)(i) and (a)(2)(B)(i) specify fear of physical harm to any person[21] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is a defined term that refers to ongoing security from intrusions on one's bodily integrity or bodily movement. Subsections (a)(2)(A)(ii) and (a)(2)(B)(ii) also provide that "significant emotional distress" is a second type of emotional injury that may establish stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering.

Subsection (b) provides the penalties for the offense. [RESERVED.]

N.W.2d 491 (Minn. Ct. App. 2018) (concluding that tweets tagging a specific individual are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts). Note that communications about the specific individual that amount to a criminal threat may constitute stalking conduct per subsection (a)(1)(C).

[16] Consider, for example, Person A sends multiple messages to Person B threatening to "beat him up." Person B is unafraid because he has been specially trained as a fighter. Person A has, nevertheless, may have committed a stalking offense against Person B.

[17] RCC § 22A-206.

[18] Consider, for example, Person A secretly follows Person B from place to place, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has committed stalking, if Person B's fear was objectively reasonable. Consider also, a person incessantly contacts an ex-lover after being asked to stop, with the intention of reconciling. Although the person did not intend to cause any undue fear or distress, the unwanted communication nevertheless amounts to stalking, if it negligently does cause such a harm.

[19] For example, if the actor reasonably but mistakenly believes that the victim of the stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22A-208. The fact that another reasonable person might find the same consequence alarming is inconsequential.

[20] RCC § 22A-206.

[21] This includes fear that the stalker will physically harm the victim, a member of the victim's family, or a stranger.

Subsection (c) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven, the maximum penalty is increased by one class.

Subsection (c)(1) authorizes an enhancement when the defendant was subject to a court order or condition of release prohibiting contact with the specific individual at the time the elements of the stalking offense were completed. Per the rules of interpretation in RCC § 22A-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether a court order or condition of release prohibited contact with the complaining witness.[22] The term "court order" includes any judicial directive, oral or written, that clearly restricts contact with the stalking victim.[23] A condition of release may be imposed by a court or by the United States Parole Commission.[24]

Subsection (c)(2) allows a sentence increase for any person who has a prior stalking conviction within ten years of the instant offense. This includes any criminal offense against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a District criminal offense in subsection (a).

Subsection (c)(3) establishes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor must recklessly disregard the fact that the victim is a minor. The term "recklessly" is defined in the revised code and here means the person must be aware of a substantial risk that the complainant is under 18 years of age and grossly deviate from the standard of care that a reasonable person would observe.[25] Per the rules of interpretation in RCC § 22A-207, the phrase "in fact" indicates that the accused is strictly liable with respect to whether he or she is an adult who is at least four years older than the complainant. It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was something less than four years.

Subsection (c)(4) provides an enhancement for stalking conduct that causes the affected persons to incur expenses that amount to more than $2,500. The term "financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the stalking.[26] This provision does not affect the sentencing court's discretion with respect to ordering restitution. The government's decision to not seek a penalty enhancement will not preclude the government from seeking reimbursement under the restitution statute.[27]

Subsection (d)(1) cross-references applicable definitions located elsewhere in the RCC.

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[22] A good faith belief that the order was expired or vacated is not a defense.

[23] Examples include stay away orders, civil protection orders, family court orders, civil injunctions, and consent decrees. The order must clearly address prohibitions on contact with the specified person. An order to stay away from a particular location, without reference to the specific individual will not suffice.

[24] Regarding the legal authority to impose such conditions, see *Hunt v. United States*, 109 A.3d 620, 621-22 (D.C. 2014).

[25] *See* RCC § 22A-206. For example, a 20-year-old who knows that the target of the stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 16 years old, absent evidence to the contrary. On the other hand, a person may engage in pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[26] RCC § 22A-1801(d)(4).

[27] *See* D.C. Code § 16-711.

Subsection (d)(2) defines "comparable offense" to mean a criminal offense for a threat or predicate property offense committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a District criminal threat offense in RCC § 22A-1204. This definition clarifies that if the pattern of stalking conduct includes a criminal act in another jurisdiction, the crime must be one that is prohibited by District law.

Subsection (d)(3) provides that the term "pattern of conduct" means conduct on two or more separate occasions, evidencing a continuity of purpose.[28] Where conduct is of a continuing nature, each 24-hour period constitutes one occasion. The phrase "separate occasions" clarifies that the repeated behavior must be distant enough in time to constitute a new effort or determination by the actor.[29] The "continuity of purpose" requirement effectively excludes behavior, albeit habitual, that is interrupted by reconciliation,[30] provocation,[31] or judicial intervention.[32] However, "continuity of purpose" does not require that the actor's conduct on each occasion or the actor's goal on each occasion be identical.[33]

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[28] The common purpose does not have to be nefarious, such as asserting physical dominance or intruding on the victim's peace and tranquility. *See. e.g., Sydney H. v. Wyatt D.*, No. C064329, 2012 WL 1024661, at *4 (Cal. Ct. App. Mar. 27, 2012). On the contrary, a person might persistently follow someone with the goal of winning their affection.

[29] The determination of whether activity constitutes a single occasion or a pattern is fact-sensitive. Multiple acts may constitute a single occasion, whether the acts are the same or different. Consider, for example, a person who commits stalking by sending a series of unwanted text messages. Sending 50 back-to-back text messages may constitute a single occasion, whereas, sending only five text messages days apart may constitute a pattern. *See, e.g., People v. Cahill*, No. H025511, 2004 WL 1551602, at *4 (Cal. Ct. App. July 9, 2004). Consider also a person who within a thirty-minute timespan secretly follows a spouse from work, learns of an affair, and immediately scratches a threatening message into the side of the spouse's car. This behavior likely amounts to multiple crimes, including threats (RCC § 22A-1204) and criminal damage to property (RCC § 22A-2503). However, it amounts to only one occasion for purposes of the stalking statute and does not, by itself, establish a pattern of conduct.

[30] Consider, for example, two people who are in an on-again-off-again romantic relationship; Person A ignores Person B's directive to not contact him again, calls him on the phone, and convinces him to get back together again. Years later, during an unrelated argument, A commits a predicate property offense against B. Because the two events were interrupted by a period of reconciliation, the pattern of conduct does not evidence continuity of purpose. *See* Voluntary D.C. Sentencing Guidelines ("DCSG") R. 7.10. (Generally, "[actions] are part of a single event if they were committed at the same time and place or have the same nucleus of facts. [Actions] are part of multiple events if they were committed at different times and places or have a different nucleus of facts.").

[31] Consider, for example, two sisters who do not get along, but continue to interact; Sister A threatens Sister B, then Sister B assaults Sister A, then Sister A destroys Sister B's property. Sister A is liable for threats (RCC § 22A-1204) and criminal damage to property (RCC § 22A-2503) but has not committed stalking, because the continuity of purpose was disrupted by the intervening assault. This avoids the absurd result of treating both sisters as stalkers of one another. The sisters have infringed on each other's rights to bodily integrity and personal property. However, it cannot be said that they infringed on each other's right to choose their own relationships and associations, which is a privacy right the stalking statute aims to protect.

