First Draft of Report #42 – Obscenity, Privacy, and Related Offenses

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

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

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

The deadline for the Advisory Group's written comments on this First Draft of Report #42 – Obscenity, Privacy, and Related Offenses is January 15, 2020. Oral comments and written comments received after this date may not be reflected in the next draft or final recommendations. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC Title 22E.

Chapter 7. Definitions.

Chapter 18. Stalking, Obscenity, and Invasions of Privacy.

Chapter 42. Breaches of Peace.

[1] Previously numbered RCC § 22E-1206.

RCC § 22E-701. Definitions.

"**Image" means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram, whether in print, electronic, magnetic, or digital format.**

Explanatory Note. The RCC definition of "image" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "image" are in some current Title 22 offenses[2]). The RCC definition of "image" is used in the revised definitions of "audiovisual recording" and "personal identifying information;" in the revised offenses of electronic stalking,[3] voyeurism,[4] unauthorized disclosure of sexual recordings,[5] distribution of an obscene image,[6] distribution of an obscene image to a minor,[7] trafficking an obscene image of a minor,[8] possession of an obscene image of a minor,[9] unlawful operation of a recording device in a motion picture theater[10] and unlawful labeling of a recording;[11] and in the revised identity theft civil provisions.[12]

Relation to Current District Law. The RCC definition of "image" is new and does not itself substantively change existing District law.

As applied in the revised voyeurism and unauthorized disclosure of sexual recordings statutes,[13] *the revised definition may change current District law.* D.C. Code § 22-3531(d)(1) makes it unlawful to "capture an image" of a person's private area without permission. The term "image" is not defined in the statute and District case law has not addressed its meaning. It is unclear whether "capture an image" has the same meaning as "electronically record" in § 22-3531(c)(1). It is also unclear whether "image" includes both refers to both "visual" and "aural images."[14] It is also unclear whether the term "image" includes a "series of images"[15] or a derivative image (e.g., a photograph of a photograph, a screenshot). Resolving this ambiguity, the revised code defines the term "image," as described herein. This definition may broaden the offense by including images that are captured without an electronic device (such as those captured using a

[2] D.C. Code §§ 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception)l 22-2603.01 (Introduction of Contraband Into Penal Institution); 22-3051 – 3057 (Non-consensual Pornography); 22-3214.01 (Deceptive Labeling); 22-3214.02 (Unlawful operation of a recording device in a motion picture theater); 22-3227.01 and 3227.05 (Identity Theft); and 22-3531 (Voyeurism).
[3] RCC § 22E-1802.
[4] RCC § 22E-1803.
[5] RCC § 22E-1804.
[6] RCC § 22E-1805.
[7] RCC § 22E-1806.
[8] RCC § 22E-1807.
[9] RCC § 22E-1808.
[10] RCC § 22E-2106.
[11] RCC § 22E-2207.
[12] RCC § 22E-2206.
[13] RCC §§ 22E-1803 and 22E-1804.
[14] *See* D.C. Code § 22-3531(a)(1). The revised offense does not criminalize creating an "aural image" of a person's private areas or of a person undressing.
[15] *See* D.C. Code § 22-3531(f)(2).

mechanically-operated camera)[16] but may narrow the offense by excluding images that are hand-drawn or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images.

As applied in the trafficking an obscene image of a minor and revised possession of an obscene image of a minor statutes,[17] the revised definition may change current District law. The current sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[18] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[19] However, there are constitutional concerns with banning the creation, distribution, and possession of images that are hand-rendered because these depictions may not be based on real children engaged sexual conduct.[20] Resolving this ambiguity, through the definition of "image" in RCC § 22E-701, the revised trafficking an obscene image of a minor statute and the revised possession of an obscene image of a minor statute are limited to images that are not hand-rendered. However, the RCC may still criminalize the underlying sexual conduct that is depicted in the hand-rendered image.[21]

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[16] While the current voyeurism statute counterintuitively defines an "electronic device" in to include "mechanical" equipment D.C. Code § 22-3531(a)(1), the voyeurism statute restricts liability in D.C. Code § 22-3531(c)(1) not to installation or use of an "electronic device" but to the act of "electronically record[ing]" which appears to exclude use of a mechanical or film-based camera. *See* D.C. Code § 22-3531(c)(1) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record, without the express and informed consent of the individual being recorded, an individual who is…"). Similarly, the exception to liability for images taken during medical procedures in the current D.C. Code is limited to "electronically recording" and appears to leave liability for use of a mechanical or film-based camera for no apparent reason. *See* D.C. Code § 22-3531(e)(4) ("Any electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent.").

[17] RCC §§ 22E-1807 and 1808.

[18] D.C. Code § 22-3101(3).

[19] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[20] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). In *Ashcroft v. Free Speech Coalition*, the Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation. This case law is discussed further in the commentaries to the revised trafficking of an obscene image of a minor statute (RCC § 22E-1807) and the revised possession of an obscene image of a minor statute (RCC § 22E-1808).

[21] For example, if a defendant forced a minor to have sex with an adult and sketched a drawing of the encounter, there would be no liability under the trafficking statute because a sketch is not an "image" as

This change improves the clarity, consistency, and constitutionality of the revised statutes.

As applied in the revised identity theft civil provisions RCC § 22E-2206, the revised definition of "image" clarifies current District law. The term "District of Columbia public record" is defined in D.C. Code § 22-3227.05 to include a "photographic image[.]"[22] Current law does not specify whether "photographic images" include images stored in print, electronic, magnetic, or digital formats. The term "photographic image" is not defined in the current statute, and there is no relevant DCCA case law. This corresponding RCC provision in RCC § 22E-2206 was copied verbatim from the current D.C. Code § 22-3227.05 and provides procedures to correct District of Columbia public records that contain false information as a result of identity theft. By use of the RCC definition of "image," the revised statute clarifies that photographic images includes print, electronic, magnetic, or digital formats.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Live broadcast" means a streaming video, or any other electronically transmitted image for simultaneous viewing by one or more other people.

Explanatory Note. The RCC definition of "live broadcast" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live broadcast" is used in the revised offense of attending or viewing a live sexual performance of a minor.[23]

Relation to Current District Law. The RCC definition of "live broadcast" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Live performance" means a play, dance, or other visual presentation or exhibition for an audience.

Explanatory Note. The RCC definition of "live performance" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "live performance" is used in the revised offenses of unlawful creation or possession of a recording,[24] arranging a live sexual performance of a minor,[25] and attending or viewing a live sexual performance of a minor.[26]

Relation to Current District Law. The RCC definition of "live performance" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

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defined in the RCC. However, the defendant would be liable under the RCC sexual assault statute (RCC § 22E-1301) for the use of force.

[22] RCC § 22E-2206.

[23] RCC § 22E-1810.

[24] RCC § 22E-2105.

[25] RCC § 22E-1809.

[26] RCC § 22E-1810.

"Monitoring equipment or software" means equipment or software with location tracking capability, including global positioning system and radio frequency identification technology.

Explanatory Note. Monitoring equipment or software is any technology that is capable of monitoring a person's whereabouts. Like the RCC definition of "detection device," "monitoring equipment" includes wearable mechanisms such as bracelets, anklets, tags, and microchips. However, unlike the RCC definition of "detection device," monitoring equipment also includes surveillance devices that are not worn. "Monitoring equipment or software" is intended to capture other equipment and software that may be developed in the future. The term refers to the equipment and software itself and does not include the records or reports that it generates.

The RCC definition of "monitoring equipment or software" is new; the term is not currently defined in Title 22 of the D.C. Code (although the current stalking statute[27] includes a definition of "any device"[28] and undefined references to "monitor" and "place under surveillance"). The RCC definition of "monitoring equipment or software" is used in the revised offense of electronic stalking.[29]

Relation to Current District Law. The RCC definition of "monitoring equipment or software" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Obscene" means:

(A) Appealing to a prurient interest in sex, under contemporary community standards and considered as a whole;

(B) Patently offensive; and

(C) Lacking serious literary, artistic, political, or scientific value, considered as a whole.

Explanatory Note. The RCC definition of "obscene" is consistent with the multi-factor test for obscenity announced by the United States Supreme Court in *Miller v. California*.[30] Namely, to determine whether material is obscene, one must consider: (a) whether the average person,[31] applying contemporary community standards[32] would find

[27] D.C. Code § 22-3132.

[28] "Any device" means electronic, mechanical, digital or any other equipment, including: a camera, spycam, computer, spyware, microphone, audio or video recorder, global positioning system, electronic monitoring system, listening device, night-vision goggles, binoculars, telescope, or spyglass.

[29] RCC § 22E-1802.

[30] 413 U.S. 15 (1973); *see also Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[31] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[32] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by

that the work, taken as a whole, appeals to the prurient interest,[33] (b) whether the work depicts or describes, in a patently offensive way,[34] sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The RCC definition of "obscene" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "obscene" are in some current Title 22 offenses[35]). The RCC definition of "obscene" is used in the revised offenses of distribution of an obscene image,[36] distribution of an obscene image to a minor,[37] trafficking an obscene image of a minor,[38] possession of an obscene image of a minor,[39] arranging a live sexual performance of a minor,[40] and attending or viewing a live sexual performance of a minor.[41]

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the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[33] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[34] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[35] D.C. Code §§ 22-1312 (Lewd, indecent, or obscene acts; sexual proposal to a minor); 22-2201 (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception); 22-3312.01 (Defacing public or private property).

[36] RCC § 22E-1805.

[37] RCC § 22E-1806.

[38] RCC § 22E-1807.

[39] RCC § 22E-1808.

[40] RCC § 22E-1809.

[41] RCC § 22E-1810.

Relation to Current District Law. The RCC definition of "obscene" is new and does not itself substantively change existing District law. The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Open to the general public"[42] means a location:

(A) To which the public is invited; and

(B) For which no payment, membership, affiliation, appointment, or special permission is required for an adult to enter, provided that the location may require entrants to show proof of age or identity and may require security screening for dangerous items.

Explanatory Note. The RCC defines "open to the general public" to mean no payment or permission is required to enter. For example, in a Metro train station, a location outside the fare gates normally would be open to the general public during business hours, but a location inside the fare gates would not be open to the general public. Locations for which the general public always needs special permission to enter, such as public schools while in session or the Central Detention Facility (D.C. Jail), are not "open to the general public."

The RCC definition of "open to the general public" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "open to the general public" appear in the current disorderly conduct[43] and aggressive panhandling[44] statutes and an undefined reference to "in public" appears in the current lewdness statute[45]). The RCC definition of "open to the general public" is used in the revised offenses of burglary,[46] disorderly conduct,[47] public nuisance,[48] indecent exposure,[49] distribution of an obscene image,[50] and distribution of an obscene image to a minor.[51]

Relation to Current District Law. The RCC definition of "open to the general public" is new and does not itself substantively change existing District law.

As applied in the revised burglary offense, the term "open to the general public" may change District law. The current burglary statute does not distinguish between public and private locations leading to some counterintuitive outcomes.[52] In contrast, the revised burglary statute requires a trespass into a dwelling or into a building or business

[42] [This definition has been updated since the First Draft of Report #36 was issued (April 15, 2019).]
[43] D.C. Code § 22-1321.
[44] D.C. Code § 22-2302.
[45] D.C. Code § 22-1312.
[46] RCC § 22E-2701.
[47] RCC § 22E-4201.
[48] RCC § 22E-4202.
[49] RCC § 22E-4401.
[50] RCC § 22E-4402.
[51] RCC § 22E-4403.
[52] For example, a witness who enters a courthouse intending to commit perjury, a government official who enters her office intending to accept a bribe, a drug user who enters his friend's home to use drugs with his companion, and a shoplifter who enters a store intending to steal a candy bar would all be guilty of burglary under current District law, even though their presence in the specified location was invited.

yard that is not open to the general public at the time of the offense. The revised code adds a definition of "open to the general public" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

As applied in the revised disorderly conduct and public nuisance statutes, the term "open to the general public" clarifies, but does not change, District law. The current disorderly conduct statute (which includes public nuisances) uses the phrase "open to the general public" but does not define it. Case law does not address its meaning. The revised code adds a definition of "open to the general public" to be used universally throughout the RCC. This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Rail transit station" has the meaning specified in D.C. Code § 35-251(a).

Explanatory Note. The RCC definition of "rail transit station" is new; the term is not currently defined in Title 22 of the D.C. Code. The RCC definition of "rail transit station" is used in the revised indecent exposure offense.[53]

Relation to Current District Law. The RCC definition of "rail transit station" is new and does not itself substantively change existing District law.

"Sadomasochistic abuse" means flagellation, torture, or physical restraint by or upon a person as an act of sexual stimulation or gratification.

Explanatory Note. The RCC definition of "sadomasochistic abuse" replaces the current definition of "sado-masochistic abuse" in D.C. Code § 22-2201(b)(2)(E)[54] and the reference to "[s]adomasochistic sexual activity for the purpose of sexual stimulation" in the definition of "sexual conduct" in D.C. Code § 22-3101(5)(D). The RCC definition of "sadomasochistic abuse" is used in the revised offenses of unauthorized disclosure of sexual recordings,[55] distribution of an obscene image,[56] distribution of an obscene image to a minor,[57] trafficking an obscene image of a minor,[58] possession of an obscene image of a minor,[59] attending a live sexual performance of a minor,[60] and attending or viewing a live sexual performance of a minor.[61]

Relation to Current District Law. The RCC definition of "sadomasochistic abuse" makes one clear change to the definition of "sado-masochistic abuse" in D.C.

[53] RCC § 22E-4206.
[54] "The term 'sado-masochistic abuse' includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed."
[55] RCC § 22E-1804.
[56] RCC § 22E-1805.
[57] RCC § 22E-1806.
[58] RCC § 22E-1807.
[59] RCC § 22E-1808.
[60] RCC § 22E-1809.
[61] RCC § 22E-1810.

Code § 22-2201(b)(2)(E). The revised definition makes no reference to the type of clothing that must be worn by the participants in sado-masochistic abuse. The current definition of "sado-masochistic abuse" includes any "flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed." Read literally, this definition is both overinclusive and underinclusive.[62] In contrast, the revised definition requires sexual stimulation or gratification without reference to any particular manner of dress. This change improves the clarity of the revised distribution of an obscene image and distribution of an obscene image to a minor statutes.[63]

As applied in the revised trafficking an obscene image of a minor, possession of an obscene image of a minor, arranging a live sexual performance of a minor, and attending or viewing a live sexual performance of a minor offenses,[64] the RCC definition of "sadomasochistic abuse" clarifies current District law. The current sexual performance of a minor statute prohibits "sadomasochistic sexual activity for the purpose of sexual stimulation"[65] without any further definition and there is no DCCA case law. The RCC definition specifies discrete types of sadomasochistic abuse and retains the requirement of sexual stimulation. The RCC definition also adds sexual "gratification" for consistency with the desire to sexually "gratify" in the RCC definitions of "sexual act"[66] and "sexual contact."[67] The revised definition clarifies the scope of the revised statutes.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Sexual act"[68] means:

(A) Penetration, however slight, of the anus or vulva of any person by a penis;

(B) Contact between the mouth of any person and another person's penis, vulva, or anus;

(C) Penetration, however slight, of the anus or vulva of any person by a hand or finger or by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire; or

(D) Conduct described in subsections (A)-(C) between a person and an animal.

Explanatory Note. This language excludes penetration done for legitimate medical, hygienic, or law-enforcement reasons.

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[62] For example, the definition includes a street fight between people dressed in costumes on Halloween and fails to include torture for sexual gratification performed by a nude person on another nude person.

[63] RCC §§ 22E-1805 and 22E-1806.

[64] RCC §§ 22E-1807; 22E-1808; 22E-1809; 22E-1810.

[65] D.C. Code § 22-3101(5)(D) (defining "sexual conduct" to include "sadomasochistic sexual activity for the purpose of sexual stimulation.").

[66] RCC § 22E-701 (subsection (C)).

[67] RCC § 22E-701.

[68] [This definition has been updated since the First Draft of Report #36 was issued (April 15, 2019).]

The RCC definition of "sexual act" replaces the current statutory definition of "sexual act" in D.C. Code § 22-3001(8),[69] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual act" is used in the RCC definitions of "commercial sex act"[70] and "sexual contact,"[71] and many RCC sex offenses[72] and obscenity and privacy offenses.[73]

Relation to Current District Law. The revised definition of "sexual act" makes four possible substantive changes to the statutory definition of "sexual act" in D.C. Code § 22-3001(8).[74]

First, subsection (A) of the revised definition of "sexual act" requires the penetration of the anus or vulva of "any person" by a penis. The current definition of "sexual act" requires the penetration of the anus or vulva "of another" by a penis.[75] The "of another" requirement in the current definition creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in a "sexual act" with the complainant and liability for the involvement of a third party.[76] This revision improves the clarity and consistency of the revised sexual abuse statutes.

Second, the revised definition of "sexual act" specifically includes certain forms of bestiality, mainly an animal sexually penetrating or making contact with a person or a person so sexually penetrating or making contact with an animal.[77] The current D.C.

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

[70] D.C. Code § 22E-701.

[71] D.C. Code § 22E-701.