[32] *See. e.g., Whylie v. U.S.*, 2014, 98 A.3d 156 (finding stalking that post-dates a no-contact order is to be treated as separate from stalking that precedes that court order, and thus, is not part of the same course of conduct warranting a single sentence.).

[33] For example, a person may commit stalking by following someone with the purpose of winning their affection on one day and destroying their property with the purpose of frightening them on another.

Subsection (d)(4) defines the term "financial injury" to mean the reasonable monetary costs, debts, or obligations incurred as a result of the stalking by the victim, a member of the victim's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the victim. The list of examples provided in subsections (d)(4)(A)-(F) is not exhaustive. The factfinder must determine that the expenditures were reasonably necessitated by the stalking.[34]

Subsection (d)(5) provides the term "physically monitoring" means being in the immediate vicinity of the victim's residence, workplace, or school to detect the victim's whereabouts or activities. As in the revised rioting statute,[35] "immediate vicinity" refers to the area near enough for the accused to see or hear the stalking target's activities. Distances may vary widely, depending on facts including crowd density, noise, and height.

Subsection (d)(6) defines "predicate property offense" to include specific offenses in the revised code that make it unlawful to interfere with, damage, take, or unlawfully enter an individual's real or personal property; or to use another individual's personal identifying information.[36]

Subsection (d)(7) explains what fear of "safety" means in subsections (a)(2)(A)(i) and (a)(2)(B)(i).[37] "Safety" is ongoing security from any unlawful intrusion on one's bodily integrity or bodily movement, such as an offensive physical contact or criminal restraint.[38] Fear of suffering minor inconveniences is not a recognized harm in the revised statute. The term "ongoing" makes clear that the fear must be continuous or continual in nature. The actor must have the intent or effect of causing trepidation that outlasts the interaction.[39]

Subsection (d)(8) defines the term "significant emotional distress", which means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. As in the definition of "safety", the term "ongoing" clarifies that the actor must have the intent or effect of causing enduring trepidation that outlasts the interaction, though not necessarily permanent.[40] The

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[34] Consider, for example, a person who relocates to an expensive, high-security apartment to avoid a stalker. The jury will first have to decide whether it was reasonable to relocate under the circumstances. Then the jury will have to decide which expenses incurred as a result of the move were reasonably necessary, e.g., the moving truck, the rent increase, the cost of furnishing the new apartment.

[35] RCC § 22A-4101.

[36] *See* D.C. Code §§ 22-3132(8)(B) and (C).

[37] *See* The National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, *available at* https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12, (hereinafter "*Revised Model Code*"), at pages 28 and 29 (highlighting an amendment to a California statute that replaced the phrase "fear of death or great bodily harm" with "fear for his or her safety.").

[38] Offensive physical contact is defined in RCC § 22A-1205. Criminal restraint is defined in RCC § 22A-1404.

[39] This requirement distinguishes the crime of stalking (an offense against persons) from violations like disorderly conduct (a public order offense). *See* RCC § 22A-4001; *see also* RCC §§ 22A-4002, Public Nuisance; 4101, Rioting; and 4102, Failure to Disperse. The breach of peace statutes require only momentary fear of an immediate harm, whereas stalking concerns longer-term apprehension.

[40] This requirement distinguishes the crime of stalking (an offense against persons) from violations like disorderly conduct (a public order offense). *See* RCC § 22A-4001; *see also* RCC §§ 22A-4002, Public Nuisance; 4101, Rioting; and 4102, Failure to Disperse. The breach of peace statutes require only momentary fear of an immediate harm, whereas stalking concerns longer-term apprehension.

government is not required to prove that the victim sought or needed professional treatment or counseling.[41]

Subsection (e) clarifies that the statute excludes constitutionally protected activity from the reach of the stalking statute.[42] Not all patterns of behavior that have the intent or effect of causing significant emotional distress are subject to prosecution. Subsection (e)(1) cross-references the U.S. Constitution and the District's First Amendment Assemblies Act, codified in Title 5 of the D.C. Code. This reference does not change or alter any person's rights or liabilities under the statute. Instead, it is merely intended to encourage readers to consider what First Amendment polices, if any, are implicated by prosecutions of the offense. Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Subsection (e)(2) specifically excludes from stalking liability certain speech about social issues that is usually constitutionally protected speech.[43] The subsection makes clear that the stalking statute does not punish activities such as participating in a labor strike, advocating a boycott, publishing harsh reviews of a restaurant, acting as a whistleblower, or criticizing a city official's fitness for office. Although such applications of the stalking statute likely would be constitutionally invalid without this statutory language, codifying the exception provides better notice to the public and criminal justice system actors.[44]

Pursuant to (e)(2)(A), (B), and (C), a person who is a government official, a candidate for elected office, or an employee of a business that is open to the public, is expected to tolerate the opinions of the community they serve, at least while they are on duty.[45] However, depending on the facts in a particular case, the First Amendment may offer broader or narrower protection than the speech highlighted in this special exception. Free speech on matters of public concern is not limited to speech directed at political figures and businesses nor is it limited to communications that occur while those persons are engaged in their official duties.[46]

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[41] *See Revised Model Code* at page 29 (explaining that law enforcement must be empowered to intervene without waiting for a medical professional to render an opinion about the degree of the injury).

[42] Stalking statutes are often vulnerable to constitutional challenges, as written and as applied. There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring); *see also State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977). The revised statute's prior notification requirement is not itself enough to render the statute constitutional. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).

[43] Speech on public issues should be "uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)).

[44] The Superior Court for the District of Columbia recently grappled with the issue of speech directed at an elected official in *White v. Muller*, 2017 D.C. Super. LEXIS 14.

[45] *See White v. Muller*, 2017 D.C. Super. LEXIS 14 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

[46] *See Gray v. Sobin*, 2014 D.C. Super. LEXIS 1, *12.

> The Supreme Court has defined speech on a matter of public concern as speech that either can be fairly considered as relating to any matter of political, social, or other

Subsection (e)(3) specifically excludes from stalking liability persons who are engaged in activities that are vital to a free press and to the fair administration of justice. A journalist, law enforcement officer, licensed private investigator, attorney, process server, *pro se* litigant, or compliance investigator who is acting within the reasonable scope of his or her professional obligations does not commit a stalking offense.[47]

Subsection (f) provides a parental discipline defense for stalking. Subsection (f)(1) states that the parental discipline defense is in addition to any defenses otherwise applicable to the conduct at issue. Subsection (f)(1)(A) limits the availability of this defense to parents, guardians, and persons who have assumed the obligations of a parent.[48] It also limits the defense to conduct directed toward minor children.[49] Subsection (f)(1)(B) requires that the stalking contact be for the purpose of parental discipline.[50] Here, "discipline" is broader than punishment for misbehavior and refers to any legitimate parenting goal.[51] Subsection (f)(1)(C) requires that the use of the discipline is "reasonable in manner and degree." Finally, subsection (f)(2) describes the burden of proof for the parental discipline defense, clarifying that, where evidence supporting the defense is raised at trial by either the government or defense, the government then has the burden of proving the absence of such circumstances beyond a reasonable doubt.

Relation to Current District Law. *The revised stalking statute changes current law in four main ways to ensure constitutionality and improve the consistency of the code.*

First, the revised statute limits stalking liability for non-threatening communications to conduct that occurs after having received notice from the individual, directly or indirectly, to cease such communication.[52] The current District stalking statute does not limit liability for communications to a specific individual to situations where the accused has received notice to cease such communications,[53] nor has the

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> concern to the community or is on a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.

(Internal quotation marks omitted.) (quoting *Snyder v. Phelps*, 562 U.S. 443 (2011); *City of San Diego v. Roe*, 543 U.S. 77 (2004); *Rankin v. McPherson*, 483 U.S. 378 (2004)).

[47] The revised statute anticipates that some legal pleadings, correspondence and negotiations will be distressing. Whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is fact-sensitive.

[48] *See Martin v. United States*, 452 A.2d 360, 362 (D.C. 1982) (explaining *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).

[49] A minor child is a person under 18 years old.

[50] *See, e.g., State v. Walsh*, 360 N.J. Super. 208 (App. Div. 2003) (reversing a conviction for a harassment as a *de minimus* infraction, where a father threatened to take away his daughter's car).

[51] Consider, for example, a child who instructs a parent to not contact her. The parent may insist on communicating with the child without running afoul of the stalking statute.

[52] RCC § 22A-1801(a)(2)(B).

[53] Notably, however, that although it incorporated much of the language in the 2007 model statute, the D.C. Council declined to adopt (without comment) a provision that provided, "In any prosecution under this law, it shall not be a defense that…the actor was not given actual notice that the course of conduct was unwanted." *See Revised Model Code* at page 25.

DCCA required proof of such notice.[54] Given that D.C. Code § 22-3133(a)(3) provides for stalking liability when the defendant does not have any subjective awareness of the impact of his or her non-threatening speech, the lack of a notice requirement in the current statute means the defendant may be guilty of stalking while never having been aware that their non-threatening speech was unwanted.[55] In contrast, the revised statute requires that, although the complaining witness does not have to affirmatively notify the actor to cease following, monitoring, or criminal behavior,[56] non-criminal speech does not become stalking until it is clear that it is unwelcome. Even when non-criminal speech may reasonably run a risk of causing a person significant emotional distress, it should not be presumed that such speech is entirely unwelcome or criminal.[57] Notice to cease effectively transforms future communications into a verbal act of ignoring the victim's directive to be left alone and invading the victim's privacy. The revised statute thereby criminalizes behavior that is calculated to torment without reaching other legitimate speech.[58] This change improves the clarity proportionality, and, perhaps, the constitutionality of the revised statutes.[59]

Second, the revised stalking statute provides as a possible basis of liability that a person negligently causes the targeted person to fear for his or her safety or that of another person, or to suffer significant emotional distress. Current D.C. Code § 22-3133(a) provides as one possible basis of liability that there be a course of conduct that "the person should have known *would cause* a reasonable person in the individual's circumstances" to experience fear for safety or emotional distress.[60] The DCCA has held

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[54] In the one DCCA case that most closely examined the culpable mental state of the defendant, he was on notice that his conduct was undesired and he was directed to cease communications. *See Atkinson v. United States*, 121 A.3d 780, 783 (D.C. 2015).

[55] In Montana, Roman McCarthy received a five-year sentence after mailing two letters to his ex-wife, neither of which she opened but which nonetheless caused her emotional distress. Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 Mich. L. Rev. 607, 608 (2015) (citing *State v. McCarthy*, 980 P.2d 629 (Mont. 1999)).

[56] In these instances, "[r]ecommending that a victim confront or try to reason with the individual who is stalking him or her can be dangerous and may unnecessarily increase the victim's risk of harm." *See Revised Model Code* at page 52.

[57] Bill collectors, global warming activists, well-intentioned family members, personal coaches, and religious leaders are among the many persons who may purposely make repeated communications to a specific individual, with messages that they know or should know will cause the hearer significant emotional distress. Absent the RCC requirement that the person making such communications have notice to cease such communications, any two such contacts (e.g. two phone calls) may constitute stalking under current District law.

[58] The "mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 414 (1992) (White, Blackmun, O'Connor & Stevens, JJ., concurring). There are many instances when one may communicate with another with the intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek. *See State v. Brobst*, 151 N.H. 420, 423 (2004); *People v. Klick*, 66 Ill. 2d 269, 273 (1977).

[59] The revised statute's prior notification requirement is not itself enough to render the statute constitutional. *See, e.g., State v. Pierce*, 152 N.H. 790 (2005).

[60] In *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017), the Supreme Court of Illinois held that identical language violates due process. The court explained:

> [T]he proscription against "communicat[ions] to or about" a person that negligently would cause a reasonable person to suffer emotional distress criminalizes certain types of speech based on the impact that the communication has on the recipient…Therefore, it is

that this element is satisfied where the defendant's conduct is "objectively frightening and alarming."[61] By contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) he or she should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the victim* and nevertheless grossly deviates from the standard of care that a reasonable person would observe, and (2) the victim did experience significant emotional distress.[62] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[63] even though it is highly unusual to provide criminal liability for merely negligent conduct.[64] The lack of any subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[65] Requiring actual harm may also better reflect the Council's prior stated intent that stalking liability be focused on harms to targeted individuals rather than communications and behaviors that are inappropriate but do not actually cause distress.[66] This change

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> clear that the challenged statutory provision must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications. *See Reed*, 576 U.S. at ——, 135 S.Ct. at 2227; *see also Matal v. Tam*, 582 U.S. ——, ——, 137 S.Ct. 1744, 1764–65, 198 L.Ed.2d 366 (2017) (plurality opinion) (holding that the 'disparagement clause,' which prohibits federal registration of a trademark based on its offensive content, violates the first amendment).

[61] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015).

[62] In *State v. Ryan*, 969 So. 2d 1268, 1271 (La. Ct. App. 2007), a Louisiana court reversed a stalking conviction that was based on the defendant driving back and forth in front of the Wrights' house several times over the course of a day to collect firewood from a tree trimming crew, causing Mrs. Wright emotional distress. The trial court had found, "There's no prior contact whatsoever between these people; nobody knew one another here," but concluded, "[A]s I've stated before, the suspicious conduct in a neighborhood causes a certain amount of—degree of emotional distress especially with the womenfolk."

[63] RCC § 22A-206.

[64] *See Elonis v. United States*, 135 S. Ct. 2001, 2011 (2015).

> Elonis's conviction, however, was premised solely on how his posts would be understood by a reasonable person. Such a "reasonable person" standard is a familiar feature of civil liability in tort law but is inconsistent with "the conventional requirement for criminal conduct—*awareness* of some wrongdoing." *Staples*, 511 U.S., at 606–607, 114 S.Ct. 1793 (quoting *United States v. Dotterweich*, 320 U.S. 277, 281, 64 S.Ct. 134, 88 L.Ed. 48 (1943); emphasis added). Having liability turn on whether a "reasonable person" regards the communication as a threat—regardless of what the defendant thinks—"reduces culpability on the all-important element of the crime to negligence," *Jeffries*, 692 F.3d, at 484 (Sutton, J., *dubitante*), and we "have long been reluctant to infer that a negligence standard was intended in criminal statutes," *Rogers v. United States*, 422 U.S. 35, 47, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975) (Marshall, J., concurring) (citing *Morissette*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288).