[72] RCC §§ 22E-1301 (sexual assault); 22E-1302 (sexual abuse of a minor); 22E-1303 (sexual exploitation of an adult); 22E-1305 (enticing a minor into sexual conduct); 22E-1306 (arranging for sexual conduct with a minor); 22E-1307 (nonconsensual sexual conduct); 22E-1312 (incest).

[73] RCC §§ 22E-1803 (Voyeurism); 22E-1804 (Unauthorized Disclosure of Sexual Recordings); 22E-1805 (Distribution of an Obscene Image); 22E-1806 (Distribution of an Obscene Image to a Minor); 22E-1807 (Trafficking an Obscene Image of a Minor); 22E-1808 (Possession of an Obscene Image of a Minor); 22E-1809 (Arranging a Live Sexual Performance of a Minor); 22E-1810 (Attending or Viewing a Live Sexual Performance of a Minor); 22E-4206 (Indecent Exposure).

[74] D.C. Code § 22-3001(8).

[75] D.C. Code § 22-3001(8)(A).

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

[77] Subsection (D) of the revised definition of "sexual act" prohibits "conduct described in subsections (A)-(C) between a person and an animal." This requires reading subsections (A) – (C) broadly to include an animal even if the statutory language specifies "person" or is silent as to the ownership of a body part.
As it pertains to subsection (A) of the revised definition, subsection (D) prohibits an animal penis penetrating the anus or vulva of a person, as well as a human penis penetrating the anus or vulva of an animal. It is not intended to include a human complainant using an animal penis to penetrate an animal.

Code definition of "sexual act" does not specifically refer to an animal, although subsections (A), (B), and (D) of the statute do not specifically exclude involvement of animals. However, D.C. Code § 22-3001(8)(C) does refer to a "person" in the phrase "arouse or gratify the sexual desire of any person."[78] There is no DCCA case law interpreting "person" in the current definition of "sexual act." The District does not have a separate bestiality statute. Resolving this ambiguity, the revised definition clearly specifies that a sexual act may occur between a human and an animal. This change improves the clarity, consistency, and proportionality of the revised definition.

Third, subsection (C) of the revised definition of "sexual act" requires that the defendant have the desire to "sexually" "abuse, humiliate, harass, [or] degrade" any person. None of these terms are defined by the current statute. Subsection (C) of the current definition of "sexual act" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[79] The current definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify." However, it also is unclear whether a prohibited penetration can be done with an intent to "abuse, humiliate harass, or degrade" that is not sexual in nature. There is no DCCA case law on point. Resolving this ambiguity, the revised definition requires, in relevant part, the intent to abuse, humiliate, etc. be sexual in nature. However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur with intent to abuse, humiliate, harass, degrade, or arouse or gratify, that is not also done with intent to *sexually* abuse, humiliate, harass, degrade, or arouse or gratify.[80] This revision improves the clarity and consistency of the revised definition.

Fourth, subsection (C) of the revised definition clarifies that the penetration can be done "at the direction of a person" with the desire to sexually abuse, harass etc. Subsection (C) of the current definition of "sexual act" requires the penetration to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[81] The current definition appears to require that the individual who does the penetration—be it the actor, the complainant, or a third party—also have the intent to abuse, humiliate, etc. This interpretation leads to counterintuitive results and

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As it pertains to subsection (B) of the revised definition, subsection (D) prohibits contact between the mouth of any person and the penis, anus, or vulva of any animal, as well as contact between the mouth of any animal and the penis, anus, or vulva of any person. It is not intended to include a human complainant causing prohibited oral sexual contact between two animals.

As it pertains to subsection (C) of the revised definition, subsection (D) prohibits the body part of any animal penetrating the anus or vulva of a person, as well as a hand or finger of a person or an object wielded by a person penetrating the anus or vulva of any animal.

[78] D.C. Code § 22-3001(8)(C) ("The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[79] D.C. Code § 22-3001(8)(C).

[80] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, defining Subsection (C) in this way aligns the revised definition of "sexual act" with the revised definition of "sexual contact" where requiring a sexual intent does have practical impact on distinguishing liability for an assault (e.g. hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g. hitting someone on their buttocks while commenting on their sexual attractiveness).

[81] D.C. Code § 22-3001(8)(C).

disproportionate penalties for similar conduct[82] and is inconsistent with the legislative history.[83] It is also inconsistent with the part of the current subsection (C) that permits an intent to arouse or gratify the sexual desire "of any person." There is no DCCA case law on this issue. Resolving this ambiguity, subsection (C) of the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the penetration, but it is also sufficient for the complainant or a third party to engage in the penetration at the direction of the actor or another person with such a desire.[84] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

Finally, the RCC definition of "sexual act" makes five clarificatory changes to the current definition that do not substantively change District law.

First, subsection (B) of the revised definition clarifies that the contact must be with "another person's" penis, vulva, or anus. Subsection (B) of the current definition does not specify "any person" or "another person," requiring only "[c]ontact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus."[85] This omission creates ambiguities in the current sexual abuse offenses regarding liability for the actor engaging in "sexual contact" with the complainant and liability for the involvement of a third party.[86] Specifying that the contact can be between the specified body parts of "another person" clarifies the definition.

Second, subsection (C) of the revised definition clarifies that the penetration can be of "any person." Subsection (C) of the current definition does not specify "any person" or "another person," requiring only "penetration…of the anus or vulva."[87] This omission creates ambiguities in the current sexual abuse offenses regarding liability for

[82] For example, an actor that digitally penetrates the complainant's anus with the intent to abuse the complainant has satisfied subsection (C) of the current definition. The actor has also satisfied the current subsection if he or she digitally penetrates the complainant with the intent to sexually gratify a third person that is watching the encounter. However, if the actor makes the complainant digitally penetrate himself or herself, it is unlikely that the complainant shares the actor's intent to abuse the complainant or the intent to sexually gratify a third person and there may not be liability under the current definition.

[83] The Anti-Sexual Abuse Act of 1994 was intended to "strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1.

[84] For example, an actor that causes the complainant to digitally penetrate the complainant's anus has satisfied the first part of the current subsection (C) and revised subsection (C)—penetration of the anus or vulva of any person (the complainant) by a finger. However, it is arguable that the required intent of current subsection (C) has not been met. The actor may have the intent to abuse the complainant, but the complainant is the individual doing the actual penetration and likely does not share this intent. Under the revised subsection (C), however, there is no ambiguity as to whether the actor's conduct suffices because the complainant has engaged in the required penetration "at the direction of" the actor with the desire to sexually abuse the complainant.

[85] D.C. Code § 22-3001(8)(B).

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

[87] D.C. Code § 22-3001(8)(C).

the actor engaging in "sexual contact" with the complainant and liability for the involvement of a third party.[88] Specifying that the penetration can be of "any person" (subsection (C)) clarifies the definition.

Third, the revised definition of "sexual act" requires in subsection (C) "the desire to" degrade, arouse, etc., instead of "with intent to." "Intent" is a defined culpable mental state in RCC § 22E-206. Using "with the desire to" avoids codifying a culpable mental state within a definition while conveying the same meaning.

Fourth, subsection (C) of the revised definition of "sexual act" requires the desire to "sexually" "arouse" or "gratify" any person. Subsection (C) of the current definition of "sexual act" requires, in relevant part, intent to "arouse or gratify the sexual desire of any person."[89] Subsection (C) of the revised definition clarifies that both the desire to "arouse" and the desire to "gratify" must be sexual in nature. Specifying "sexually" "arouse" or "gratify" improves the clarity of the revised definition.

Fifth, the revised definition of "sexual act" no longer states that "the emission of semen is not required," as is the case in subsection (D) of the current definition of "sexual act."[90] Nothing in the remaining subsections of the current definition[91] or in the revised definition of "sexual act" suggests that emission of semen is required. The language is surplusage and potentially confusing. Consequently, the revised definition of "sexual act" omits this language to improve the clarity of the definition.

As applied in the revised voyeurism offense[92] the revised definition makes one possible substantive change to current District law. The voyeurism offense in D.C. Code §§ 22-3531(b)(3) and (c)(1)(C) uses the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include in voyeurism liability conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised voyeurism statute uses the defined term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[93] Consequently, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act, masturbation, or displaying certain body parts[94]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

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

[89] D.C. Code § 22-3001(8)(C).

[90] D.C. Code § 22-3001(8)(D).

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

[92] RCC § 22E-1803.

[93] RCC § 22E-701.

[94] RCC § 22E-1803(a)(1)(A) ("…nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola…").

As applied in the revised unauthorized disclosure of sexual recordings offense,[95] *the revised definition makes one possible substantive change to current District law.* The current non-consensual pornography statute protects against depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[96] while the current felony voyeurism statute protects depictions of "sexual activity"[97] without defining that term. Broadly construed, the term "sexual activity" may include conduct short of penetration, such as kissing or caressing. Resolving this ambiguity, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701, as well as masturbation, sadomasochistic abuse, and images certain body parts[98]—but not mere kissing or caressing. This change improves the clarity and consistency of the revised offense.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Sexual contact"[99] means:

(A) Sexual act; or

(B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person:

(i) With any clothed or unclothed body part or any object, either directly or through the clothing; and

(ii) With the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire.

Explanatory Note. Including "sexual act" in subsection (A) of the revised definition of "sexual contact" establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. The requirement in sub-subparagraph (B)(ii) of the revised definition, "with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person," excludes touching done for legitimate medical, hygienic, or law-enforcement reasons.

The RCC definition of "sexual contact" replaces the current statutory definition of "sexual contact" in D.C. Code § 22-3001(9),[100] applicable to provisions in Chapter 30, Sexual Abuse. The RCC definition of "sexual contact" is used in the definition of

[95] RCC § 22E-1804.

[96] D.C. Code §§ 22-3051(6); 22-3101(5).

[97] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).

[98] RCC § 22E-1804(a)(1)(A) ("…Nude genitals or anus; or Nude or undergarment-clad pubic area, buttocks, or developed female breast below the top of the areola …").

[99] [This definition has been updated since the First Draft of Report #36 was issued (April 15, 2019).]

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

"commercial sex act"[101] and many RCC sex offenses[102] and obscenity and privacy offenses.[103]

Relation to Current District Law. The RCC definition of "sexual contact" substantively changes the statutory definition of "sexual contact" in D.C. Code § 22-3001(9)[104] in one main way.

The revised definition of "sexual contact" specifically includes a "sexual act," as that term is defined in RCC § 22E-701. It is unclear in current District law whether "sexual contact" necessarily includes a "sexual act" because the current definition of "sexual contact" requires the intent to abuse, humiliate, etc., and subsection (A) and subsection (B) of the current definition of "sexual act" do not.[105] In contrast, the revised definition of "sexual contact" statutorily specifies that "sexual contact" includes a "sexual act." This change establishes that RCC sex offenses that require a "sexual contact" are lesser included offenses of otherwise identical RCC sex offenses that differ only in that they require a "sexual act"—for example first degree sexual assault and third degree sexual assault. This change improves the clarity, consistency, and proportionality of the revised sex offenses and removes a possible gap in current District law.

The RCC definition of "sexual contact" makes two possible substantive changes to the current statutory definition of "sexual contact."

First, the revised definition of "sexual contact" requires the desire to "sexually" "abuse, humiliate, harass, [or] degrade" any person. The current definition of "sexual contact" requires an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the

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[101] D.C. Code § 22E-701.

[102] RCC §§ 22E-1301 (sexual assault); 22E-1302 (sexual abuse of a minor); 22E-1303 (sexual exploitation of an adult); 22E-1305 (enticing a minor into sexual conduct); 22E-1306 (arranging for sexual conduct with a minor); 22E-1307 (nonconsensual sexual conduct); 22E-1312 (indecent sexual proposal to a minor).

[103] RCC §§ 22E-1803 (Voyeurism); 22E-1804 (Unauthorized Disclosure of Sexual Recordings); 22E-1805 (Distribution of an Obscene Image); 22E-1806 (Distribution of an Obscene Image to a Minor); 22E-1807 (Trafficking an Obscene Image of a Minor); 22E-1808 (Possession of an Obscene Image of a Minor); 22E-1809 (Arranging a Live Sexual Performance of a Minor); 22E-1810 (Attending or Viewing a Live Sexual Performance of a Minor); 22E-4206 (Indecent Exposure).

[104] D.C. Code § 22-3001(9).

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

Although *In re E.H.* is specific to child sexual abuse, all the current sexual abuse offenses that require a "sexual act" and "sexual contact" have the same issue—the current definition of "sexual contact" has a specific intent requirement that two subsections of the definition of "sexual act" do not. It seems as though the DCCA would find that this specific intent requirement precludes otherwise identical sex offenses from having a lesser included relationship.

sexual desire of any person." None of these terms are defined by the current statute. The current definition's reference to the "sexual desire of any person" appears limited to an intent to "arouse or gratify." However, it is unclear whether all contacts with a specified body part done with a non-sexual intent to "abuse, humiliate harass, or degrade" constitute a sexual contact. There is no DCCA case law on point. Resolving this ambiguity, the revised definition requires, in relevant part, the intent to abuse, humiliate, etc. be sexual in nature. Practically, it would be an unusual fact pattern where the prohibited touching would occur with intent to abuse, humiliate, harass, degrade, or arouse or gratify, that is not done with intent to *sexually* abuse, humiliate, harass, degrade, or arouse or gratify—but, where such facts occur there is assault rather than sex assault liability.[106] This revision improves the clarity, consistency, and proportionality of the revised definition.

Second, the revised definition clarifies that the touching can be done "at the direction of a person" with the desire to sexually abuse, harass etc. The current definition of "sexual contact" requires the touching to be done with an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person."[107] The current definition appears to require that the individual who does the touching—be it the actor, the complainant, or a third party—also have the intent to abuse, humiliate, etc. This interpretation leads to counterintuitive results and disproportionate penalties for similar conduct[108] and is inconsistent with the legislative history.[109] It is also inconsistent with the part of the current definition that permits an intent to arouse or gratify the sexual desire "of any person." There is no DCCA case law on this issue. Resolving this ambiguity, the revised definition specifies that the actor can himself or herself have the required desire to sexually abuse, etc., if the actor engages in the touching, but it is also sufficient for the complainant or a third party to engage in the touching at the direction of the actor or another person with such a desire.[110] This change improves the clarity and consistency of the revised definition and removes a possible gap in current law.

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[106] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, a touching of clothed breast or buttock (or genitalia) as required by the definition of "sexual contact" may be motivated by and have an effect that is non-sexual. Requiring a sexual intent to abuse, humiliate, harass, or degrade may have practical impact on distinguishing liability for an assault (e.g. hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g. hitting someone on their buttocks while commenting on their sexual attractiveness).

[107] D.C. Code § 22-3001(9).

[108] For example, an actor that touches the complainant's breast with the intent to abuse the complainant has satisfied the current definition. The actor has also satisfied the current definition if he or she touches the complainant's breast with the intent to sexually gratify a third person that is watching the encounter. However, if the actor makes the complainant touch his or her own breast, it is unlikely that the complainant shares the actor's intent to abuse the complainant or the intent to sexually gratify a third party and there may not be liability under the current definition.

[109] The Anti-Sexual Abuse Act of 1994 was intended to "strengthen the District's laws against sexual abuse and make them more inclusive, flexible and reflective of the broad range of abusive conduct which does in fact occur." Council of the District of Columbia, Report of the Committee on the Judiciary, Bill 10-87, the "Anti-Sexual Abuse Act of 1994 at 1.

[110] For example, an actor that causes the complainant to touch his or her own breast has satisfied part of the current and revised definitions of "sexual contact"—touching the breast of any person (the complainant). However, it is arguable that the required intent of the current definition has not been met. The actor may have the intent to abuse the complainant, but the complainant is the individual doing the actual touching

The RCC definition of "sexual contact" also makes two clarificatory changes to the current definition of "sexual contact."

First, the revised definition of "sexual contact" requires "the desire to" sexually degrade, sexually arouse, etc., instead of "with intent to." "Intent" is a defined culpable mental state in RCC § 22E-206. Using "with the desire to" avoids codifying a culpable mental state within a definition while conveying the same meaning.

Second, subsection (C) of the revised definition of "sexual contact" requires the desire to "sexually" "arouse" or "gratify" any person. The current definition of "sexual contact" requires, in relevant part, intent to "arouse or gratify the sexual desire of any person."[111] The revised definition clarifies that both the desire to "arouse" and the desire to "gratify" must be sexual in nature. Specifying "sexually" "arouse" or "gratify" improves the clarity of the revised definition.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

"Simulated" means feigned or pretended in a way which realistically duplicates the appearance of actual conduct.

Explanatory Note. The RCC definition of "simulated" applies to specific types of sexual conduct in the RCC obscenity offenses such as a simulated "sexual act" or "simulated" masturbation. In this context, the definition of "simulated" is intended to include highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring,[112] not other portrayals that are clearly staged. The definition excludes highly suggestive sex scenes like one would find in a movie. This definition is similar to another jurisdiction's definition[113] and is supported by Supreme Court case law.[114]

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and likely does not share this intent. Under the revised definition, however, there is no ambiguity as to whether the actor's conduct suffices because the complainant has engaged in the required touching "at the direction of" the actor with the desire to sexually abuse the complainant.

[111] D.C. Code § 22-3001(9).

[112] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[113] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[114] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually explicit conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although

The RCC definition of "simulated" is new; the term is not currently defined in Title 22 of the D.C. Code (although undefined references to "simulated" are in some current Title 22 offenses[115]). The RCC definition of "simulated" is used in the revised offenses of distribution of an obscene image,[116] distribution of an obscene image to a minor,[117] trafficking an obscene image of a minor,[118] possession of an obscene image of a minor,[119] arranging a live sexual performance of a minor,[120] and attending or viewing a live sexual performance of a minor.[121]

Relation to Current District Law. The RCC definition of "simulated" is new and does not itself substantively change current District law.

The commentaries to specific RCC offenses using the revised definition may discuss further the effect of the revised definition on current District law for that specific offense.

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the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse. *Williams*, 553 U.S. at 296–97.

[115] D.C. Code §§ 22-3101(5)(A) (Sexual Performance Using Minors); 22-3312.02 (Defacing or burning cross or religious symbol; display of certain emblems).

[116] RCC § 22E-1805.

[117] RCC § 22E-1806.

[118] RCC § 22E-1807.

[119] RCC § 22E-1808.

[120] RCC § 22E-1809.

[121] RCC § 22E-1810.

RCC § 22E-1802. Electronic Stalking.

(a) *Offense.* A person commits electronic stalking when that person:
  (1) Purposely, on 2 or more separate occasions, engages in a course of conduct directed at a complainant that consists of:
    (A) Creating an image or an audio recording of the complainant, other than a derivative image or audio recording; or
    (B) Accessing monitoring equipment or software, on property of another, that discloses the complainant's location; and
  (2) The person engages in the course of conduct either:
    (A) With intent to cause the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress; or
    (B) Negligently causing the complainant to:
      (i) Fear for the complainant's safety or the safety of another person; or
      (ii) Suffer significant emotional distress.

(b) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution, the First Amendment Assemblies Act of 2004 codified at § 5-331.01 et al., or the Open Meetings Act codified at D.C. Code § 2-575.
  (2) A person shall not be subject to prosecution under subparagraph (a)(1)(A) of this section if:
    (A) The person is a party to the communication; or
    (B) One of the parties to the communication has given effective consent to the conduct.
  (3) A person shall not be subject to prosecution under this section if the person is:
    (A) A journalist, photojournalist, law enforcement officer, professional investigator, attorney, process server, pro se litigant, or compliance investigator; and
    (B) Acting within the reasonable scope of that role.

(c) *Unit of Prosecution.* Where conduct is of a continuing nature, each 24-hour period constitutes one occasion.

(d) *Jury Trial*. A defendant charged with a violation or an inchoate violation of this section may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

(e) *Penalties.*
  (1) Electronic stalking is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) *Penalty Enhancements*. In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, 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:

(A) The person, in fact, was subject to a court order or condition of release prohibiting contact with the complainant;
(B) The person, in fact, has one prior conviction for stalking or electronic stalking of any person within the previous 10 years;
(C) The person was, in fact, 18 years of age or older and at least 4 years older than the complainant and the person recklessly disregarded that the complainant was under 18 years of age; or
(D) The person caused more than $5,000 in financial injury.

(f) *Definitions*.
(1) The terms "intent," "negligently," and "purposely" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "complainant," "effective consent," "financial injury," "image," "law enforcement officer," and "significant emotional distress" have the meanings specified in RCC § 22E-701; and the term "prior conviction" has the meaning specified in RCC § 22E-606.
(2) In this section, the term "safety" means ongoing security from significant intrusions on one's bodily integrity or bodily movement.

COMMENTARY

Explanatory Note. *This section establishes the electronic stalking offense and penalty 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. Together with the revised stalking offense,*[122] *the offense replaces the current stalking offense and related provisions in D.C. Code §§ 22-3131 - 3135.*

Paragraph (a)(1) specifies that the accused must purposely engage in a course of conduct directed at a particular complainant. As applied here, "purposely," a term defined in RCC § 22E-206, requires a conscious desire to cause a pattern of misconduct. A course of conduct does not have to consist of identical conduct, but the conduct must share an uninterrupted purpose[123] and must consist of one or both of the activities listed in subparagraphs (a)(1)(A) and (a)(1)(B). The behavior must be directed at a specific person, not merely surveilling the general public.

Subparagraph (a)(1)(A) provides that one means of committing electronic stalking is creating an original image or audio recording of a specific individual.[124] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in

[122] RCC § 22E-1801. [Previously numbered RCC § 22E-1206.]
[123] The common purpose does not have to be nefarious. For example, a person might persistently monitor someone with the goal of ensuring the they are not engaging in risking or dangerous behavior.
[124] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030.

print, electronic, magnetic, or digital format. The image may be created remotely.[125] Unlike the defined term "sound recording,"[126] the phrase "audio recording" does not require fixation onto a material object, and may include an electronic file. Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state also applies to this element of the offense. That is, the accused must consciously desire to create an image or audio recording.

Subparagraph (a)(1)(B) provides that another means of committing electronic stalking is to access equipment or software that is designed to trace a complainant's movements from one location to another.[127] The term "monitoring equipment or software" is defined in RCC § 22E-701 and means equipment or software with location tracking capability, including global positioning system and radio frequency identification technology. The equipment or software must be installed on property that is "property of another," which is a defined term in RCC § 22E-701.[128] Per the rule of construction in RCC § 22E-207, the "purposely" culpable mental state also applies to this element. That is, the accused must consciously desire to electronically track the complainant's location.

Paragraph (a)(2) requires that the conduct described in paragraph (a)(1) be committed with either the intent or the effect of causing the victim to experience fear or distress. Under (a)(2)(A), a person commits electronic stalking when they act "with intent to" cause someone fear or significant emotional distress. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause someone fear or significant emotional distress. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such fear or significant distress occurred, just that the defendant believed to a practical certainty that such fear or significant emotional distress would result.[129] Under (a)(2)(B), a person commits electronic stalking when they negligently cause fear or significant distress, even if they did not subjectively intend to do so.[130] "Negligently" is a defined term and, applied here, means the actor should be aware of a substantial risk that the pattern of conduct will frighten or significantly distress that particular individual[131] and be clearly blameworthy

[125] For example, by using of a fixed camera, aerial drone, or a third person.

[126] RCC § 22E-701.

[127] A parent who overtly or covertly traces their child's movements may be able to avail herself of the parental defense in RCC § 22E-408(a)(1).

[128] Property of another may include a motor vehicle, bicycle, clothing, or accessory.

[129] Consider, for example, Person A livestreams video footage of Person B singing in her car, in the hopes of causing profound humiliation and emotional distress. Person B is surprised but overall enjoys the attention and praise she receives from the online audience. Person A, nevertheless, may have committed an electronic stalking offense against Person B.

[130] Consider, for example, Person A surreptitiously places a tracking device in Person B's shoe, hoping Person B will not notice, but Person B does notice and becomes afraid. Person A has attempted electronic stalking, if Person B's fear was objectively reasonable.

[131] For example, if the actor reasonably but mistakenly believes that the victim of the electronic stalking conduct will be unbothered by the pattern of conduct, the actor has not acted negligently. RCC § 22E-206. The fact that another reasonable person might find the same consequence alarming is inconsequential.

under the circumstances.[132] Sub-subparagraphs (a)(2)(A)(i) and (a)(2)(B)(i) specify fear of physical harm or confinement to any person[133] is one of two alternative emotional injuries that may establish stalking liability. The term "safety" is defined in subsection (f) and refers to ongoing security from significant intrusions on one's bodily integrity or bodily movement. Sub-subparagraphs (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 electronic stalking liability. "Significant emotional distress" is a defined term that means substantial, ongoing mental suffering that may, but does not necessarily, require medical or other professional treatment or counseling. The suffering must rise significantly above the level of uneasiness, nervousness, unhappiness or the like which is commonly experienced in day to day living.[134]

Subsection (b) clarifies that not all patterns of behavior that have the intent or effect of causing significant emotional distress are subject to prosecution.

Paragraph (b)(1) cross-references the U.S. Constitution, the District's First Amendment Assemblies Act, and the District's Open Meetings Act. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that the revised statute leaves all rights conferred under these Acts unchanged.[135] Not all conduct involved in the offense, of course, will implicate First Amendment rights.

Paragraph (b)(2) specifies that a person does not commit an electronic stalking offense if they are acting with the permission of one of the people depicted in the image or audio recording.[136]

Paragraph (b)(3) specifically excludes from electronic 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, professional investigator,[137] attorney, process server, *pro se* litigant, or compliance investigator who is acting within the

[132] RCC § 22E-206.

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

[134] RCC § 22E-701; *Coleman v. United States*, 202 A.3d 1127, 1145 (D.C. 2019).

[135] 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, but 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).

[136] For example, a person does not commit the offense by recording his or her own phone call. A conference calling company does not commit the offense by recording a call at the direction of the moderator. And, a security company does not commit the offense by hosting surveillance footage on its website at the request of the property owner.

[137] Proof of professional licensure is not required. For example, an investigator working on behalf of the Public Defender Service for the District of Columbia or under the Criminal Justice Act does not commit an electronic stalking offense by conduct that is reasonably within the scope of his or her professional responsibilities.

reasonable scope of their professional duties or court obligations does not commit an electronic stalking offense.[138]

Subsection (c) provides that where conduct is of a continuing nature, each 24-hour period constitutes one occasion.[139]

Subsection (d) provides a jury trial for defendants charged with electronic stalking or attempted electronic stalking.[140] Inclusion of a jury trial right is intended to ensure that the First Amendment rights of the accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties.[141]

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

Paragraph (e)(2) authorizes four penalty enhancements. If one or more of the enhancements is alleged and proven beyond a reasonable doubt, the maximum penalty is increased by one class.

Subparagraph (e)(2)(A) authorizes an enhancement when the defendant was subject to a court order or condition of release prohibiting contact with the complainant at the time the elements of the electronic stalking offense were complete. Per the rules of interpretation in RCC § 22E-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 complainant. A good faith belief that the order was expired or vacated is not a defense. The term "court order" includes any judicial directive, oral or written, that restricts contact with the stalking victim.[142] A condition of release may be imposed by a court or by the United States Parole Commission.[143]

Subparagraph (e)(2)(B) authorizes a sentence increase for any person who has a prior stalking conviction within ten years of the stalking or electronic stalking. 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 subparagraph (a)(1)(C).

Subparagraph (e)(2)(C) authorizes a minor victim enhancement, which includes two distinct culpable mental states. First, the actor must recklessly disregard the fact that

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[138] The revised statute anticipates that some legal pleadings, correspondence and negotiations will cause significant emotional distress. Determining whether conduct exceeds the scope of a person's duties as an attorney or unrepresented litigant is a fact-sensitive inquiry.

[139] *See also Whylie v. United States*, 98 A.3d 156, 158 (D.C. 2014) (finding that all 1400 phone calls that occurred before entry of a restraining order constituted one course of conduct, while all 800 phone calls that occurred after the entry of the restraining order constituted another).

[140] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *4 (D.C. Mar. 7, 2019) (explaining the Council expressly stated that the penalty of 12 months for first-time stalking offenders was established "so that a defendant will have a right to a jury of [his] peers.").

[141] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

[142] 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.

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

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 behave in a manner that is clearly blameworthy under the circumstances.[144] Per the rules of interpretation in RCC § 22E-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 less than four years.

Subparagraph (e)(2)(D) authorizes an enhancement for electronic stalking conduct that results in expenses amounting to more than $5,000. "Financial injury" is a defined term that includes all reasonable monetary costs, debts, or obligations that were sustained as a result of the electronic stalking.[145] 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 does not preclude the government from seeking reimbursement under the restitution statute.[146]

Paragraph (f)(1) cross-references applicable definitions in the RCC.

Paragraph (f)(2) defines "safety" to mean ongoing security from significant intrusions on one's bodily integrity or bodily movement.[147]

Relation to Current District Law. *The revised electronic stalking statute substantively changes current District law in six main ways.*

First, the revised code separately punishes electronic stalking as a stand-alone offense. Current D.C. Code § 22-3132 defines a course of stalking conduct to include acts that "monitor" and "place under surveillance."[148] However, these terms are not defined and the DCCA has not interpreted their meaning.[149] In contrast, the revised code distinguishes between "physically monitoring"[150] in violation of the revised stalking statute[151] and electronically stalking in violation of RCC § 22E-1802. Different exclusions from liability and penalties apply to each offense.[152] This change improves

[144] *See* RCC § 22E-206. For example, a 20-year-old who *knows* that the target of the electronic stalking conduct attends middle school has likely disregarded a substantial risk that the victim is less than 18 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.

[145] RCC § 22E-701.

[146] *See* D.C. Code § 16-711.

[147] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *2–3 (D.C. Mar. 7, 2019) (explaining, "'Fear for safety' means fear of significant injury or a comparable harm…seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community.").

[148] D.C. Code § 22-3132(8)(a).

[149] At least one other state has interpreted monitoring to include a wide variety of relatively nonintrusive 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).

[150] RCC § 22E-701 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.

[151] RCC § 22E-1801. (Previously numbered RCC § 22E-1206.)

[152] *Compare* RCC §§ 22E-1801(b)(2) *with* 1802(b)(2). *Compare* RCC §§ 22E-1801(e)(1) *with* 1802(e)(1).

the clarity and proportionality of the revised offenses and eliminates unnecessary gaps and overlap in District law.

Second, the revised stalking and electronic stalking statutes provide 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 (emphasis added).[153] The DCCA has held that this element of stalking is satisfied where the defendant's conduct is "objectively frightening and alarming."[154] In contrast, under the revised statute an actor is liable for causing an unintended harm only if: (1) they should have been aware of a substantial risk that conduct would cause fear for safety or be distressing to *the complainant* and nevertheless conducted themselves in a manner that is clearly blameworthy under the circumstances, and (2) the complainant did experience significant emotional distress.[155] This change applies the standard culpable mental state definition of "negligently" used throughout the RCC,[156] even though it is highly unusual to provide criminal liability for merely negligent conduct.[157] The broad scope of the

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[153] 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 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).

See also People v. Morocho, 1-15-3232, 2019 WL 2438619 (Ill. App. Ct. June 10, 2019); *State v. Shackelford*, COA18-273, 2019 WL 1246180, at *9 (N.C. Ct. App. Mar. 19, 2019).

[154] *Atkinson v. United States*, 121 A.3d 780, 786-87 (D.C. 2015); *see also Beachum v. United States*, 189 A.3d 715 (D.C. 2018) (affirming a conviction for negligently causing emotional distress where the defendant's conduct scared the complainant).

[155] 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."

[156] RCC § 22E-206.

[157] *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

offense due to the lack of any requirement of subjective awareness by the accused, however, is offset to some degree by the new requirement that the complainant actually experience harm.[158] 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.[159] This change improves the clarity, consistency, and proportionality of District statutes and may ensure constitutionality.

Third, the revised statutes do not specifically authorize multiple convictions for stalking and identity theft based on the same facts. 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 (or conduct constituting electronic stalking) based on the same act or course of conduct. In contrast, the revised stalking and electronic stalking statutes do not contain such a concurrent sentencing provision. There is no apparent reason for specially treating identity theft in this manner, and there may be situations where convictions for identity theft, stalking, and electronic stalking based on the same acts or course of conduct should merge.[160] The revised code includes a comprehensive merger provision in its general part that applies to charges for identity theft and stalking arising from the

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> 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).

[158] *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).

[159] 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 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 § 22E-4201.

[160] RCC § 22E-2205 (Identity Theft) prohibits possessing personal identifying information without effective consent. Personal identifying information, such as a credit card number, may be obtained by physically or electronically monitoring someone.

same act or course of conduct.[161] This change improves the proportionality of penalties and the consistency of the code.

Fourth, the revised statute provides a jury trial for defendants charged with electronic stalking or attempted electronic stalking. Under current District law, attempted stalking is a not jury demandable offense.[162] The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve the exercise of civil liberties[163] and expressly acknowledged the appropriateness of a trial by jury in stalking cases.[164] This change improves the consistency of the revised code.

Fifth, the revised statute provides a distinct penalty enhancement for having one prior stalking or electronic stalking conviction that increases the penalty by one class. The current D.C Code penalty provisions for stalking include distinct enhancements for a second offense[165] and a third offense.[166] The revised statute retains a repeat offender enhancement in the statute for when a person has one prior but eliminates the additional 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.[167] This change improves the consistency and proportionality of District statutes.

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[161] *See* RCC § 22E-212. A stalking offense may reasonably account for the predicate offenses in some cases and not in others.

[162] D.C. Code § 22-1803 ("Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not more than the amount set forth in § 22-3571.01 or by imprisonment for not more than 180 days, or both."); D.C. Code § 16-705.

[163] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

[164] *See Coleman v. United States*, 202 A.3d 1127, 1134 (D.C. 2019).

> The current version of the stalking statute was enacted as part of the Omnibus Public Safety and Justice Amendment Act of 2009, D.C. Law 18-88, 56 D.C. Reg. 7413 (Dec. 10, 2009). Citing the 'subjective nature' of stalking, the Council's Committee on Public Safety and the Judiciary deemed it an offense for which 'the community, not a single judge, should sit in judgment' and found it 'highly appropriate that a jury of [the defendant's] peers…judge whether the behavior is acceptable or outside the norm and indicative of escalating problems.' D.C. Council, Comm. on Pub. Safety & Judiciary, Rep. on Bill 18-151, at 33 (June 26, 2009), http://lims.dccouncil.us/Download/22306/B18-0151-CommitteeReport1.pdf (Committee Report). The Council expressly set the maximum penalty for stalking at a level that guaranteed the defendant's right to a jury trial. *Id*. (explaining that the penalty of twelve months for first-time stalking offenders was established "so that a defendant will have a right to a jury of [his] peers").