[65] *See Republic of Sudan, Ministry of External Affairs, et al. v. James Owens, et al.*, No. 17-SP-837, 2018 D.C. App. (Sep. 20, 2018) (noting civil liability for negligent infliction of emotional distress requires some limiting principles to avoid "virtually infinite liability"); *Williams v. Baker*, 572 A.2d 1062, 1069 (D.C. 1990) (en banc).

[66] D.C. Code § 22-3131 explains that the current stalking statute aims to protect victims of stalking from grief and violence, as opposed to protecting the public from conduct that is generally alarming or distressing.

> (a) The Council finds that stalking is a serious problem in this city and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates

improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

Third, the revised statute limits liability for "monitoring" to in-person monitoring at a person's residence, workplace, or school. Current law defines a course of stalking conduct to include acts to "monitor" and "place under surveillance."[67] These terms are not defined and the DCCA has not interpreted their meaning.[68] By contrast, the revised stalking statute defines "physically monitoring" to mean being in the immediate vicinity of the person's residence, workplace, or school, with intent to detect the person's whereabouts or activities.[69] Limiting monitoring to locations where the specific individual is obliged to be and there is a heightened expectation of privacy may help ensure first amendment protections for conduct in public spaces is not burdened.[70] The revised code punishes indirectly observing or recording someone's location or activities as a separate offense focused on nonconsensual electronic monitoring.[71] This change eliminates unnecessary gaps and overlap between criminal offenses.

Fourth, the revised statute does not specifically authorize multiple convictions for stalking and identity theft based on the same facts.[72] Current D.C. Code § 22-3134(d) provides that, "A person shall not be sentenced consecutively for stalking and identify theft based on the same act or course of conduct." Although there is no case law on point, this language appears to categorically authorize multiple convictions for identity theft and stalking based on the same act or course of conduct. By contrast, the revised stalking statute does not contain such a concurrent sentencing provision and treats identity theft the same as other criminal conduct that may subject a person to stalking liability. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft and stalking based on the same acts or course of conduct should merge. The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft (and other predicate crimes) and stalking arising from the same act or course of

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> risks to the security and safety of the victim and others, even in the absence of express threats of physical harm…(b)…The Council recognizes that stalking includes a pattern of following or monitoring *the victim*, or committing violent or intimidating acts *against the victim*, regardless of the means.

(Emphasis added.) Notably, behavior that alarms the general public may be separately punished as disorderly conduct in D.C. Code § 22-1321 and corresponding RCC § 22A-4001.

[67] D.C. Code § 22-3132(8)(a).

[68] At least one other state has interpreted monitoring to include a wide variety of relatively conduct, including "keeping track of" an individual's online activity. *See People v. Gauger*, 2-15-0488, 2018 WL 3135087, at *3 (Ill. App. Ct. June 27, 2018) (affirming a stalking conviction where a defendant impersonated the victim's friends on Facebook and downloaded photographs of her family).

[69] RCC § 22A-1801(d).

[70] Reasonable time, place, and manner restrictions may be imposed upon constitutionally protected speech in some circumstances, and several District statutes reflect these considerations. *See, e.g.*, D.C. Code § 22-1314.02 (regarding obstruction of access to or disruption of medical facilities).

[71] RCC § 22A-[XX][The CCRC has not yet drafted this statute]. *See also* D.C. Code § 22-3531, Voyeurism, which makes it unlawful to secretly monitor a person who is (A) Using a bathroom or rest room; (B) Totally or partially undressed or changing clothes; or (C) Engaging in sexual activity.

[72] "A person shall not be sentenced consecutively for stalking and identity theft based on the same act or course of conduct." D.C. Code § 22-3134(d).

conduct.[73] This change improves the proportionality of penalties and the consistency of the code.

Beyond these four changes to current District law, nine other aspects of the revised stalking statute may constitute substantive changes of law.

First, the revised statute specifies the RCC threat offense and certain RCC property offenses as possible predicates for stalking liability. Current D.C. Code § 22-3132(8) defines a "course of conduct" for the stalking statute and provides an extensive list of activities that already appear to be criminal, such as efforts to "threaten,"[74] "[i]nterfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so,"[75] and "[u]se another individual's personal identifying information."[76] The DC Court of Appeals ("DCCA") has not addressed whether the conduct listed in the current stalking statute's definition of a "course of conduct" requires proof equal to corresponding criminal offenses or how such conduct differs from corresponding criminal offenses. The revised statute specifies that only conduct constituting a criminal threat or a specified property offense in the RCC is predicate conduct for stalking, replacing the corresponding general references to threats, property damage, and misuse of personal information in the current statute.[77] This change improves the clarity and consistency of District statutes.

Second, the revised statute provides stalking liability for communications "about", not "to", a person only when such communications are otherwise criminal. Current law defines a course of stalking conduct to include both communications to a person and communications about a person without distinction.[78] Read literally, the current language would capture all speech that a person should know would cause an individual to feel alarmed, disturbed, or distressed.[79] However, the revised stalking statute more narrowly proscribes speech that is not merely insensitive to the subject of the

[73] *See* RCC § 22A-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.
[74] D.C. Code § 22-3132(8)(A).
[75] D.C. Code § 22-3132(8)(B).
[76] D.C. Code § 22-3132(8)(C).
[77] For example, "threaten" in the current stalking statute generally corresponds to the threat offense codified at RCC § 22A-1204 or the menacing offense codified at RCC § 22A-1203. "Interfere with, damage, take, or unlawfully enter an individual's real or personal property or threaten or attempt to do so," generally corresponds to the offenses of theft (RCC § 22A-2101), unauthorized use of property (RCC § 22A-2102; arson (RCC § 22A-2501), damage to property (RCC § 22A-2503), graffiti (RCC § 22A-2504), trespass (RCC § 22A-2601), and trespass of motor vehicle (RCC § 22A-2602). "Use another individual's personal identifying information" generally corresponds with references to the offenses of forgery (RCC § 22A-2204) and identity theft (RCC § 22A-2205).
[78] D.C. Code § 22-3132(8)(C).
[79] D.C. Code § 22-3133(a)(3)(B). Consider, for example, a person who exposes another person's extramarital affair to several other people. Although the revelation may be disturbing or distressing, it is not the kind of behavior that is typically considered stalking behavior and it is likely protected as free speech. *United States v. Stevens*, 559 U.S. 460, 479 (2010) ("*Most* of what we say to one another lacks "religious, political, scientific, educational, journalistic, historical, or artistic value" (let alone serious value), but it is still sheltered from government regulation." (emphasis in original)). Civil tort remedies, including monetary damages and injunctive relief, exist for defamation, invasion of privacy – false light, tortious interference, intentional infliction of emotional distress, and negligent infliction of emotional distress.