[165] D.C. Code § 22-3134(b)(2) increases the maximum penalty 5 times, from 12 months to 5 years when a person has one prior conviction within the last 10 years.

[166] D.C. Code § 22-3134(c) increases the maximum penalty 10 times, from 12 months to 10 years when a person has two prior convictions within the last 10 years, one or more of the convictions must have been jury-demandable.

[167] RCC § 22E-606.

Sixth, the revised offense includes a one-party consent exclusion that is largely consistent with the District's wiretapping law. The current stalking statutes in D.C. Code §§ 22-3131 – 3135 do not carve out an exclusion from liability for a person who records their own communications with others. Although the District is a one-party consent jurisdiction,[168] self-recording may be punished as stalking if the actor knows it would reasonably cause the other party to suffer emotional distress.[169] In contrast, the revised electronic monitoring statute excepts conduct where there was one-party consent. This change corrects a misalignment of the stalking and wiretapping laws, a misalignment that is often overlooked or misunderstood by the general public.[170] The revised statute improves the clarity, consistency, and proportionality of the revised code.

Beyond these six substantive changes to current District law, five other aspects of the revised electronic stalking statute may constitute substantive changes of law.

First, the revised statute more precisely specifies the nature of the social harm in electronic stalking to be a course 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.[171] The current stalking statute does not define the meaning of "safety" and its definition of "emotional distress"[172] is silent on whether such distress is of an ongoing nature. The DCCA has explained only that each term requires a severe degree of intrusion.[173] To resolve these ambiguities, the revised statute defines the terms "safety" and "significant emotional distress" as *ongoing* fear or distress.[174] Because stalking is most commonly understood to mean an obsessive, protracted pursuit,[175] the revised statutes' definition refers to both the degree and the duration of the harm. This change improves the clarity of the revised statutes.

Second, the revised definition of "financial injury" more consistently and precisely defines the types of expenses that will trigger a penalty enhancement. Current D.C. Code § 22-3132(5) includes all expenses incurred by the complainant, member of the complainant's household, a person whose safety is threatened by the stalking, or a person who is financially responsible for the complainant. It is unclear, however, whether there are any reasonableness limitations under the current statute to what may be

[168] *See* D.C. Code § 23-542(b)(2); *see also, e.g.*, Jena McGregor, *Can you record your boss at work without him or her knowing?*, WASHINGTON POST (August 14, 2018) (concerning Omarosa Manigualt Newman's recordings of President Trump in the White House).
[169] *See* D.C. Code § 3133(a)(2)(C).
[170] *See, e.g.*, Benjamin Freed, *Under DC Law, Ryan Lizza Didn't Need to Ask Scaramucci's Permission to Record Phone Call*, THE WASHINGTONIAN (August 10, 2017).
[171] D.C. Code § 22-3132(8).
[172] D.C. Code § 22-3132(4).
[173] *See Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *11 (D.C. Mar. 7, 2019).
[174] RCC §§ 22E-1206(d)(8) and (9).
[175] 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).

considered financial injury.[176] To resolve this ambiguity, the revised definition includes expenses incurred by any natural person,[177] but requires that the expenses be reasonably incurred by the criminal conduct. Additionally, the revised definition includes more examples in the non-exhaustive list of costs, such as the cost of clearing a debt and "lost compensation," which includes employment benefits and other earnings. These changes clarify and improve the consistency of District statutes.

Third, the revised penalty enhancement requires $5,000 in financial injury. Current D.C. Code § 22-3134(b)(4) specifies that the maximum term of imprisonment for a stalking offense may be increased from one year to five years, if the person "caused more than $2,500 in financial injury." The revised code resets the dollar value thresholds for property offenses to include $500, $5,000, $50,000, and $500,000.[178] To improve the consistency of the revised stalking and electronic stalking offenses, the threshold for financial injury has been doubled from $2,500 to $5,000.

Fourth, the revised stalking and electronic stalking statutes exclude 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.[179] To resolve these ambiguities as to the constitutional scope of the offense, the revised statutes specifically exclude from stalking and electronic 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.[180] Without a clear exclusion, such legitimate activities may constitute stalking or electronic stalking.[181] This change improves the clarity, proportionality and perhaps the constitutionality of the revised offenses.

Fifth, the revised statute limits jurisdiction for stalking and electronic 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

[176] E.g., it is unclear whether the purchase of a new house or hiring a bodyguard would be included under the current statute, insofar as it may be "incurred as a result of the stalking" but not be objectively reasonable.

[177] Expenses incurred by the court system or another entity are excluded from the calculation of financial injury.

[178] *See, e.g.*, RCC §§ 22E-2101 (Theft), 22E-2301 (Extortion), 22E-2401 (Possession of Stolen Property).

[179] 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.

[180] 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).

[181] 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 photojournalist may approach and photograph a defendant or victim leaving a courthouse, knowingly exacerbating their distress. Similarly, a business owner monitoring an employee's compliance with worker safety laws may knowingly cause the person some degree of emotional unrest.

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 complainant is a District resident.[182] Authority to exercise jurisdiction over acts that occur outside the District's physical borders has traditionally been limited by courts to acts that occur in, or are intended to have, and actually do have, a detrimental effect within the District.[183] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[184] and such an extension, if intended, may be unconstitutional.[185] This change improves the clarity and perhaps the constitutionality of the revised statutes.

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

First, the revised statute separately criminalizes only conduct that intends or causes another to experience fear 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.[186] The DCCA has explained that serious alarm, disturbance, and fright should be understood as mental harms comparable to fear for one's safety or significant emotional distress.[187] Accordingly, the revised stalking and electronic stalking statutes eliminate a distinct reference to conduct that causes a person to "feel seriously alarmed, disturbed, or frightened" because such results are adequately captured in the statute by other terminology.[188] This change improves the clarity of District statutes.

Second, the revised statutes do not specially codify a statement of legislative intent for the stalking and electronic stalking offenses. Current D.C. Code § 22-3131 codifies a lengthy statement of legislative intent that, e.g., "urges intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences." [189] No other criminal offense in the current D.C. Code contains a

[182] 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.
[183] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[184] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[185] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[186] 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.
[187] *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *11 (D.C. Mar. 7, 2019).
[188] *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).
[189] 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.

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 and electronic stalking statutes rely upon the usual sources of legislative intent rather than a special codified statement. This change improves the clarity and consistency of the revised statutes.

Third, the revised statutes apply standardized definitions for the "purposely" and "with intent" culpable mental states required for stalking and electronic stalking liability. The current stalking statute requires that the accused "purposely 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"[190] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[191] These changes clarify and improve the consistency of District statutes.

Fourth, the definition of "safety" in the revised offense clarifies, but does not change, District law. The current statute uses the phrase "fear for safety" but does not define it. In *Coleman v. United States*, 16-CM-345, 2019 WL 1066002, at *2–3 (D.C. Mar. 7, 2019), the District of Columbia Court of Appeals explained, "'Fear for safety' means fear of significant injury or a comparable harm...seriously troubling conduct, not mere unpleasant or mildly worrying encounters that occur on a regular basis in any community." This change applies consistent, clearly articulated definitions and improves the clarity of the revised offenses.

Relation to National Legal Trends. *The revised electronic 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.[192] Twenty-nine states (hereafter "reform

[190] RCC § 22E-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 § 22E-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).

[191] RCC § 22E-207(a).

[192] 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. §

jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[193] Many state stalking statutes have been influenced by model language published by the Department of Justice in 1993[194] and a revised model statute published by the National Center for Victims of Crime in 2007.[195] However, constitutional challenges on grounds of vagueness and overbreadth have been common.[196] Sixteen states are now considering legislation to amend their stalking codes.[197]

First, most jurisdictions' statutes do not precisely describe the type of misconduct that may establish the basis of a stalking charge.[198] This may be due to the fact that many jurisdictions' statutes are heavily influenced by model stalking codes that were designed

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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

[193] 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).

[194] 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.

[195] *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.

[196] 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 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.

[197] 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.

[198] 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. 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).

to be easily implemented by every state and, therefore, do not reference specific offenses under any individual state's criminal code.

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.[199] One of those four statutes was found to be facially unconstitutional.[200] The majority of reform jurisdictions require that the offender's conduct *actually cause* fear or distress, not merely that the conduct *would be* disturbing.[201] Few reform jurisdictions have any stalking liability for simple negligence, whether or not fear or distress actually occurs.[202]

Third, no other jurisdiction's stalking statute expressly authorizes multiple convictions for stalking and identity theft based on the same facts.[203] Only three reform jurisdictions include misuse of personal identifying information as a means of stalking.[204] Only Maryland addresses the issue of concurrent sentencing for stalking and another offense.[205]

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

First, 19 out of 50 states statutorily require a continuity of purpose in the conduct constituting stalking.[206]

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[199] 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.

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

[201] 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.

[202] *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.

[203] "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).

[204] 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).

[205] 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.").

[206] 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.

Second, only one other jurisdiction, Minnesota, has a provision that bases jurisdiction for certain stalking offenses on the victim's state of residency.[207]

Third, 19 reform jurisdictions (a majority) expressly authorize an increased penalty for persons with a previous stalking conviction.[208] However, no reform jurisdictions have an additional enhancement for a third time stalking offender.

[207] 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.

[208] 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.

RCC § 22E-1803. Voyeurism.

(a) *First Degree*. An actor commits first degree voyeurism when that actor:
  (1) Knowingly:
    (A) Creates an image, other than a derivative image, of the complainant's nude or undergarment-clad genitals, pubic area, anus, buttocks, or developed female breast below the top of the areola; or
    (B) Creates an image or audio recording, other than a derivative image or audio recording, of the complainant engaging in or submitting to a sexual act or masturbation;
  (2) Without the complainant's effective consent; and
  (2) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

(b) *Second Degree.* An actor commits second degree voyeurism when that actor:
  (1) Knowingly observes:
    (A) The complainant's nude or undergarment-clad genitals, anus, pubic area, buttocks, or developed female breast below the top of the areola;
    (B) The complainant engaging in or submitting to a sexual act or masturbation;
  (2) Without the complainant's effective consent; and
  (3) In fact, the complainant has a reasonable expectation of privacy under the circumstances.

(c) *Penalties.*
  (1) First degree voyeurism is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (2) Second degree voyeurism is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
  (3) *Penalty Enhancements*. In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for this offense may be increased in severity by one class when, in addition to the elements of the offense, it is proven that the actor knew the complainant was under 18 years of age.

(d) *Definitions*. The term "knowingly" has the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "complainant," "effective consent," "image," "law enforcement officer," "property of another," and "sexual act" have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the voyeurism offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits observing or recording a person who is privately undressing or engaging in sexual conduct without*

permission.[209] *The offense replaces the current misdemeanor voyeurism offense in D.C. Code § 22-3531.*[210]

Subsection (a) specifies the requirements of first degree voyeurism, which requires creating a recording of private behavior without permission.

Paragraph (a)(1) specifies that the person must act at least knowingly.[211] Subparagraph (a)(1)(A) prohibits capturing visual images, whereas subparagraph (a)(1)(B) prohibits capturing visual or aural images. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. The image may be created remotely.[212] Unlike the defined term "sound recording,"[213] the phrase "audio recording" does not require fixation onto a material object, and may include an electronic file. The image or audio recording must be creating an original depiction of a specific individual.[214]

Subparagraph (a)(1)(A) prohibits capturing images of a someone's exposed private areas or a person in their underwear.[215] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image of one the itemized areas.[216]

Subparagraph (a)(1)(B) prohibits capturing images or audio recordings of a person while they are engaging in a sexual act or masturbation. The term "sexual act" is defined in RCC § 22E-701. Unlike the electronic stalking offense,[217] it is not a defense that one party consented to the recording. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are capturing an image or audio recording of one the itemized activities.

Paragraph (a)(2) requires that the person act without the complainant's effective consent. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being recorded.[218]

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[209] *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 76-77 (D.C. 2018) (explaining that the voyeurism statute's legislative aim is to "prohibit persons from spying on their neighbors, guests, tenants, or others in places and under circumstances where there is an expectation of privacy, that is, in a home, bedroom, bathroom, changing room, and similar locations and under one's clothing.")

[210] The felony voyeurism offense in D.C. Code § 22-3531(f)(2) is replaced by RCC § 22E-1804, Unauthorized Disclosure of Sexual Recordings.

[211] "Knowingly" is defined in RCC § 22E-206.

[212] For example, by using of a fixed camera, aerial drone, or a third person.

[213] RCC § 22E-701.

[214] The offense excludes creating a derivative image (e.g., taking a photograph of a photograph, capturing a screenshot) or hacking into a trove of pre-existing images. A person who takes a derivative image without permission may commit unauthorized use of property, in violation of RCC § 22E-2102. A person who commits a computer hacking crime may be subject to punishment under 18 U.S.C. § 1030.

[215] The words "nude" and "undergarment-clad" modify each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

[216] The phrase "developed female breast" includes cisgender and transfeminine women.

[217] RCC § 22E-1802.

[218] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the person is practically certain that the couple does not want to be recorded.

Paragraph (a)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such a recording would not occur. A person does not commit an offense where it is objectively unreasonable to expect privacy under the circumstances.[219] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances,[220] including the time, place,[221] the complainant's manner of dress,[222] the complainant's body position,[223] and efforts to communicate that privacy is expected.[224] A person may know that they will be observed and nevertheless reasonably expect to not be recorded.[225]

Subsection (b) specifies the requirements of second degree voyeurism, which requires observing[226] private behavior without permission.

Paragraph (b)(1) specifies that the person must act specifies that a person must act at least knowingly. "Knowingly" is a defined term[227] and applied here means that the person must be practically certain that they are looking at the complainant engaging in the specified private behavior. Paragraph (b)(1) prohibits observing a person's exposed private areas[228] or a person in their underwear.[229] It also prohibits observing a person while they are engaging in a sexual act or masturbation. The term "sexual act" is defined in RCC § 22E-701.

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[219] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit second degree voyeurism by photographing the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[220] This language is meaningfully distinct from the phrasing "while the person is *in a place* where he or she would have a reasonable expectation of privacy," that appears in other state statutes. *See State v. Glas* (2002) 147 Wash.2d 410, 54 P.3d 147 (holding that the voyeurism statute, as written, does not cover intrusions of privacy in public places and, thus, does not prohibit "upskirt" photography).

[221] *See, e.g., State v. Frost*, 92 Ohio App. 3d 106 (1994) (holding a defendant was not guilty of voyeurism by acts of observing bikini-clad women on public beach with binoculars from his vehicle, while engaging in masturbation).

[222] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be photographed.

[223] The more public the place and the more likely it is that people will take photographs there, the more conscientious and personally responsible one must be about what they do and do not expose. For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be photographed. *Compare*, Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[224] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

[225] For example, a person may not expect that a sexual partner will observe their body but not record it. *See also* Derek Hawkins, *Former Playmate sentenced for Snapchat body-shaming of naked woman at gym*, WASHINGTON POST (May 25, 2017).

[226] The word "observe" includes direct and indirect observations. For example, watching a livestream of a video feed, without recording it, is sufficient.

[227] "Knowingly" is defined in RCC § 22E-206.

[228] The word "nude" modifies each word in the list that follows.

[229] The word "undergarment-clad" modifies each word in the list that follows. Consider, for example, a person who angles a camera to photograph underneath a woman's dress or skirt.

Paragraph (b)(2) requires that the person act without the complainant's effective consent. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant has not given effective consent to being viewed.

Paragraph (b)(3) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the complainant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to expect privacy under the circumstances.[230] Whether a person's expectation of privacy is reasonable depends on all of the surrounding circumstances, including the time, place, the complainant's manner of dress,[231] the complainant's body position,[232] and efforts to communicate that privacy is expected.[233]

Subsection (c) provides the penalty for each gradation of the revised offense. [RESERVED.] Paragraph (c)(4) specifies that the penalty may be increased by one penalty class if it is proven that the defendant knew the complainant was a minor.

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

Relation to Current District Law. *The revised voyeurism offense changes current District law in nine main ways.*

First, the revised voyeurism offense punishes observing a person's nude or undergarment-clad private area without their permission. Current D.C. Code § 22-3531(d) makes it unlawful to electronically record a person's private area without express and informed consent, under circumstances in which that person has a reasonable expectation of privacy. However, the statute does not provide any liability for merely observing a private area, without recording, unless the victim is also using the bathroom, undressing, or engaging in sexual activity. Accordingly, a person who strategically positions himself or angles a mirror to look up the skirts of passersby does not commit an offense. In contrast, the revised statute criminalizes all upskirting behavior that violates a

[230] Consider, for example, a couple of exhibitionists who are having sex against a window that is visible from the street. A person does not commit third degree voyeurism by watching the exhibition unless it is proven that the couple has a reasonable expectation of privacy.

[231] For example, a person who exposes their undergarment-clad buttocks by sagging their pants in a public place does not have a reasonable expectation that their buttocks will not be viewed.

[232] For example, a woman who exposes her underwear by sitting on the steps of the Lincoln Memorial at a time when many people are photographing the historic landmark does not have a reasonable expectation that her underwear will not be seen. *Compare*, Justin Jouvenal and Miles Parks, *Voyeur charges dropped against photographer at Lincoln Memorial*, WASHINGTON POST (October 9, 2014) *with* Perry Stein, *Man charged with voyeurism after allegedly filming under a girl's dress at Whole Foods*, WASHINGTON POST (October 1, 2019).

[233] For example, a person may post a "Do Not Disturb" sign on a hotel room door or call out "Occupied!" when a bathroom door will not lock, or put a sock on their doorknob to tell their roommate to come back later.

reasonable expectation of privacy, even if the accused does not produce a recorded image. This change may eliminate an unnecessary gap in law.[234]

Second, the revised statute does not require that an observation be covert. Current D.C. Code § 22-3531(b) requires that the accused act with "the purpose of secretly or surreptitiously observing" the complainant. This requirement may exclude liability for a person who overtly views a complainant by intruding into a bedroom, peering over a bathroom stall,[235] or lifting a dress.[236] In contrast, the revised offense punishes any hostile observation that occurs without the complainant's effective consent, if the victim has a reasonable expectation of privacy under the circumstances. This change eliminates an unnecessary gap in law and clarifies the revised offense.

Third, the revised offense includes only a developed female breast. Current D.C. Code § 22-3531(a)(2) defines the term "private area" to mean the "naked or undergarment-clad genitals, pubic area, anus, or buttocks, or female breast below the top of the areola." The term "breast" is undefined and District case law has not addressed whether it broadly includes the undeveloped chest of a child. This change improves the clarity and proportionality of the revised offense.

Fourth, the revised voyeurism and unauthorized disclosure of sexual recordings[237] offenses establish four distinct penalties for attempting, observing, recording, and distributing. Current D.C. Code § 22-3531 includes only two sentencing gradations. Under current law, a person is subject to up to one year in jail if they "occupy a hidden observation post or to install or maintain a peephole, mirror, or any electronic device for the purpose of secretly or surreptitiously observing" the complainant using the bathroom, undressing, or engaging in sexual activity.[238] A person is subject to the same one-year penalty if they electronically record those observations[239] or create a recording of the complainant's private area.[240] And, a person is subject to a maximum penalty of five years in prison if they disseminate or attempt to disseminate any such recording "directly or indirectly, by any means."[241] In contrast, the revised statute punishes creating a recording more severely than observations alone and relies on the general part's common definition of attempt[242] and penalty for an attempt[243] to define and penalize attempts the

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[234] *But see Valenzuela-Castillo v. United States*, 180 A.3d 74, 85 (D.C. 2018) (J. Easterly, *dissenting*) (reasoning that the legislative history of the voyeurism statute indicates that it was not meant to encompass simple viewing).

[235] The DCCA has held that a person "occupies a hidden observation post" in violation of the statute when he furtively sneaks into a bathroom and looks underneath a stall, even if the victim is then able to see him. *See Valenzuela-Castillo v. United States*, 180 A.3d 74, 75 (D.C. 2018); *but see* Judge Easterly's dissent (reasoning that one does not "occupy" a "hidden" "post" by merely changing their body position in a public space). However, the court has not addressed whether a person who more overtly bursts into a bathroom or bedroom commits the offense.

[236] *See, e.g.*, Dana Hedgpeth, *Fairfax police seek man they say chased woman, tried to take photos by lifting her skirt*, WASHINGTON POST (September 12, 2019). Chasing a woman and lifting her skirt would also be punished as assault under RCC § 22E-1202.

[237] RCC § 22E-1804.

[238] D.C. Code §§ 22-3531(b) and (f)(1).

[239] D.C. Code §§ 22-3531(c) and (f)(1).

[240] D.C. Code §§ 22-3531(d) and (f)(1).

[241] D.C. Code § 22-3531(f)(2).

[242] RCC § 22E-301(a).

[243] RCC § 22E-301(c)(1).

same as for other revised offenses.[244] Distribution of a recording is punished as unauthorized disclosure of sexual recordings, under RCC § 22E-1804. This change improves the consistency and proportionality of the revised offense.

Fifth, the revised offense includes an enhancement for knowingly committing voyeurism against a child. When the current voyeurism statute was enacted, the Council considered including a penalty enhancement for offenses against any person who is under 18 years of age.[245] At least one advocacy group recommended deferring the decision about enhancements to the Criminal Code Reform Commission.[246] The revised statute includes an enhancement but requires proof that the defendant knew that the victim was underage.[247] A person who is practically certain that they are observing or recording a child inflicts a more egregious social harm than a person who invades the privacy of an adult.[248] Similar enhancements appear in other RCC offenses against persons, such as sexual assault and related provisions in Chapter 13. This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute applies the culpable mental state definitions in the RCC's general part. None of the mental states in the current statute are defined in the D.C. Code.[249] In contrast, the revised statute specifies a defined mental state for every

[244] Under the revised statute, using an observation post, peephole, or mirror is punished only if it amounts to attempted third degree voyeurism and attempting to disseminate a recording is punished as attempted first degree voyeurism. *See, e.g., State v. Million*, 63 Ohio App. 3d 349 (1989) (explaining, although evidence that defendant used hand-held mirror to look underneath stall did not support voyeurism conviction if adjacent stall was unoccupied, it might have supported attempted voyeurism conviction if the following stall was occupied).

[245] *Freundel v. United States*, 146 A.3d 375, 382 (D.C. 2016) (explaining, "[T]wo versions of the statute that were then under consideration…one version provided for different penalties depending on whether the victim was a minor or an adult.").

[246] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on behalf of the District of Columbia Association of Criminal Defense Attorneys ("We believe the decision to punish such a crime more severely if the victim is a minor should be deferred as a subject to be considered by the proposed Reform Commission.").

[247] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 175, testimony of Richard Gilbert on behalf of the District of Columbia Association of Criminal Defense Attorneys ("It is not at all clear to us that such penalty enhancements based upon the age or other characteristic of the victim are [sic.] must necessarily be enshrined in statutes as opposed to factors to be considered at sentencing. However, we join PDS in believing that any such enhancements should be limited to situations in which that characteristic is foreseeable and/or contributes to the commission of the crime.").

[248] Some instances of voyeurism against children—i.e. possession and distribution of images that are sexual in nature—will overlap and merge with the offenses of possession of an obscene image of a minor and trafficking an obscene image of a minor. *See* RCC §§ 22E-214, 22E-1805, and 22E-1806.

[249] Current D.C. Code § 22-3531(b) specifies that a person who occupies a hidden observation post or who installs or maintains a mirror, peephole, or electronic device, must act with the purpose of secretly or surreptitiously observing another person. Current D.C. Code § 22-3531(c) does not specify a culpable mental state for a person who records another person engaging in private behavior. Current D.C. Code § 22-3531(d) specifies that a person who records another person's private area must capture the image intentionally, however, it is unclear whether the person must also intend to violate the subject's reasonable expectation of privacy or express and informed consent. Finally, current D.C. Code § 22-3531(f)(2) specifies that a person is guilty of a felony if they distribute or attempt to distribute a recording that they know or should know was taken in violation subsection (b), (c), or (d).

conduct, result, and circumstance element of the offense. First, the revised statute requires that the person know—that is, be practically certain—that they are observing, recording, or distributing an image or audio recording of the complainant without the complainant's effective consent. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[250] Second, the revised statute requires that a person who distributes an image or audio recording be at least reckless as to the fact that the image or audio recording was created unlawfully. Courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[251] Third, the revised statute holds an observer or recorder strictly liable with respect to whether the complainant has a reasonable expectation of privacy under the circumstances and holds a distributer strictly liable with respect to whether the conduct that created the image or recording amounts to second degree voyeurism. Although applying strict liability to statutory elements that distinguish innocent from criminal behavior is strongly disfavored by courts[252] and legal experts[253] for any non-regulatory crimes, it may be difficult or impossible in many cases to prove that a distributer knew the elements of second degree voyeurism or that an observer or recorder was practically certain that the victim reasonably expected privacy. This change improves the clarity and consistency of the revised offense.

Seventh, the revised offense narrows the exclusions from liability in four ways. First, D.C. Code § 22-3531(e)(1) excludes liability for "[a]ny lawful law enforcement, correctional, or intelligence observation or surveillance." The revised offense does not include an exclusion for law enforcement officers or investigators and instead relies on

[250] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[251] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

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

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

the general defense for execution of a public duty.[254] This change improves the consistency and proportionality of the revised offense. Second, D.C. Code § 22-3531(e)(2) excludes liability for "[s]ecurity monitoring in one's own home." This phrasing broadly exempts any person who places covert security cameras in a bathroom or guestroom and records guests engaging in private, sexual activity. In contrast, under the revised statute, offense liability attaches in any location in which the victim's expectation of privacy is reasonable under the circumstances.[255] Third, D.C. Code § 22-3531(e)(3) excludes liability for "[s]ecurity monitoring in any building where there are signs prominently displayed informing persons that the entire premises or designated portions of the premises are under surveillance." In contrast, under the revised statute, signage is one of many factors that the factfinder may consider when determining whether the complainant's expectation of privacy is reasonable under the circumstances. Fourth, D.C. Code § 22-3531(e)(4) excludes liability for "[a]ny electronic recording of a medical procedure which is conducted under circumstances where the patient is unable to give consent." This phrasing broadly exempts any person who records a patient, even if it is done without the doctor's permission and even if the patient expressly objects to the recording before being rendered unable to do so.[256] In contrast, the revised code includes an emergency health professional defense[257] which is available only to doctors and their designees during an in which it would be too difficult to obtain consent. These changes eliminate unnecessary gaps in law.

Eighth, the revised code defines the term "effective consent."[258] Current D.C. Code §§ 22-3531(c)(1) and (d) require that the person act without the victim's "express and informed consent." This phrase is not defined by statute and District case law has not interpreted its meaning in the context of the voyeurism statute. The RCC definition of "effective consent" does not require that consent be express or informed, only that it not be induced by physical force, a coercive threat, or deception. This change improves the proportionality of the revised offense.

Ninth, the revised statute partially clarifies the appropriate unit of prosecution for the voyeurism offense. Although is not obvious from the organization of the D.C. Code whether the voyeurism offense is intended to protect individual victims or to ensure public order,[259] the DCCA has explained that its purpose is to protect the victim of the observation or recording.[260] The RCC classifies voyeurism as an offense against persons,

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[254] [The Commission's recommendations for general defenses are forthcoming.] *See also* Model Penal Code § 3.03.

[255] For example, using a "nanny cam" to observe a house sitter in one's own kitchen may not amount to voyeurism whereas using that same camera to observe that same house sitter in one's own shower may constitute an offense.

[256] For example, a rogue hospital employee could install a hidden camera in an operating room.

[257] RC § 22E-408(a)(3).

[258] RCC § 22E-701.

[259] Current D.C. Code § 22-3531 appears in Subtitle I of Title 22 of the D.C. Code, which is titled simply, "Criminal Offenses." The offense is sandwiched between property offenses such as trespass, repealed public order offenses such as vagrancy, and general provisions such as use of "District of Columbia" by certain persons and the fines for criminal offenses.

[260] *See Freundel v. United States*, 146 A.3d 375, 379 (D.C. 2016) (stating, "The provision by its terms is directed at protecting individual privacy.")

clarifying that the statute permits separate punishments for separate victims.[261] and does not permit separate punishments for each copy of an image or for each recipient. Other unit of prosecution issues[262] are not addressed in the statutory language or accompanying commentary but may be addressed in the RCC's general part.[263] This change clarifies and improves the proportionality the revised offense.

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

First, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "[t]otally or partially undressed or changing clothes." The word "undressed" and the phrase "changing clothes" are not defined in the current statute and District case law has not addressed their meaning. Broadly construed, "undressed" may include a person who has removed their clothing but concealed their body using a blanket, robe, or towel. Broadly construed, "changing clothes" may include changing outerwear. The revised statute clarifies that photographing a person who is sleeping under the covers or changing their jacket does not amount to voyeurism.[264] This change improves the clarity of the revised offense.

Second, unlike current D.C. Code §§ 22-3531(b)(2) and (c)(1)(B), the revised offense does not separately criminalize observations of a person who is "using a bathroom or restroom." The phrase—which is commonly used as a euphemism for urinating or defecating—is not defined in the statute and District case law has not addressed its meaning. Broadly construed, the phrase may capture conduct that is not voyeuristic in nature.[265] The revised statute prohibits recording a person who is using the

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[261] *See Freundel v. United States*, 146 A.3d 375, 384 (D.C. 2016); *see also State v. Mason*, 410 P.3d 1173 (Wash. Ct. App. 2018).

[262] For example, creating a single recording of multiple people together in the nude may constitute a single offense or multiple offenses. *See Freundel v. United States*, 146 A.3d 375, 382-83 (D.C. 2016) ("Because each victim was recorded undressing separately, we need not decide whether multiple punishments would be permissible based on a single recording depicting more than one victim at the same time."). Watching two people engage in a single sex act together may constitute a single offense or multiple offenses. *See, e.g., State v. Diaz-Flores*, 148 Wash. App. 911 (2009). Taking multiple photos of the same person in succession or taking multiple videos of the same conduct from different angles may constitute a single offense or multiple offenses. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim did not establish multiple acts of voyeurism but rather a continuing course of conduct). Recording one person over multiple days may constitute a single offense or multiple offenses. *See, e.g.*, RCC §§ 22E-1801(c) and 1802(c) which provide, "Where conduct is of a continuing nature, each 24-hour period constitutes one occasion."

[263] [Further Commission recommendations are forthcoming.]

[264] A person who places a recording device in a changing room but only captures people changing clothes without exposing their private areas or underwear may nevertheless commit attempted voyeurism. *See generally* RCC § 22E-301.

[265] E.g., posting a bathroom selfie that shows a stranger in the background applying makeup, filming a hallway that shows people entering and exiting a bathroom, creating an audio recording of a person singing in the shower or talking to herself. *See, e.g.*, Charles V. Bagli and Vivian Yee, *Robert Durst of HBO's 'The Jinx' Says He 'Killed Them All,'* NEW YORK TIMES (March 15, 2015) (discussing documentary filmmakers recording a suspected murderer muttering inculpatory statements to himself in the bathroom).

bathroom only if that person's nude or undergarment-clad private areas are exposed.[266] Other private bathroom behaviors that involve sexual conduct, nudity, or the removal of clothing are separately protected under the other subsections of the revised code.

Third, the revised statute defines the term "image" and specifies that the creation of a derivative image does not amount to voyeurism. D.C. Code § 22-3531(d)(1) makes it unlawful to "capture an image" of a person's private area without permission. The term "image" is not defined in the statute and District case law has not addressed its meaning. It is unclear whether "capture an image" has the same meaning as "electronically record" in § 22-3531(c)(1). It is also unclear whether "image" includes both refers to both "visual" and "aural images."[267] It is also unclear whether the term "image" includes a "series of images"[268] or a derivative image (e.g., a photograph of a photograph, a screenshot). To resolve this ambiguity, the revised code defines the term "image" to mean a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. This definition broadens the offense by including images that are captured without an electronic device (such as those captured using a mechanical camera) but narrows the offense by excluding images that are hand-drawn or illustrated on an electronic device (such as a tablet). The definition also clarifies that a film or video constitutes a single image, not a series of images. And, the statutory language specifies that derivative images are not included. This change clarifies the revised offense and improves the consistency of the revised offenses.

Fourth, the revised statute defines the type of sexual activity that may not be viewed or recorded without permission. D.C. Code §§ 22-3531(b)(3) and (c)(1)(C) use the term "sexual activity," without defining it. District case law has not addressed its meaning. Broadly construed, the term may include conduct short of penetration, such as kissing or caressing. The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.[269] And, the revised voyeurism offense prohibits observing or recording a person who is engaging in a sexual act or masturbation. This change improves the clarity and consistency of the revised offense.

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

The revised offense is prosecuted by the United States Attorney for the District of Columbia ("USAO"). Current D.C. Code § 22-3531(g) grants prosecutorial authority to

[266] A person who places a recording device in a bathroom but only captures people urinating or defecating without exposing their private areas or underwear may nevertheless commit attempted voyeurism. *See generally* RCC § 22E-301.

[267] *See* § 22-3531(a)(1). The revised offense does not criminalize creating an "aural image" of a person's private areas or of a person undressing.

[268] *See* D.C. Code § 22-3531(f)(2).

[269] RCC § 22E-701.

the Attorney General for the District of Columbia. However, the DCCA has held that the offense must be prosecuted by USAO under the Home Rule Act.[270]

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

[270] *See In re Perrow*, 172 A.3d 894 (D.C. 2017) (explaining that voyeurism is distinguishable from "Peeping Tom" conduct punished as disorderly conduct, because it requires intent to observe, record, or photograph).

RCC § 22E-1804. Unauthorized Disclosure of Sexual Recordings.