commentary but also has the intent or effect of tormenting the listener[80] or threatening bodily harm. This approach may be more consistent with the Council's prior stated intent, as there are many distressing communications "about" an individual that do not amount to the "severe intrusions on the victim's personal privacy and autonomy" that the current statute aims to curtail.[81] This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Third, the revised statute excludes stalking liability for communications concerning political and public matters to on-duty government officials, candidates for elected office, or employees of businesses that serve the public.[82] The current stalking statute provides no exceptions for particular types of communications besides stating that the statute "does not apply to constitutionally protected activity."[83] While the DCCA has not directly addressed First Amendment challenges to the stalking statute, the issue has been litigated in D.C. Superior Court.[84] However, the revised code explicitly recognizes an exercise of free speech that is especially common in Washington, DC: contacting elected representatives to urge or criticize political action.[85] The revised code provides that expressions of opinion about public issues are not a basis for stalking liability,[86]

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[80] *Compare Matter of Welfare of A.J.B.*, 910 N.W.2d 491 (Minn. Ct. App. 2018) (upholding a conviction where the defendant published tweets tagging a specific individual; concluding the tweets are both public and specifically targeted because the act of tagging someone is intended so that the tagged individual sees the posts) *and People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (reversing a conviction where the defendant made several postings on Facebook about a specific individual but did not send the Facebook posts directly to her and, because she was not one of his Facebook friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[81] D.C. Code § 22-3131(a); *see also Rowan v. United States Post Office Department*, 397 U.S. 728 (1970) (holding that nonconsensual one-to-one communications that impinge on the privacy rights of the recipient are not protected under the first amendment); *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (invalidating language in the state's stalking statute identical to the District's current law as overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.).

[82] RCC § 22A-1801(e)(2).

[83] D.C. Code § 22-3133(b).

[84] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *10 (concluding that 47 text messages that a journalist sent to a Councilmember were not protected because they "do not reference any particular policy or subject matter" and are instead "personal in nature, belittling, and appear to be [an] attempt to intimidate…").

[85] For example, Senator Kamala Harris recently urged her 1.73 million Twitter followers, "Save this number to your favorites: (202) 224-3121. Call your Senators in the morning and tell them to oppose Kavanaugh. Call them in the afternoon. Leave a message at night. Keep making your voice heard." Kamala Harris (@kamalaharris), Twitter (September 7, 2018, 11:02 AM), *https://twitter.com/KamalaHarris/status/1038125246778368001*.

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> '[A]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.' *Hustler Magazine v. Falwell*, 485 U.S. 46, 50, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). Speech on 'public issues should be uninhibited, robust, and wide-open…[because such] speech occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.' *Snyder v. Phelps*, 562 U.S. 443, 131 S. Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011) (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) and *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)) (internal quotation marks omitted).

Gray v. Sobin, 2014 D.C. Super. LEXIS 1, *11.

while cautioning the reader that harassing and insulting one-to-one communications[87] sent after hours may not enjoy the same protection.[88] The exception also applies to employees of businesses that serve the public, who may be the subject of distressing criticism of their goods or services. This change improves the clarity, proportionality, and perhaps the constitutionality of the revised statutes.

Fourth, the revised statute more precisely specifies the nature of the social harm in stalking to be a "pattern of conduct" that causes "ongoing" safety concerns or emotional distress. The current stalking statute requires proof that the defendant engaged in a "course of conduct," a defined term that refers to conduct "on 2 or more occasions" but is silent as to whether or how the conduct on these occasions is related.[89] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[90] is silent on whether such distress is of an ongoing nature. The DCCA has not interpreted these provisions to date. However, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress[91] and the term "pattern of conduct" to mean "conduct on two or more separate occasions, with continuity of purpose." Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[92] the revised statute's definitions refer to both the degree and the duration of the harm. This change improves the clarity of the revised statute.

Fifth, the revised statute specifically defines the meaning and scope of "purposefully" and "with intent" culpable mental states for stalking liability. The current stalking statute requires that the accused "purposefully engages in a course of conduct," and provides alternative culpable mental state requirements of acting "with the intent" or "[t]hat the person knows" would cause an individual a specified harm. However, the terms "purposely," "with the intent," and "knows," are not defined and it is unclear to what extent that mental state applies to the language that follows. There is no DCCA case law on point. The revised statute uses the RCC's general provisions that define "purposefully" and "with intent"[93] and specify that culpable mental states apply until the

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[87] By contrast, blocking speech on a public forum constitutes viewpoint discrimination that violates the First Amendment. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (disallowing President Trump to block users from his @realdonaldtrump Twitter page).

[88] *See White v. Muller*, 2017 D.C. Super. LEXIS 1, *14 (distinguishing insulting text messages sent to an elected official's phone and critical posts about the official on a public social media page or at a community meeting.); *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act…raise[s] no question under that instrument."); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

[89] D.C. Code § 22-3132(8).

[90] D.C. Code § 22-3132(4).

[91] RCC §§ 22A-1801(d)(8) and (9).

[92] Merriam-Webster.com, "*stalking*", 2018, *available at* https://www.merriam-webster.com/dictionary/stalking (defining stalking as 1 : to pursue by stalking; 2 : to go through (an area) in search of prey or quarry stalk the woods for deer; 3 : to pursue obsessively and to the point of harassment).

[93] RCC § 22A-206. Note that the RCC definition of "with intent" requires that a person "believes that conduct is practically certain to cause the result," which is the same standard as for "knowing." Also, proof that a person acts purposely, consciously desiring to cause the result, will meet the culpable mental state requirement that a person act "with intent" per RCC § 22A-206(f)(3). Consequently, the revised stalking statute's use of "with intent" appears to match the requirements of both "with the intent" and "knows" in current D.C. Code § 22-3133(a)(1) and (a)(2).

occurrence of a new culpable mental state in the offense.[94] These changes clarify and improve the consistency of District statutes.

Sixth, the revised stalking statute excludes liability for conduct that is reasonably within the scope of a person's journalistic, law enforcement, legal, or other specified duties. Current D.C. Code § 22-3133(b) contains a general statement that the offense "does not apply to constitutionally protected activity," but otherwise is silent as to whether other activities are excluded. The DCCA has not addressed whether a person's bona fide action pursuant to their occupational duties is excepted from stalking liability.[95] However, the revised statute specifically excludes from stalking liability activities that, despite being distressing, are generally recognized as legitimate occupational activities. Even if the current and RCC stalking statutes' general statements regarding the protection of constitutional activities provide adequate notice that certain activities do not constitute stalking, such statements do not obviously extend to activities beyond the First Amendment.[96] Without a clear exclusion, such legitimate activities may constitute stalking.[97] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offenses.

Seventh, the revised stalking statute codifies a parental discipline defense. The District's current stalking statute is silent as to whether there is a defense for parental discipline. While there is no case law on the applicability of the parental defense to stalking, the DCCA has recognized the defense for assault, requiring that the conduct be "reasonable."[98] The revised code addresses physical and mental injuries inflicted by parents against minor children in the child abuse offense[99] and excludes parent-child interactions from the stalking statute. This change improves the clarity and consistency of the revised statutes and may eliminate unnecessary overlap between offenses.