(a) *Offense*. An actor commits unauthorized disclosure of sexual recordings when that actor:
  (1) Knowingly distributes or displays to a person other than the complainant, or makes accessible on an electronic platform to a user other than the complainant or actor:
    (A) An image of the complainant's:
      (i) Nude genitals or anus; or
      (ii) Nude or undergarment-clad pubic area, buttocks, or developed female breast below the top of the areola; or
    (B) An image or an audio recording of the complainant engaging in or submitting to a sexual act, masturbation, or sadomasochistic abuse;
  (3) Without the complainant's effective consent; and
  (4) Either:
    (A) After reaching an agreement or understanding with the complainant that the image or audio recording will not be distributed or displayed, with intent to:
      (i) Alarm or sexually abuse, humiliate, harass, or degrade the complainant; or
      (ii) Receive financial gain as a result of the distribution or display; or
    (B) In fact, after personally obtaining the image or audio recording by conduct that constitutes:
      (i) Voyeurism under RCC § 22E-1803;
      (ii) Theft under RCC § 22E-2101;
      (iii) Unauthorized Use of Property under RCC § 22E-2102; or
      (iv) Extortion under RCC § 22E-2102.

(b) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) Nothing in this chapter shall be construed to impose liability on a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.
  (3) Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(c) *Affirmative Defense.*
  (1) It is an affirmative defense to a prosecution under this section, that the defendant:
    (A) Distributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably

believed to be depicted in the image or involved in the creation of the image;

(B) With intent, exclusively and in good faith, to report possible illegal conduct or seek legal counsel from an attorney.

(2) *Burden of Proof.* The defendant has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(d) *Penalties.*

(1) Unauthorized disclosure of sexual recordings is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) *Penalty Enhancements*. In addition to any general penalty enhancements in RCC §§ 22E-605 – 22E-608, the penalty classification for this offense may be increased in severity by one class when it is proven that the actor knowingly distributes or displays to 6 or more persons other than the complainant, or makes publicly accessible on an electronic platform to a user other than the complainant or actor, the image or audio recording.

(e) *Definitions.*

(1) The terms "intent" and "knowingly" have the meanings specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "effective consent," "image," "sadomasochistic abuse," and "sexual act," have the meanings specified in RCC § 22E-701.

(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

COMMENTARY

Explanatory Note. *This section establishes the unauthorized disclosure of sexual recordings offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits distributing sexually explicit images of a person without permission. The offense replaces the non-consensual pornography chapter in D.C. Code §§ 22-3051 – 3057 and the felony voyeurism offense in D.C. Code § 22-3531(f)(2).*[271]

Paragraph (a)(1) specifies that a person must act at least knowingly with respect to a distribution or display. "Knowingly" is a defined term[272] and, applied here, means that the person must be practically certain that they are distributing, displaying, or making available online an image or audio recording to a third person who is not the complainant.[273] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[274] The phrase "make accessible on an

[271] The misdemeanor voyeurism offense is replaced by RCC § 22E-1803, Voyeurism.

[272] RCC § 22E-206.

[273] *See Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (holding a defendant must have disclosed a sexual image to a third party).

[274] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

electronic platform" does not require proof that the material was actually accessed or viewed.[275] The word "user" excludes technical administrators that have access to all files hosted on the website.[276]

Subparagraph (a)(1)(A) prohibits dissemination of images. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. Per the rules of interpretation in RCC § 22E-207, the actor must know—that is, be practically certain—that what they are distributing or displaying is an image of the complainant's nude genitals or anus; or nude or undergarment-clad pubic area, buttocks, or developed female breast below the top of the areola.[277]

Subparagraph (a)(1)(B) prohibits dissemination of images or audio recordings. The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. Unlike the defined term "sound recording,"[278] the phrase "audio recording" does not require fixation onto a material object, and may include an electronic file. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that what they are distributing or displaying is an image or audio recording of the complainant engaging in or submitting to a sexual act, masturbation, or sadomasochistic abuse.[279] The terms "sexual act" and "sadomasochistic abuse" defined in RCC § 22E-701.

Paragraph (a)(2) requires that the actor engage in conduct without the complainant's effective consent. A person does not commit an offense by distributing an image of herself or by distributing an image with permission from the person who is depicted. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that the complainant does not give effective consent to disseminating the image or recording.

Paragraph (a)(3) specifies two alternative requirements for liability.

Subparagraph (a)(3)(A) imposes liability where an actor and the complainant reached an agreement or understanding that the image or audio recording would not be shared.[280] Per the rules of interpretation in RCC § 22E-207, the person must know—that

[275] For example, a person may commit an offense by publishing the image on their own public website, on a peer-to-peer social networking platform, or on the dark web, even if no one else ever views the page.

[276] For example, a person who uploads an image of the complainant to their own cloud account, without granting access to any other user, does not commit an offense, even though a cloud service administrator or information technology specialist may have access to it.

[277] Although some swimwear, formal wear, or other garments may be more revealing than some underwear, the word "undergarment" does not include such garments.

[278] RCC § 22E-701.

[279] Consider, for example, a woman who, upon noticing her boyfriend has a DVD with another woman's name on it, steals the DVD and asks her best friend to watch it for her. Because the woman was merely suspicious, and not practically certain, about the contents, she has not committed unauthorized disclosure of a sexual recording. *But see* RCC § 22E-2101, Theft.

[280] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 ("Explicit warning not to share a sexual image is not necessary to create an understanding…within the

is, be practically certain—that such an agreement or understanding applied at the time of the distribution or display. Subparagraph (a)(3)(A) requires an intent to alarm or sexually abuse, humiliate, harass, or degrade the complainant, or an intent to receive financial gain as a result of the distribution or display. "Intent" is a defined term in RCC § 22E-206 that, applied here, means the actor was practically certain that his or her conduct would cause one of the specified harms to the complainant or result in a financial benefit. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that such harm or financial benefit occurred, just that the defendant believed to a practical certainty that it would result.

Subparagraph (a)(3)(B) imposes liability where a person obtains the image or recording by any of three unlawful means: voyeurism, theft, unauthorized use of property, or extortion. For example, a person who obtains a photograph by stealing a DVD, hacking a cloud server, texting an image from someone else's phone, or secretly recording a consensual encounter, commits a new offense by sharing the image or audio recording with others. Subparagraph (a)(3)(B) uses the term "in fact" to specify that there is no culpable mental state required as to whether the defendant's conduct constitutes a predicate offense. Subparagraph (a)(3)(B) does not require intent to harm or gain financially.

Subsection (b) establishes three exclusions from liability for the distribution of an obscene image offense. Paragraph (b)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (b)(2) provides that the statute does not apply to any licensee[281] under the Communications Act of 1934, such as a radio, television, or phone service provider.[282] Paragraph (b)(3) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[283]

Subsection (c) establishes an affirmative defense for the innocent display or distribution of a prohibited image. The recipient of the display or distribution must be "a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction" and the actor must have the intent "exclusively and in good faith, to report

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context of a romantic or similarly close relationship where it is the norm to send these images between the parties... [However,] such an understanding does not exist where a sexual image is sent unsolicited without any prior agreement or understanding in place.").

[281] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[282] *See* D.C. Code § 22-2201(d).

[283] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

possible illegal conduct or seek legal counsel from any attorney."[284] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would.

Subsection (d) provides the penalty for the revised offense. [RESERVED.] Paragraph (d)(2) establishes a penalty enhancement for mass dissemination or publication online.

Subsection (e) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised unauthorized disclosure of sexual recordings statute changes current District law in eleven main ways.*

First, the revised statute criminalizes disseminating images that were obtained unlawfully by the actor. The current non-consensual pornography offenses require that "[t]here was an agreement or understanding between the person depicted and the person disclosing that the sexual image would not be disclosed." [285] This requirement does not provide liability for distribution of an image that was taken without the victim's knowledge or permission.[286] In contrast, the revised statute provides liability for dissemination of images or audio recordings that were illegally obtained by specified means. Exposing intimate images or audio recordings against a person's will fundamentally deprives that person of her right to privacy.[287] A victim whose image has been disseminated without consent suffers the same privacy violation and negative consequences of exposure, regardless of the disseminator's objective.[288] The revised statute punishes exploiting a stranger as severely as exploiting a former partner.[289] This change eliminates an unnecessary gap in law.

Second, the revised statute specifies more precisely which types of audio and visual recordings are protected. First, the current non-consensual pornography offense

[284] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[285] D.C. Code §§ 22-3052(a)(2) and 22-3053(a)(2).

[286] For example, a person could snoop through a lover's smartphone, discover nude photographs from another suitor, steal a screenshot, and post it online without incurring any criminal liability. *See, e.g.*, *State v. VanBuren*, 214 A.3d 791 (Vt. 2019). Or, a person could hack into a celebrity's cloud server and publish their nude photographs online, subject only to federal computer crime laws. *See* 18 U.S.C. § 1030; *see also* Laura M. Holson, *Hacker of Nude Photos of Jennifer Lawrence Gets 8 Months in Prison*, NEW YORK TIMES (August 30, 2018). This conduct does not amount to stalking (RCC § 22E-1801) or electronic stalking (RCC § 22E-1802), unless it occurs on multiple occasions with the intent or effect of causing significant emotional distress. This conduct does not amount to voyeurism (RCC § 22E-1803), unless it surreptitiously recorded by the same person who is distributing it. This conduct does not amount to extortion (RCC § 22E-2301), unless there is some demand for action in exchange for the recordings.

[287] *People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019).

[288] *Id*. at *19.

[289] *See People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019) ("[C]riminal liability here does not depend on "whether the image was initially obtained with the subject's consent; rather, it is the absence of consent to the image's distribution that renders the perpetrator in violation of the law.").

prohibits distribution of "one or more sexual images,"[290] whereas the current felony voyeurism offense prohibits the distribution of any "image or series of images or sounds or series of sounds" of a "private area."[291] In contrast to the current non-consensual pornography statute, the revised statute recognizes a right to privacy in sexual audio recordings,[292] that is more consistent with the scope of the voyeurism statute.[293] Second, the current non-consensual pornography offense defines the term "sexual image" to mean "a photograph, video, or other visual recording,"[294] whereas the current felony voyeurism statute does not define the term "image" but does require that the image be electronic.[295] It is unclear whether the current non-consensual pornography offense requires the image to be an electronic recording. To resolve this ambiguity, the revised statute applies the RCC's definition of "image,"[296] which excludes drawings and illustrations, consistent with the current non-consensual pornography offense. These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Third, the revised statute applies a more consistent definition of the type of sexual content that is protected. First, the current non-consensual pornography offense defines the term "sexual image" to include a depiction of "an *unclothed* private area"[297] and defines "private area" to mean "the genitals, anus, or pubic area of a person, or the *nipple* of a developed female breast, *including the breast of a transgender female*."[298] The current voyeurism statute defines "private area" differently as "the naked *or undergarment-clad* genitals, pubic area, anus, or *buttocks*, or female *breast below the top of the areola*."[299] In contrast to the current non-consensual pornography statute, the revised statute recognizes a privacy right warranting criminal sanction in the more expansive list of depictions of the human body described in the voyeurism statute. Second, the current non-consensual pornography statute protects depictions of "sexual conduct," including masturbation and "[s]adomasochistic sexual activity for the purpose of sexual stimulation,"[300] whereas the current felony voyeurism statute protects depictions of "sexual activity"[301] or "using a bathroom or restroom,"[302] without defining those terms. The meaning of the term "sexual activity" is unclear and may include

[290] D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a).
[291] D.C. Code § 22-3531.
[292] For example, such recordings may be of sexual encounters and masturbation (e.g., phone sex), consistent with the current voyeurism offense.
[293] The revised offense does not refer to "one *or more* images" or to a "*series of* images" or "*series of* sounds," to avoid confusion with respect to the appropriate unit of prosecution. A series of images taken in rapid succession may constitute a single course of conduct whereas a compilation of images taken weeks or months apart may be appropriately charged as separate counts. *See, e.g., State v. Boyd*, 137 Wash. App. 910 (2007) (finding two photographs of the same victim on the same day did not establish multiple acts of voyeurism but rather a continuing course of conduct).
[294] D.C. Code § 22-3051(7). (Emphasis added.)
[295] D.C. Code §§ 22-3531(c)(1) ("Except as provided in subsection (e) of this section, it is unlawful for a person to electronically record…").
[296] RCC § 22E-701.
[297] D.C. Code § 22-3051(7). (Emphasis added.)
[298] D.C. Code § 22-3051(4). (Emphasis added.)
[299] D.C. Code § 3531(a)(2). (Emphasis added.)
[300] D.C. Code §§ 22-3051(6); 22-3101(5).
[301] D.C. Code §§ 22-3531(b)(3) and (c)(1)(C).
[302] D.C. Code §§ 22-3531(b)(1) and (c)(1)(A).

conduct short of penetration, such as kissing or sadomasochistic contact. Similarly, the term "using a bathroom" is unclear and could include activities such as grooming, blowing one's nose, or applying makeup. Resolving these ambiguities, the revised statute includes depictions of a "sexual act," as defined in RCC § 22E-701,[303] masturbation, and sadomasochistic activity, that is more consistent with the detailed list in the current non-consensual pornography statute. The revised statute does not include depictions of urination or defecation unless they depict the complainant's nude or undergarment-clad private areas. These changes improve the clarity and consistency of the revised offense and reduce unnecessary gaps in liability.

Fourth, the revised statute clarifies the type of intended harm required for disclosure of an image that was lawfully obtained. The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a)(3) and 22-3053(a)(3) require a showing that the accused distributed the sexual image "with the intent to harm the person depicted" or for financial gain. The term "harm" is defined in the statute to mean "any injury, whether physical or nonphysical, including psychological, financial, or reputational injury."[304] To resolve these ambiguities, the revised statute more precisely requires intent to "alarm or sexually abuse, humiliate, harass, or degrade the complainant." These injuries are required in other RCC offenses.[305] This change improves the consistency of the revised statutes.

Fifth, the revised offense does not include a categorical exclusion from liability for commercial images. D.C. Code § 22-3055(a)(2) provides that the non-consensual pornography chapter shall not apply to "[a] person disclosing or publishing a sexual image that resulted from the voluntary exposure of the person depicted in a public or commercial setting." This blanket exception appears to eliminate any protection for people who agree to participate in a commercial recording, even if the recording was for a limited audience.[306] In contrast, the revised statute provides liability for commercial images if the other elements of the offense, including a reasonable expectation of privacy, are met. The revised offense recognizes that effective consent as to distribution may be limited and puts the privacy rights of models and sex workers on par with other citizens. This change eliminates an unnecessary gap in law.

Sixth, the revised offense does not punish attempts to commit unauthorized distribution as severely as a completed offense. The current felony voyeurism statute applies the same five-year penalty to a person who "distributes or disseminates, or attempts to distribute or disseminate."[307] Although the current non-consensual pornography offense requires this element, the statute nonetheless punishes "making a sexual image available for viewing even if the image is not actually viewed by anyone

[303] The revised code defines the term "sexual act" to include direct contact between one person's genitalia and another person's genitalia, mouth, or anus.
[304] D.C. Code § 22-3051(2).
[305] See RCC § 22E-701 (defining "sexual act" and "sexual contact").
[306] *See, e.g.,* Katie Van Syckle, *22 Women Say They Were Exploited by Porn Producers: Their lawsuit, a rare look into an opaque industry, seeks $22 million in damages,* NEW YORK TIMES (Aug. 29, 2019); Adeel Hassan and Katie Van Syckle, *Porn Producers Accused of Fooling Women Get Sex Trafficking Charges: Young women say that they responded to ads seeking models and were tricked into performing,* NEW YORK TIMES (Oct. 13, 2019).
[307] D.C. Code § 3531(f)(2).

other than the defendant and the person depicted in the image."[308] In contrast, the revised statute requires that the person "distribute or display" the image to another person who actually views it. Attempts to distribute an image would remain criminal, but subject to a lower penalty. The revised statute relies on the general part's common definition of attempt[309] and penalty for an attempt[310] to define and penalize attempts the same as for other revised offenses. This change improves the consistency[311] and proportionality of the revised offense.

Seventh, under the revised statute, a person is not liable for redistributing an image that was disclosed by someone else. The current felony voyeurism statute makes it unlawful to distribute images "that the person knows or has reason to know were taken in violation of" the voyeurism statute.[312] The current non-consensual pornography chapter makes it unlawful to distribute an image "obtained from a third party or other source…with conscious disregard that the sexual image was obtained as a result of" a violation of the non-consensual pornography statute.[313] In contrast, the revised statute punishes redistribution only if the person acted as a co-conspirator or as an accomplice.[314] The revised statute's language avoids punishing a person who shares an image as severely as the person who is responsible for the original privacy intrusion.[315] This change improves the consistency and proportionality of the revised statutes.

Eighth, the revised offense expands liability for publication online. First, the current felony voyeurism punishes an actor who "distributes or disseminates, or attempts to distribute or disseminate" an image that was obtained through voyeurism.[316] The terms "distribute" and "disseminate" are not defined in the statute and District case law has not addressed their meaning. Second, the current non-consensual pornography statutes specify that it is unlawful to make pornographic material "available for viewing by uploading to the Internet"[317] and define "Internet" to mean "an electronically available platform by which sexual images can be disseminated to a wide audience."[318] The term

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[308] *See* D.C. Code §§ 22-3051 – 3054; *Roberts v. United States*, 17-CF-431, 2019 WL 4678119, at *6 (D.C. Sept. 26, 2019) (requiring that the defendant "exhibit" the image to a third party but not requiring that the third party see it).