Eighth, the revised statute extends jurisdiction for stalking only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3135(b) states that jurisdiction extends to communications if "the specific individual lives in the District of Columbia" and "it *can be* electronically accessed in the District of Columbia" (emphasis added). The DCCA has not interpreted the meaning of this phrase. The revised statute does not extend jurisdiction to harms where the accused and the complainant and all relevant action occurs outside the District, even though the

[94] RCC § 22A-207(a).
[95] Notably, in *White v. Muller*, 2017 D.C. Super. LEXIS 1, the court's analysis did not focus on the fact that Muller had duties as a member of the press so much as the status of White as a Councilmember.
[96] Many of the professional activities excepted in the RCC stalking statute, e.g. a private investigator, are not constitutionally protected activities. Notably, the District's current voyeurism statute contains an exception for monitoring by law enforcement. D.C. Code § 22-3531(e)(1).
[97] The intent requirements in the current and revised stalking statutes do not necessarily exempt persons engaged in bona fide, legitimate occupational activities. For example, a process server may need to repeatedly lie in wait near someone's home and workplace to hand-serve that person with a distressing pleading. Similarly, a business owner monitoring an employee's compliance with worker safety laws may cause the person some degree of emotional unrest.
[98] *See, e.g., Newby v. United States*, 797 A.2d 1233, 1241-42 (D.C. 2002); *Florence v. United States*, 906 A.2d 889, 893 (D.C. 2006).
[99] RCC § 22A-1501.

complainant is a District resident.[100] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[101] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[102] and such an extension may be unconstitutional.[103] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Ninth, the revised statute provides a distinct penalty enhancement for having one prior stalking conviction that increases the penalty by one class.[104] The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[105] and a third offense.[106] The revised statute retains the second-strike enhancement but eliminates the third-strike enhancement. Instead, the RCC's general repeat offender penalty enhancement may apply when a defendant has two or more prior convictions for a comparable offense.[107] This change improves the consistency and proportionality of District statutes.

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

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear for safety or emotional distress. Current D.C. Code § 22-3133(a) specifically refers to conduct that would cause another person to "feel seriously alarmed, disturbed, or frightened" without defining these terms. Current D.C. Code §22-3133(a) also refers to fear for "safety", undefined, and "emotional distress" which is defined.[108] The DCCA has not ruled on the meaning of these terms or their differences. The revised stalking statute eliminates a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured by other terminology – fear for safety or emotional distress.[109] This change improves the clarity of District statutes.

Second, the revised statute does not specially codify a statement of legislative intent for the stalking offense. Current D.C. Code § 22-3131 codifies a lengthy statement

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[100] For example, Person A resides in Toronto and sends Person B a threatening text message each time she visits the Canada from her home in Washington, DC. Current law may be understood to mean that A has committed a stalking offense in the District, simply because the messages *can be* accessed here.

[101] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

[102] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(c)(1) (3d ed.).

[103] WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 4.4(a) (3d ed.).

[104] [This entry will be reevaluated when the CCRC proposes penalty classes for RCC offenses, at which time it will be clear how the revised stalking statute changes available penalties.]

[105] D.C. Code § 22-3134(b)(2).

[106] One or more of the convictions must have been jury-demandable. D.C. Code § 22-3134(c).

[107] RCC §§ 22A-806(a) and (b).

[108] Under D.C. Code § 22-3132(4), "emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

[109] *See* Merriam-Webster.com, *"alarmed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/alarmed (defining alarmed as feeling a sense of danger : urgently worried, concerned, or frightened); Merriam-Webster.com, *"disturbed"*, 2018, *available at* https://www.merriam-webster.com/dictionary/disturbed (defining disturbed as showing symptoms of emotional illness); Merriam-Webster.com, *"frightened"*, 2018, *available at* https://www.merriam-webster.com/dictionary/frightened (defining frightened as feeling fear : made to feel afraid).

of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences."[110] No other criminal offense in the current D.C. Code contains a comparable statement of legislative intent. Instead, the DCCA routinely uses the Council's legislative documents (e.g. Committee reports) to determine legislative intent. The revised stalking statute relies upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Relation to National Legal Trends. *The revised stalking statute's above-mentioned changes to current District law have mixed support in national legal trends.*

Stalking is a relatively new offense, originating in California in 1990. Today, all 50 states have criminalized stalking.[111] Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[112] Many state stalking statutes have been influenced by model language published by the Department of Justice in 1993[113] and a revised model statute published by the National Center for Victims of Crime in 2007.[114] However, constitutional challenges on grounds of vagueness and overbreadth have been common.[115] Sixteen states are now considering legislation to amend their stalking codes.[116]

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[110] The statement of legislative intent appears to be based on model language recommended by the National Center for Victims of Crime. *See Revised Model Code*, at page 24.

[111] Reform jurisdictions: Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Ark. Code Ann. § 5-71-229; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Del. Code Ann. tit. 11, § 1312; Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); 720 Ill. Comp. Stat. Ann. 5/12-7(a); Ind. Code Ann. § 35-45-10-5; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.150; Me. Rev. Stat. tit. 17-A, § 210-A; Minn. Stat. Ann. § 609.749; Mo. Ann. Stat. § 565.227; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-1; Tenn. Code Ann. § 39-17-315; Tex. Penal Code Ann. § 42.072; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Non-reform jurisdictions: Cal. Penal Code § 646.9; Fla. Stat. Ann. § 784.048; Ga. Code Ann. §§ 16-5-90 – 92; Idaho Code Ann. §§ 18-7905 – 7906; Iowa Code Ann. § 708.11; La. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802; Mass. Gen. Laws Ann. ch. 265, § 43; Mich. Comp. Laws Ann. §§ 750.411h – i; Miss. Code. Ann. § 97-3-107; Neb. Rev. Stat. Ann. § 28-311.03; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. §§ 30-3A-3 – 3.1; N.C. Gen. Stat. Ann. § 14-277.3A; Okla. Stat. Ann. tit. 21, § 1173; 11 R.I. Gen. Laws Ann. § 11-59-2; S.C. Code Ann. § 16-3-1730; Vt. Stat. Ann. tit. 13, §§ 1061 – 1064; Va. Code Ann. § 18.2-60.3; W. Va. Code Ann. § 61-2-9a; Wyo. Stat. Ann. § 6-2-506

[112] The 29 states are: Alabama; Alaska; Arizona; Arkansas; Colorado; Connecticut; Delaware; Hawaii; Illinois; Indiana; Kansas; Kentucky; Maine; Minnesota; Missouri; Montana; New Hampshire; New Jersey; New York; North Dakota; Ohio; Oregon; Pennsylvania; South Dakota; Tennessee; Texas; Utah; Washington; Wisconsin. *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 326 (2007).

[113] National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, Washington, DC: U.S. Department of Justice, National Institute of Justice, October 1993, NCJ 144477.

[114] *See* The National Center for Victims of Crime, *The Model Stalking Code Revisited: Responding to the New Realities of Stalking*, January 2007, *available at* https://victimsofcrime.org/docs/default-source/src/model-stalking-code.pdf?sfvrsn=12.

[115] By 1996, 19 states defended their stalking statutes against facial challenges. National Institute of Justice, *Domestic Violence, Stalking, and Antistalking Legislation: An Annual Report to Congress under the Violence Against Women Act*, April 1996, at page 7. Content neutrality is an important feature of any

First, five states require that the accused receive a warning before stalking liability attaches.[117] Unlike these states, however, the RCC requires notice only with regard to unwanted communications; no prior warning is required when the accused physically follows, physically monitors, or commits a crime against the victim.