[309] RCC § 22E-301(a).

[310] RCC § 22E-301(c)(1).

[311] Similarly, in the revised criminal threats offense, the verb "communicates" is intended to be broadly construed, encompassing all speech and other messages that are received and understood by another person. RCC § 22E-1205. In *Evans v. United States*, 779 A.2d 891, 894-95 (D.C. 2001), the DCCA recognized that for there to be a communication of a threat the recipient must be able to access or comprehend it, at the most basic level. For example, there is no communication of a threat if the content of the threat is in a language that the recipient does not comprehend.

[312] D.C. Code § 22-3531(f)(2).

[313] D.C. Code § 22-3054(a).

[314] *See* RCC §§ 22E-210 and 22-302.

[315] Consider, for example, Classmate A posts a partially-nude locker room photograph of a student on Twitter, commenting, "How ugly! She should be ashamed!" Classmate B retweets it, commenting, "Wow, what an invasion of privacy! YOU should be ashamed!" Under current law, Classmates A and B face the same punishment.

[316] D.C. Code § 22-3531(f)(2).

[317] D.C. Code § 22-3051(5).

[318] D.C. Code § 22-3051(3). The definition includes "social media" and "smartphone applications" but excludes "text messages." In some cases, this may be a distinction without a difference. Many social

"wide audience" is not defined in the statute and District case law has not addressed its meaning. In contrast, the revised statute clarifies that uploading material to any online forum that is accessible by a user other than the complainant or defendant is sufficient, even if no other person actually accesses or views it and the electronic platform is not accessible by a "wide audience." This change simplifies the revised offense and avoids litigation over whether an online forum is available to a "wide audience." It also improves the logical organization of the revised statute by making unauthorized disclosure of sexual recordings a lesser-included version of the enhanced offense.

Ninth, the revised statute establishes a penalty enhancement for large-scale unauthorized distribution of images. Under the current felony voyeurism statute, distribution of sexual images obtained through voyeurism is punishable by up to five years of in prison, irrespective of audience size.[319] Under the current non-consensual pornography statutes, distribution of sexual images obtained by consent is punishable by either 180 days in jail[320] or three years in prison,[321] depending on how widespread the disclosure is. Publication to six or more people or to the internet is punishable by three years. In contrast, the revised statute includes two penalty levels through the enhancement in subsection (d)(2), consistent with the current non-consensual pornography chapter's penalty distinction between distribution to a few people versus distribution to a large audience or online forum. This change improves the consistency and proportionality of the revised statutes.

Tenth, the revised statute excludes liability for a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act. The current nonconsensual pornography statute, D.C. Code § 22-3055(b), provides that: "Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person." However, the current non-consensual pornography offenses do not include an exception for other telecommunications services provider such as radio stations, television broadcasters, and phone service providers, and the current felony voyeurism offense does not include an exception for any service provider. In contrast to these statutes' limited or absent exclusions for commercial service providers, the revised statute makes clear that there is no criminal liability for a company or employee who merely facilitates the transmission of an image or sound at a user's request. This change improves the consistency and proportionality of the revised offense.

Eleventh, the revised code defines and uses the term "effective consent" instead of using other, undefined references to "consent." The current nonconsensual pornography offenses, through D.C. Code §§ 22-3052(a)(1), 22-3053(a)(1), and 22-3054(a)(1) require that "the person depicted did not *consent* to the disclosure of the sexual image." (Emphasis added.) The current voyeurism offense, in D.C. Code §§ 22-3531(c)(1) and (d), requires that the person act without the victim's "express and

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media platforms and smartphone applications have a direct messaging feature that is virtually identical to Short Message Service.

[319] D.C. Code § 22-3531(f)(2).

[320] D.C. Code § 22-3052(b).

[321] D.C. Code § 22-3053(b).

informed consent." The terms "consent" "express consent" and "informed consent" are not defined in the D.C. Code and District case law has not interpreted their meaning in the context of the non-consensual pornography and voyeurism statutes. In contrast, the revised statute uses the defined term "effective consent."[322] The RCC definition of "effective consent" does not require that consent be express or informed—however those terms are defined—only that the consent not be induced by physical force, a coercive threat, or deception.[323] This change improves the consistency and proportionality of the revised offense.

Beyond these eleven substantive changes to current District law, three other aspects of the revised unauthorized disclosure of sexual recordings statute may constitute substantive changes of law.

First, the revised statute applies standardized definitions as to the culpable mental states required for unauthorized disclosure liability. Current nonconsensual pornography statutes in D.C. Code §§ 22-3052 – 3054 specify that a person must "knowingly disclose" or "knowingly publish" a sexual image, and require that the actor proceed "with the intent to harm the person depicted or to receive financial gain." However, the terms "knowingly" and "with intent" are not defined for the statute, and it is unclear whether the "knowingly" mental state applies to the elements that follow concerning agreement and consent. The current voyeurism statute, in D.C. Code § 22-3531(f)(2), does not specify any culpable mental state as to distribution, but it does require that "the person knows or has reason to know" the images were obtained unlawfully. To resolve these ambiguities, the revised statute uses the RCC's general provisions that define "knowingly" and "with intent"[324] and specify that there is no additional culpable mental state required with respect to an actor's underlying criminal conduct. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[325] These changes clarify and improve the consistency of District statutes.

Second, the revised statute extends jurisdiction for unauthorized disclosure liability only to instances where some aspect of the crime occurs in the District. Current D.C. Code § 22-3057 states: "A violation of § 22-3052, § 22-3053, or § 22-3054 shall be deemed to be committed in the District of Columbia if any part of the violation takes place in the District of Columbia, including when either the person depicted or the person

[322] RCC § 22E-701.

[323] For more information on the meaning of "effective consent" in the RCC, see entries for "consent" and "effective consent" in RCC § 22E-701.

[324] RCC § 22E-206.

[325] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

who disclosed or published the sexual image *was a resident of*, or located in, the District of Columbia at the time that the sexual image was made, disclosed, or published." (emphasis added.) However, 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.[326] There is no clear precedent for states to extend jurisdiction based solely on the residency of the alleged victim,[327] and the DCCA has not addressed the issue. To resolve this ambiguity, 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 complainant is a District resident. Some authorities have questioned whether a purported extension of jurisdiction as in the current statute is unconstitutional.[328] This change improves the clarity and perhaps the constitutionality of the revised statutes.

Third, the revised statute clarifies the scope of the affirmative defense. The current non-consensual pornography chapter establishes an affirmative defense that applies "if the disclosure or publication of a sexual image is made in the public interest, including the reporting of unlawful conduct, the lawful and common practices of law enforcement, or legal proceedings."[329] The current felony voyeurism statute does not include a comparable affirmative defense provision.[330] The phrase "in the public interest" is not defined in the statute and District case law has not yet addressed its meaning. To resolve this ambiguity, the revised affirmative defense requires that a defendant demonstrate she "[d]stributed the image or audio recording to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the person that the actor reasonably believed to be depicted in the image or involved in the creation of the image" and intended only "to report possible illegal conduct or seek legal counsel from an attorney." This revised language recognizes that a person in public life enjoys a right to sexual privacy and protection.[331] This change clarifies the revised statute and may eliminate an unnecessary gap in law.

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

First, the revised statute does not specify that the victim must be an "identified or identifiable person." The current nonconsensual pornography statutes in D.C. Code §§ 22-3052(a), 22-3053(a), and 22-3054(a) state: "It shall be unlawful in the District of Columbia for a person to knowingly [disclose or publish] one or more sexual images of another identified or identifiable person." However, this language does not appear in the current felony voyeurism statute, in D.C. Code § 22-3531(f)(2). Legislative history suggests that this phrase was included to make clear that a person is liable for non-

[326] *See Strassheim v. Daily*, 221 U.S. 280, 285 (1911).
[327] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(c)(1) (3d ed.).
[328] Wayne R. LaFave, 1 Subst. Crim. L. § 4.4(a) (3d ed.).
[329] D.C. Code § 22-3056.
[330] D.C. Code § 22-3531(f)2).
[331] For example, a defendant might argue under the current statute that the public has an interest in viewing a sexual recording of a politician or a movie star that undermine that celebrity's public denials of infidelity. However, such conduct would not be covered by the revised statute's affirmative defense.

consensual pornography whether the victim is named ("identified") or the victim's face is depicted ("identifiable").[332] However, District case law has held that a person is "identified or identifiable" even if they are not named and even if they are not recognizable by others. In *Roberts v. United States*,[333] the DCCA explained, "it suffices that the person depicted in a sexual image can identify himself or herself in the image." Because the revised statute already makes clear that it applies only to images of a specific complainant—and not anonymous images—the phrase "identified or identifiable" is stricken as superfluous. This change clarifies the revised offense.

Second, the revised statute does not specify that a person is liable for distributing images "directly or indirectly, by any means."[334] This language is surplusage.

Relation to National Legal Trends.

For more than 100 years, there has been a recognition that the law must afford some remedy for the unauthorized circulation of portraits of private persons.[335]

The overwhelming majority of state legislatures have enacted laws criminalizing the nonconsensual dissemination of private sexual images. [336] In 2004, New Jersey was the first state to enact such a statute. [337] By 2013, only Alaska and Texas followed suit. However, between 2013 and 2017, 36 additional states enacted criminal statutes, bringing the total to 39. [338] These statutes "vary widely throughout the United States, each with their own base elements, intent requirements, exceptions, definitions, and penalties." [339] The mass adoption of these statutes by states on opposite sides of the political spectrum reflects the urgency of the problem.[340]

Most of these states provide elaborate descriptions of malice, such as "the intent to harass, intimidate, threaten, humiliate, embarrass, or coerce"[341] or "the intent to annoy, terrify, threaten, intimidate, harass, offend, humiliate or degrade"[342] or "the intent to harass, intimidate, or coerce."[343] Other states describe simply the intent to "harm"[344] or

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[332] *See* Report on Bill 20-903, the "Criminalization of Non-Consensual Pornography Act of 2014," Council of the District of Columbia Committee on the Judiciary and Public Safety (November 12, 2014) at Page 5 (providing a hypothetical and explaining, "The photo is a sexual image because it shows the nipple of [the victim's] developed female breast, who is identifiable by her face in the photo. If her face was cropped out of the photo, however, she would still be identified by the use of her first name in the email subject line and the reference to her employment at the school.").

[333] 17-CF-431, 2019 WL 4678119, at *10 (D.C. Sept. 26, 2019).

[334] D.C. Code § 22-3531(f)(2).

[335] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 195 (1890).

[336] *People v. Austin*, 123910, 2019 WL 5287962, at *4 (Ill. Oct. 18, 2019) (internal citations omitted).

[337] *Id*.

[338] *Id*.

[339] *Id*.

[340] *Id*.

[341] *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing W. Va. Code § 61-8-28a(b) (2019); see N.M. Stat. Ann. § 30-37A-1(A) (2019)).

[342] *State v. VanBuren*, 214 A.3d 791, 795 (Vt. 2019) (citing Idaho Code § 18-6609(3)(a) (2019)).

[343] *Id*. (citing Colo. Rev. Stat. § 18-7-801(1)(a) (2019); Mo. Rev. Stat. § 573.110(2); Okla. Stat. tit. 21, § 1040.13b(B)(2) (2019); Va. Code Ann. § 18.2-386.2(A) (2019)).

[344] *Id*. (citing Ohio Rev. Code Ann. § 2917.211(B)(5) (West 2019); Tex. Penal Code Ann. § 21.16(b)(3) (West 2019)).

"harass."[345] In contrast, the legislatures of four states have chosen not to expressly include "malice" as a distinct element of the offense.[346]

[345] *Id*. (citing Minn. Stat. § 617.261(2)(b)(5) (2018)).
[346] *Id*. (citing 720 ILCS 5/11-23.5 (West 2016); Wis. Stat. § 942.09 (2017-18); N.J. Stat. Ann. § 2C:14-9 (West 2019); Del. Code Ann. tit. 11, § 1335 (2017)).

RCC § 22E-1805. Distribution of an Obscene Image.

(a) *Offense*. An actor commits distribution of an obscene image when that actor:
  (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
    (A) Sexual act;
    (B) Sadomasochistic abuse;
    (C) Masturbation;
    (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
    (E) Sexual contact; or
    (F) Sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering;
  (2) Without the complainant's effective consent; and
  (3) Reckless as to the fact that the image is obscene.

(b) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) Nothing in this chapter shall be construed to impose liability on a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.
  (3) Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.
  (4) An actor shall not be subject to prosecution under this section for distribution or display of an image to a complainant in a location open to the general public or in an electronic forum unless the actor also:
    (A) Knowingly distributes or displays the image directly to the complainant; or
    (B) Purposely distributes or displays the image to the complainant.

(c) *Affirmative Defense.*
  (1) It is an affirmative defense to a prosecution under this section, which the defendant must prove by a preponderance of the evidence, that the defendant:
    (A) Is an employee of a school, museum, library, or movie theater;
    (B) Is acting within the reasonable scope of that role; and
    (C) Has no control over the selection of the image.
  (2) *Burden of Proof.* The defendant has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(d) *Jury Trial*. A defendant charged with a violation or an inchoate violation of this section may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

(e) *Penalty.* Distribution of an obscene image is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "knowingly," "purposely," and "reckless" have the meanings specified in RCC § 22E-206; and the terms "complainant," "effective consent," "obscene," "open to the general public," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

COMMENTARY

Explanatory Note. *This section establishes the distribution of an obscene image offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces a subsection of the obscenity statute, D.C. Code § 22-2201(a) (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[347] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person. The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[348] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format. The person must also be practically certain that the picture or video depicts an actual or simulated[349] sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Paragraph (a)(2) requires that the person act without the recipient's effective consent.[350] The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be

[347] RCC § 22E-206.

[348] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

[349] The term "simulated" is defined in RCC § 22E-701 and means feigned or pretended in a way which realistically duplicates the appearance of actual conduct.

[350] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

practically certain—that the complainant has not given effective consent to receiving the offensive image.[351]

Paragraph (a)(3) specifies that a person must also be reckless as to the image being obscene.[352] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[353] and considered as a whole;[354] is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[355] "Reckless" is defined in the revised code,[356] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's conduct must be clearly blameworthy under the circumstances.

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[351] A person does not commit distribution of an obscene image if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the material. For example, a man does not commit an offense for sending a photograph of his erect penis by text message to a woman he is dating and, based on a prior conversation, believes the woman has agreed to such conduct. On the other hand, a man who, for example, sends a similar penis picture with intent to annoy, harass, or alarm someone, or with intent to seduce a stranger he knows nothing about (and, therefore, has not given any indication of agreement to such behavior) does commit the offense.

[352] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[353] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[354] National standards are a matter of proof at trial. *Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973). In *Parks v. United States*, 294 A.2d 858, 859-60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[355] *See Miller v. California*, 413 U.S. 15 (1973).

[356] RCC § 22E-206.

Subsection (b) establishes six exclusions from liability for the distribution of an obscene image offense. Paragraph (b)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (b)(2) provides that the statute does not apply to any licensee[357] under the Communications Act of 1934, such as a radio, television, or phone service provider.[358] Paragraph (b)(3) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[359] Paragraph (a)(4) excludes liability for publishing an image in or on a public forum, unless the image is also distributed or displayed directly to a specific viewer[360] or with the purpose of reaching a specific viewer,[361] without that viewer's effective consent.

Subsection (c) establishes an affirmative defense for an employee of a school, museum, library, or movie theater, who is acting within the scope of their role.[362] The burden of proof is on the defendant to prove the defense by a preponderance of the evidence.

Subsection (d) provides a jury trial for defendants charged with distribution of an obscene image or attempted distribution of an obscene image. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of the accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[363]

Subsection (e) provides the penalty for the revised offense. [RESERVED.]

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

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[357] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[358] *See* D.C. Code § 22-2201(d).

[359] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[360] E.g., sending an image to another social media user via direct message.

[361] *Compare Matter of Welfare of A.J.B.*, 910 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) *with 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).

[362] The exclusion does not apply to an employee who is acting *ultra vires*. For example, a cashier who accepts a bribe from a 15-year-old to be admitted into an X-ray screening commits a distributing obscene materials to a minor offense.

[363] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

Relation to Current District Law. *The revised distribution of an obscene image offense changes current District law in eight main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(a)(1) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. Current D.C. Code § 22-2201(a)(2)(B) broadly defines "knowingly" to mean "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of" the obscene materials.[364] In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[365] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the image being of the sort that is criminally obscene. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[366] Moreover, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[367]and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[368] This change improves the clarity and consistency of the revised statute.

Second, the revised statute requires a distribution or display of an image. The current obscenity statute in D.C. Code § 22-2201(a)(1) makes it unlawful to participate in,[369] purchase,[370] possess,[371] materials that are obscene, indecent, filthy, or immoral.[372]

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[364] *See also Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) (citing *Morris v. United States*, 259 A.2d 337 (D.C. 1969)).

[365] RCC § 22E-206.

[366] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[367] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[368] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[369] *See* D.C. Code §§ 22-2201(a)(1)(B) ("present, direct, act in, or otherwise participate in the preparation or presentation of…"); 22-2201(a)(1)(C) ("pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale…"); 22-2201(a)(1)(E) ("create").

[370] D.C. Code § 22-2201(a)(1)(E) ("buy, procure").