Second, four reform jurisdictions criminalize conduct the actor should have known *would* cause or *is likely* to cause a reasonable person to feel frightened or distressed without also requiring that the conduct *did* cause fear or distress.[118] One of those four statutes was found to be facially unconstitutional.[119] The majority of reform jurisdictions require that the offender's conduct *actually cause* fear or distress, not merely that the conduct *would be* disturbing.[120] Few reform jurisdictions have any stalking liability for simple negligence, whether or not fear or distress actually occurs.[121]

Third, it is unclear to what extent other jurisdictions' stalking statutes exclude electronic monitoring. Most jurisdictions' statutes do not precisely describe the type of misconduct that may establish the basis of a stalking charge.[122] This may be due to the

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stalking or harassment statute's ability to pass constitutional muster. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1303 (2005); *see also People v. Dietze*, 75 N.Y.2d 47, 53–54 (1989); *People v. Golb*, 23 N.Y.3d 455, 15 N.E.3d 805 (2014); *Musselman v. Com.*, 705 S.W.2d 476 (Ky. 1986); *State v. Moulton*, 991 A.2d 728, 733+, (Conn.App. Apr. 13, 2010), (NO. 29617); *State v. Reed*, 176 Conn. App. 537 (2017); *State v. LaFontaine*, 16 A.3d 1281, 1283+, (Conn.App. May 10, 2011), (NO. 31284); *State v. Nowacki*, 111 A.3d 911, 915+, (Conn.App. Mar. 10, 2015), (NO. 34577); *State v. Brown* (App. Div.2 2004) 207 Ariz. 231, 85 P.3d 109, review denied.

[116] Delaware, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Washington, and Wisconsin. 2017 DE S.B. 209; 2017 IL H.B. 5663; 2017 IA H.F. 589; 2018 LA H.B. 282; 2017 MA S.B. 2200; 2017 MN S.F. 2940; 2018 MS H.B. 744; 2017 NH H.B. 1627; 2018 NJ A.B. 4244; 2017 NY A.B. 7662; 2017 NC H.B. 186; 2017 PA H.B. 2437; 2017 RI S.B. 340; 2017 TN S.B. 200; 2017 WA H.B. 2254; 2017 WI S.B. 568.

[117] Ala. Code § 13A-6-90.1; Conn. Gen. Stat. Ann. § 53a-181d(b)(2); N.Y. Penal Law § 120.45; S.C. Code Ann. § 16-3-1700(a)(2)(requires notice or a police report); Va. Code Ann. § 18.2-60.3; *see also* Md. Code Ann., Crim. Law § 3-803 ("Harassment").

[118] Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[119] *People v. Relerford*, 104 N.E.3d 341, 350 (Ill. 2017).

[120] Ala. Code § 13A-6-90.1; Alaska Stat. Ann. § 11.41.270; Ariz. Rev. Stat. Ann. § 13-2923; Colo. Rev. Stat. Ann. § 18-3-602; Conn. Gen. Stat. Ann. § 53a-181e; Ind. Code Ann. §§ 35-45-10-5 and 35-45-10-1("Definitions"); Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. §§ 508.150 and 508.130 ("Definitions"); Minn. Stat. Ann. § 609.749; Mont. Code Ann. § 45-5-220; N.H. Rev. Stat. Ann. § 633:3-a; N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(2); Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws §§ 22-19A-1 and 22-19A-4 ("Definitions"); Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32. Two reform states do not expressly require fear or distress at all and instead require only harassment, annoyance, or alarm. Haw. Rev. Stat. Ann. § 711-1106.5 ("Harassment by Stalking"); S.D. Codified Laws § 22-19A-1.

[121] *See* Minn. Stat. Ann. § 609.749; Tex. Penal Code Ann. § 42.072; Wash. Rev. Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32; Del. Code Ann. tit. 11, § 1312; 720 Ill. Comp. Stat. Ann. 5/12-7; N.Y. Penal Law § 120.45; Utah Code Ann. § 76-5-106.5.

[122] For example, some statutes provide that a "credible threat" is a predicate for stalking liability, without explaining what the person must threaten to do. Instead, these statutes define "credible threat" as essentially any communication or conduct that expressly or impliedly threatens some other conduct that a would cause a reasonable person to feel frightened or disturbed. *See* Ala. Code § 13A-6-92(b); Colo. Rev. Stat. Ann. § 18-3-602(2)(b); S.D. Codified Laws § 22-19A-6; Tenn. Code Ann. § 39-17-315(c)(1)(D); Cal.

fact that many jurisdictions' statutes are heavily influenced by model stalking codes that were designed to be easily implemented by every state and, therefore, do not reference specific offenses under any individual state's criminal code.

Fourth, 10 reform states include explicitly prohibit contacting the stalking victim at home, work or school.[123]

Fifth, no other jurisdiction's stalking statute expressly authorizes multiple convictions for stalking and identity theft based on the same facts.[124] Only three states include misuse of personal identifying information as a means of stalking.[125] Only Maryland addresses the issue of concurrent sentencing for stalking and another offense.[126]

Other possible changes to law in the revised stalking statute are generally supported by national legal trends.

First, most jurisdictions do not proscribe in their stalking statutes communications "about" a person. Eight reform states define "course of conduct" to include "communicating to or about a person."[127] This definition apparently was adopted from the model code stalking code published in 2007.[128]

Second, most jurisdictions codify exceptions for protected speech and other actions undertaken with a "legitimate purpose" or "proper authority."[129] Some states

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Penal Code § 646.9(g); Fla. Stat. Ann. § 784.048(1)(c); *but see* Mich. Comp. Laws Ann. § 750.411i; Miss. Code. Ann. § 97-3-107(8)(b); W. Va. Code Ann. § 61-2-9a(f)(2).

[123] Alaska Stat. Ann. § 11.41.270(b)(3)(C); 720 Ill. Comp. Stat. Ann. 5/12-7(a)(c)(5)-(7); Kan. Stat. Ann. § 21-5427(f)(1)(C); N.H. Rev. Stat. Ann. § 633:3-a(II)(a)(3); Ohio Rev. Code Ann. §§ 2903.211(B)(2)(c) and (h); Or. Rev. Stat. Ann. § 163.730(3)(j); Tenn. Code Ann. § 39-17-315(a)(5)(C); Utah Code Ann. §§ 76-5-106.5(1)(B)(ii)(B)-(C); Wash. Rev. Code Ann. § 9A.46.110(6)(b); Wis. Stat. Ann. §§ 940.32(1)(a)(3) and (4).

[124] "A person shall not be sentenced consecutively for stalking and identity theft based on the same act or course of conduct." D.C. Code § 22-3134(d).

[125] Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); Minn. Stat. Ann. § 609.749(Subd. 2)(8); Wis. Stat. Ann. § 940.32(2m)(c).

[126] Md. Code Ann., Crim. Law § 3-802 (e) ("A sentence imposed under this section may be separate from and consecutive to or concurrent with a sentence for any other crime based on the acts establishing a violation of this section.").

[127] Ark. Code Ann. § 5-71-229(f)(1)(A); Del. Code Ann. tit. 11, § 1312(e)(1); 720 Ill. Comp. Stat. Ann. 5/12-7(c)(1); Me. Rev. Stat. tit. 17-A, § 210-A(2)(A); N.J. Stat. Ann. § 2C:12-10(a)(1); Ohio Rev. Code Ann. §§ 2903.211(A)(2) and (D)(7) (making it unlawful to "post a message" about an individual); Utah Code Ann. § 76-5-106.5(1)(B)(i); Wis. Stat. Ann. § 940.32(1)(1)(7). Case law research was not conducted to determine whether phrases such as "any conduct" or "any two acts" have been understood to include communications about an individual.

[128] *See Revised Model Code* at pages 24-25. The National Center for Victims of Crime may have aimed to punish a specific type of conduct by this language. *See id.*, at page 47 ("It is also designed to cover stalking tactics in which stalkers indirectly harass victims through third parties. For example, stalkers have posted messages on the Internet suggesting that victims like to be raped and listing the victims' addresses, thereby inciting third parties to take action against victims."). Such conduct may either be protected by the First Amendment or be punishable as solicitation under RCC § 22A-302, depending on the speaker's word choice and mental state.

[129] Ala. Code § 13A-6-92(c); Ariz. Rev. Stat. Ann. § 13-2923(D)(1)(a)(iii); Conn. Gen. Stat. Ann. § 53a-181d(b)(1); Del. Code Ann. tit. 11, § 1312(j); Haw. Rev. Stat. Ann. § 711-1106.5(1); Kan. Stat. Ann. § 21-5427(f)(1); Ky. Rev. Stat. Ann. § 508.130(1)(a)(3); Mo. Ann. Stat. § 565.225(1); N.H. Rev. Stat. Ann. § 633:3-a(II)(a); N.Y. Penal Law § 120.45; N.D. Cent. Code Ann. § 12.1-17-07.1(c); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; S.D. Codified Laws § 22-19A-4; Tenn. Code Ann. § 39-17-315(a)(3); Wash. Rev.

provide explicit exceptions for: picketers;[130] journalists;[131] law enforcement officers and private investigators;[132] insurance investigators;[133] process servers;[134] persons authorized by a court order or monitoring compliance with a court order;[135] persons monitoring labor laws;[136] and persons engaged in lawful business activity.[137]

Third, 19 states statutorily require a continuity of purpose in the conduct constituting stalking.[138]

Fourth, only one other jurisdiction, Minnesota, has a provision that bases jurisdiction for certain stalking offenses on the victim's state of residency.[139]

Fifth, nineteen reform jurisdictions (a majority) expressly authorize an increased penalty for persons with a previous stalking conviction.[140] However, no reform states have an additional enhancement for a third time stalking offender.

Code Ann. § 9A.46.110; Wis. Stat. Ann. § 940.32(4)(a)(3)(b). Case law research was not performed to determine which activities courts have found to be legitimate in each state.

[130] Cal. Penal Code § 646.9(labor picketing); Del. Code Ann. tit. 11, § 1312(i) (lawful picketing); Fla. Stat. Ann. § 784.048; 720 Ill. Comp. Stat. Ann. 5/12-7(1)(ii)(labor-related picketing); Nev. Rev. Stat. Ann. § 200.575(f)(1) (labor-related picketing); N.J. Stat. Ann. § 2C:12-10l Wis. Stat. Ann. § 940.32(4)(a)(3) (peaceful picketing or patrolling); W. Va. Code Ann. § 61-2-9a(g); Wyo. Stat. Ann. § 6-2-506.

[131] Nev. Rev. Stat. Ann. § 200.575(f)(2).

[132] Del. Code Ann. tit. 11, § 1312(j); Mo. Ann. Stat. § 565.225(4); La. Stat. Ann. § 14:40.2(G)(1)("unless the investigator was retained for the purpose of harassing the victim"); S.C. Code Ann. § 16-3-1700; Va. Code Ann. § 18.2-60.3; N.D. Cent. Code Ann. § 12.1-17-07.1(4)(affirmative defense).

[133] La. Stat. Ann. §§ 14:40.2(H) and (I).

[134] S.C. Code Ann. § 16-3-1700.

[135] Nev. Rev. Stat. Ann. § 200.575(f); Md. Code Ann., Crim. Law § 3-802(b)(1).

[136] 720 Ill. Comp. Stat. Ann. 5/12-7(1)(i); Wis. Stat. Ann. § 940.32(5).

[137] Ga. Code Ann. § 16-5-92; Md. Code Ann., Crim. Law § 3-802(b)(2); Nev. Rev. Stat. Ann. § 200.575(f)(3); N.M. Stat. Ann. § 30-3A-3(B)(1).

[138] Ala. Code § 13A-6-92; Cal. Penal Code § 646.9; Colo. Rev. Stat. Ann. § 18-3-602; Fla. Stat. Ann. § 784.048; Kan. Stat. Ann. § 21-5427; Ky. Rev. Stat. Ann. § 508.130; La. Stat. Ann. § 14:40.2 (a "series of acts" "evidencing an intent to inflict a continuity of emotional distress upon the person"); Mich. Comp. Laws Ann. § 750.411i(a); Miss. Code. Ann. § 97-3-107; Nev. Rev. Stat. Ann. § 200.575; N.H. Rev. Stat. Ann. § 633:3-a; N.D. Cent. Code Ann. § 12.1-17-07.1; Okla. Stat. Ann. tit. 21, § 1173; 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1 ("continuity of conduct"); S.C. Code Ann. § 16-3-1700; S.D. Codified Laws § 22-19A-5; Tenn. Code Ann. § 39-17-315; Wis. Stat. Ann. § 940.32; Wyo. Stat. Ann. § 6-2-506.

[139] Minn. Stat. Ann. § 609.749(Subd. 1b)(b); D.C. Code § 22-3135(b) (extending jurisdiction to communications if "the specific individual lives in the District of Columbia" and "it can be electronically accessed in the District of Columbia."). By contrast, the model code from 2007 provides, "As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction. *Revised Model Code* at page 25.

[140] Alaska Stat. Ann. § 11.41.260(5); Ark. Code Ann. § 5-71-229(a)(1)(B); Conn. Gen. Stat. Ann. § 53a-181c(a)(1); Del. Code Ann. tit. 11, § 1312(g); Haw. Rev. Stat. Ann. § 711-1106.4; Ind. Code Ann. § 35-45-10-5(c)(2); Kan. Stat. Ann. § 21-5427; Me. Rev. Stat. tit. 17-A, § 210-A(1)(C); Minn. Stat. Ann. § 609.749; N.H. Rev. Stat. Ann. § 633:3-a; N.J. Stat. Ann. § 2C:12-10; N.Y. Penal Law §§ 120.50 and 120.55; Ohio Rev. Code Ann. § 2903.211; Or. Rev. Stat. Ann. § 163.732(2)(b); 18 Pa. Stat. and Cons. Stat. Ann. § 2709.1; Tenn. Code Ann. § 39-17-315; Utah Code Ann. § 76-5-106.5; Wash. Rev. Code Ann. § 9A.46.110(5)(b); Wis. Stat. Ann. § 940.32. Some penalty provisions require the previous conviction to involve the same victim or to have occurred within five years.