[371] D.C. Code § 22-2201(a)(1)(E).

The current statute also makes it unlawful to promote[373] or possess with intent to disseminate[374] obscene materials. D.C. Code § 22-2201(a)(2)(A) also contains a permissive inference that states, "[T]he creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection."

In contrast, the revised offense makes it unlawful to distribute or display obscene materials only if it is unsolicited, unwelcome, and unwanted. Merely creating, possessing, or promoting depictions of sexual activity between consenting adults is not prohibited.[375] Due process confers a right to privately create and enjoy erotica, even if it is objectively offensive.[376] The United States Supreme Court has made clear that public morality cannot justify a law that regulates private sexual conduct that does not relate to prostitution, potential for injury or coercion, or public conduct.[377] It is not clear that the aspects of the current law that relate to the creation and possession of obscene pornography create a risk of harm to any of the participants or the general public. In addition, elimination of the permissive inference also may reduce the possibility of a constitutional challenge.[378] Moreover, the rationale for criminalizing conduct short of an attempt[379] is less compelling with respect to obscenity than it is for other contraband offenses such as weapons or controlled substances. The offensive material itself—which oftentimes exists in digital format only—does not create a health hazard, pose a risk of

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[372] Under § 22-2201(a)(1)(C), it is unlawful to "pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale" specified obscene materials. Under § 22-2201(a)(1)(B), it is unlawful to "present, direct, act in, or otherwise participate in the preparation or presentation of" specified obscene materials. Under § 22-2201(a)(1)(E), it is unlawful to "create, buy, procure, or possess…with intent to disseminate" specified obscene materials. Under D.C. Code §§ 22-2201(a)(1)(A) and (D), it is unlawful to "offer or agree to sell" specified obscene materials. Under §§ 22-2201(a)(1)(F) and (G), it is unlawful to "advertise or otherwise promote the sale of" obscene material (or materials represented to be obscene).

[373] D.C. Code §§ 22-2201(a)(1)(A) and (D) ("offer or agree to sell, deliver, distribute, or provide"); 2202291(a)(1)(F) and (G) ("advertise or otherwise promote the sale of").

[374] D.C. Code § 22-2201(a)(1)(E).

[375] Producing adult pornographic films may constitute prostitution in violation of D.C. Code § 22-2701 et seq. "Prostitution" is broadly defined to include "a sexual act or contact with another person in return for giving or receiving anything of value." D.C. Code § 22-2701.01(3).

[376] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744, 747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing); *see also* D.C. Code § 22-2201(a)(1)(D), which makes it unlawful to "sell…any…device which is intended for…immoral use."

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

[378] *See Reid v. United States*, 466 A.2d 433, 435 (D.C. 1983) (citing *Leary v. United States*, 395 U.S. 6, 36 (1969)) ("Statutes, or parts of statutes, authorizing the inference of one fact from the proof of another in criminal cases "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.").

[379] *See* RCC § 22E-301.

physical danger, or invite violence from rival distributors. This change improves the proportionality of the revised offense and may ensure its constitutionality.

Third, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (a) of D.C. Code § 22-2201 applies broadly to materials that are obscene, indecent, filthy, or immoral. The terms "obscene," "indecent," "filthy," and "immoral" are not defined in in the statute. However, District case law[380] has interpreted the terms to refer to the three criteria enumerated by the Supreme Court in *Miller v. California*.[381] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[382] applying contemporary community standards'[383] would find that the work, taken as a whole, appeals to the prurient interest,[384] (b) whether the work depicts or describes, in a patently offensive way,[385] sexual conduct specifically defined by the applicable state law, and (c) whether

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[380] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g.*, *Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[381] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

[382] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[383] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[384] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[385] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces

the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[386] a person may be held criminally liable if they comprehend the material's content[387] or character,[388] even if they do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fourth, the revised statute criminalizes distribution or display of images only. Subsection (a) of current D.C. Code § 22-2201 criminalizes obscene[389] writings, pictures, sound recordings, plays, dances, motion pictures, performances, exhibitions, representations, devices, articles, and things. In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.[390] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[391] A blanket prohibition of devices, articles, or things that are "intended

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> no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[386] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[387] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

[388] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[389] D.C. Code § 22-2201(a)(1)(G) also makes it unlawful to "advertise or otherwise promote the sale of material represented or *held out by such person* to be obscene." (Emphasis added.)

[390] RCC § 22E-701.

[391] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."

for…immoral use"[392] also may be especially vulnerable to a substantive due process challenge.[393] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fifth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[394] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[395] This change improves the proportionality of the revised offense.

Sixth, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. The current statute was enacted in 1967, decades before the invention of smartphones equipped with cameras and internet access.[396] In contrast, the revised statute limits liability for obscene online publication to conduct that targets an online user. Subsection (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[397] tagging that user in the image or image caption[398]). A mere knowledge standard for online publication is insufficient

[392] D.C. Code § 22-2201(a)(1)(D).

[393] *See, e.g., Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 744-747 (5th Cir. 2008) (holding Texas criminal statute prohibiting sale of sexual devices violated consumers' rights to engage in private intimate conduct of their choosing).

[394] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

[395] *See, e.g.*, D.C. Code § 22-3055(b).

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[397] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[398] *Compare Matter of Welfare of A.J.B.*, 910 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) *with 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

because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Seventh, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, and movie theaters who are acting within the reasonable scope of their professional duties.[399] Other general defenses in the RCC's general part may also apply to persons with special justification.[400] This change improves the clarity and consistency of the revised offense.

Eighth, the revised offense does not codify a special confiscation and disposal provision. Current D.C. Code § 22-2201(a)(3) provides: "When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person's arrest." In contrast, the revised offense does not require confiscation of obscene materials. Unlike dangerous articles such as firearms and explosives,[401] obscene images do not present a physical danger to public health or safety. Moreover, under the revised statute, a person is permitted to possess and enjoy obscene material without distributing it inside the District. Accordingly, the revised statute does not authorize a sentencing court to order an offender to relinquish or destroy it. This change improves the consistency and proportionality of the revised offense.

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

The revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act. The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license

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friends, she could not view the posts through her own Facebook account, and only received the alarming posts via email from a colleague).

[399] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[400] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

[401] *See* D.C. Code § 22-4517 (providing for the taking and destruction of weapons).

granted or continued in force under authority of this chapter"[402] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."[403] The revised statute adopts this definition to clarify the meaning of the revised offense.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints. Only seven jurisdictions do not have an obscenity offense.[404] With the exception of Maryland and the District of Columbia, which do not define obscenity in their statute, every state offense banning promotion or distribution of obscene material to adults defines obscenity to include at least the first and third elements of the *Miller* criteria: the material must appeal to the "prurient" interest" in sex, and it must lack "serious literary, artistic, political, or scientific value."[405]

[402] 47 U.S.C. § 153(30).
[403] 47 U.S.C. § 153(49).
[404] Alaska, Maine, New Mexico, Oregon, South Dakota, Vermont, and West Virginia. Paul H. Robinson and Tyler Scot Williams, Mapping American Criminal Law: variations across the 50 states (2018) at page 255 (noting these states may have offenses that criminalize the promotion, distribution, or display of obscenity to minors or depicting minors).
[405] *Id*. at page 253; *see also Miller v. California*, 413 U.S. 15 (1973).

RCC § 22E-1806. Distribution of an Obscene Image to a Minor.

(a) *Offense*. An actor commits first degree distribution of an obscene image to a minor when that actor:
  (1) Knowingly distributes or displays to a complainant an image that depicts a real or fictitious person engaging in or submitting to an actual or simulated:
    (A) Sexual act;
    (B) Sadomasochistic abuse;
    (C) Masturbation;
    (D) Sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
    (E) Sexual contact; or
    (F) Sexual or sexualized display of the breast below the top of the areola or buttocks, when there is less than a full opaque covering;
  (2) Reckless as to the fact that:
    (A) The image is obscene; and
    (B) The complainant is under 16 years of age; and
  (3) In fact, the actor is 18 years of age or older and at least 4 years older than the complainant.

(b) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) Nothing in this chapter shall be construed to impose liability on a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.
  (3) Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.
  (4) An actor shall not be subject to prosecution under this section for distribution or display of an image to a complainant in a location open to the general public or in an electronic forum unless the actor also:
    (A) Knowingly distributes or displays the image directly to the complainant; or
    (B) Purposely displays distributes or displays the image to the complainant.

(c) *Affirmative Defenses.*
  (1) It is an affirmative defense to a prosecution under this section that the defendant:
    (A) Is an employee of a school, museum, library, or movie theater;
    (B) Is acting within the reasonable scope of that role; and
    (C) Has no control over the selection of the image.
  (2) *Marriage, Domestic Partnership, or Dating Defense*. It is an affirmative defense to a prosecution under this section that:
    (A) The actor:

(i) Is married to, or in a domestic partnership with, the complainant; or

(ii) Is no more than 4 years older than the complainant and in a romantic, dating, or sexual relationship with the complainant; and

(B) The complainant gives effective consent to the conduct or the actor reasonably believes that complainant gave effective consent to the conduct.

(3) *Burden of Proof.* The defendant has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(d) *Jury Trial*. A defendant charged with a violation or an inchoate violation of this section may demand a jury trial. If the defendant demands a jury trial, then a court shall impanel a jury.

(e) *Penalty.* Distribution of an obscene image to a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "complainant," "effective consent," "obscene," "open to the general public," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated," have the meanings specified in RCC § 22E-701.

(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

COMMENTARY

Explanatory Note. *This section establishes the distribution of an obscene image to a minor offense and penalty for the Revised Criminal Code (RCC). The revised statute replaces a subsection of the obscenity statute, D.C. Code § 22-2201(b) (Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception).*

Paragraph (a)(1) specifies that a person must at least knowingly engage in distribution or display of an image. "Knowingly" is a defined term[406] and, applied here, means that the person must be practically certain that they are distributing or displaying an image to another person.[407] The word "distribute" requires granting another person the ability to exercise dominion and control over the image.[408] The term "image" is defined in RCC § 22E-701 and means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic,

[406] RCC § 22E-206.

[407] The government is not required to prove that the recipient viewed the picture or video, only that it was received.

[408] Consider, for example, a person who brings a computer to a repairman for service, with an agreement or understanding that the repairman will not browse and open his private files.

magnetic, or digital format. The person must also be practically certain that the image depicts: a sexual act; sadomasochistic abuse; masturbation; a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or a sexual or sexualized display of the breast below the top of the areola or buttocks, when there is less than a full opaque covering. The terms "sexual act," "sexual contact," and "sadomasochistic abuse" are defined in RCC § 22E-701.

Subparagraph (a)(2)(A) specifies that a person must also be reckless as to image being obscene.[409] The term "obscene" is defined in RCC § 22E-701 and requires proof that the image: appeals to a prurient interest in sex, under contemporary community standards[410] and considered as a whole[411] is patently offensive; and is lacking serious literary, artistic, political, or scientific value, considered as a whole.[412] "Reckless" is defined in the revised code,[413] and, applied here, means that the person must be aware of a substantial risk that the image is obscene, and the person's conduct must be clearly blameworthy under the circumstances.

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[409] The government is not required to prove that the person viewed the image. The person may be practically certain that a film contains pornography based on the title, description, or other indicators. *See Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[410] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards").

[411] National standards are a matter of proof at trial. *Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973). In *Parks v. United States*, 294 A.2d 858, 859-60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[412] *See Miller v. California*, 413 U.S. 15 (1973).

[413] RCC § 22E-206.

Subparagraph (a)(2)(B) specifies that a person must also be reckless as to the recipient being under 16 years old.[414] 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 16 years of age and the risk is clearly blameworthy under the circumstances.[415]

Paragraph (a)(3) requires that the person is at least 18 years old and at least four years older than the recipient. The term "in fact" indicates that a person is strictly liable as to their age and the relative age of the recipient.[416] It is not a defense to this enhancement that the accused believed, even reasonably, that the age difference was less than four years.

Subsection (b) establishes six exclusions from liability for the distributing obscene materials to a minor offense. Paragraph (b)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (b)(2) provides that the statute does not apply to any licensee[417] under the Communications Act of 1934, such as a radio, television, or phone service provider.[418] Paragraph (b)(3) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[419] Paragraph (a)(4) excludes liability for publishing an image in or on a public forum, unless the image is also distributed or displayed directly to a specific viewer without that viewer's effective consent.[420]

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[414] *See Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1144 (D.C. 2016) (explaining, "[A]lthough courts have been willing to protect the rights of consenting adults to transmit and receive indecent materials, they have also permitted states to regulate the dissemination of some indecent materials to minors and nonconsenting adults.") (citing *Ginsberg v. New York*, 390 U.S. 629, 636, (1968)).

[415] *See* RCC § 22E-701. For example, a 20-year-old who *knows* that the recipient of the obscene image 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 a pattern of unwelcome communication toward an anonymous person online, without having any reason to suspect that it is operated by a child.

[416] RCC § 22E-207.

[417] The term "licensee" is defined in paragraph (e)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[418] *See* D.C. Code § 22-2201(d).

[419] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[420] *Compare Matter of Welfare of A.J.B.*, 910 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) *with 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).

Paragraph (c)(1) establishes an affirmative defense for an employee of a school, museum, library, or movie theater, who is acting within the scope of their role.[421] The burden of proof is on the defendant to prove the defense by a preponderance of the evidence.

Paragraph (c)(2) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. The actor must be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant and be no more than four years older than the complainant. The "romantic, dating, or sexual relationship" language tracks the language in the District's current definition of "intimate partner violence"[422] and is intended to have the same meaning. The actor and the complainant must be the only persons who are depicted in the image. The complainant must give "effective consent" to the prohibited conduct or the actor must reasonably believe that the complainant gave "effective consent" to this conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (d) provides a jury trial for defendants charged with distribution of an obscene image to a minor or attempted distribution of an obscene image to a minor. Inclusion of a jury trial right is intended to ensure that the First Amendment rights of the accused are not infringed. The District has long recognized a heightened need to provide jury trials to defendants accused of crimes that may involve exercise of civil liberties.[423]

Subsection (e) provides the penalty for the revised offense. [RESERVED.]

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised distribution of obscene materials to a minor offense changes current District law in nine main ways.*

First, the revised statute applies the RCC standardized definitions of "knowingly" and "recklessly." The current obscenity statute in D.C. Code § 22-2201(b) states at the beginning of the offense that, "It shall be unlawful in the District of Columbia for any person knowingly:" then, after the colon, describes all the prohibited conduct. The plain language of the statute thus appears to require a mental state of "knowingly" apply to all elements of the offense. D.C. Code § 22-2201(b)(2)(F) broadly defines "knowingly" to mean "having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of: (i) The character and content of

[421] The exclusion does not apply to an employee who is acting *ultra vires*. For example, a cashier who accepts a bribe from a 15-year-old to be admitted into an X-ray screening commits a distributing obscene materials to a minor offense.

[422] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[423] *See* Report on Bill 16-247, the "Omnibus Public Safety Amendment Act of 2006," Council of the District of Columbia Committee on the Judiciary (April 28, 2006) at Page 7 ("Generally, the committee print provides for jury demandable offenses where there is a possible conflict between law and civil liberties.").

any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and (ii) The age of the minor." In contrast, the revised offense defines "knowingly" to require practical certainty and defines "recklessness" to require conscious disregard of a substantial risk.[424] The revised statute requires knowledge of the sexual nature of the image but only recklessness as to the age of the minor and as to image being of the sort that is criminally obscene. The revised statute holds an actor strictly liable with respect to the age difference between the defendant and the complainant. Application of the standardized RCC definitions here appears to be largely consistent with District case law interpreting the obscenity statute.[425] Moreover, applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[426] and courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[427] This change improves the clarity and consistency of the revised statute.

Second, the revised statute criminalizes depictions only of specified parts of the body or types of conduct. Subsection (b) of current D.C. Code § 22-2201 applies broadly to offensive materials that either include "explicit and detailed verbal descriptions or narrative accounts of sexual excitement" or depict "nudity, sexual conduct, or sado-masochistic abuse." The term "nudity" is defined broadly to include the depiction of covered male genitals in a discernibly turgid state, a pubic area or buttocks with less than a full opaque covering, and the female breast with less than a full opaque covering of any portion below the top of the nipple.[428] The term "sexual conduct" is defined broadly to include homosexuality[429] and all physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or female breast.[430] And the term "sado-masochistic

[424] RCC § 22E-206.

[425] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[426] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[427] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[428] D.C. Code § 22-2201(b)(2)(B).

[429] The term "homosexuality" is undefined and District case law has not addressed its meaning. It is not clear whether the term encompasses sexual acts, sexual contact, or any display of affection between members of the same sex.

[430] D.C. Code § 22-2201(b)(2)(C). It is unclear whether the phrase "clothed or unclothed" modifies only "genitals" or "explicit and detailed verbal descriptions or narrative accounts of sexual excitement."

abuse" is defined broadly to include any flagellation or physical restraint of a person wearing undergarments, a mask, or a bizarre costume.[431] District case law[432] explains that the proscribed materials in the obscenity statute are limited to the three criteria enumerated in *Miller v. California*.[433] Namely, to determine whether material is obscene, one must consider: (a) whether 'the average person,[434] applying contemporary community standards'[435] would find that the work, taken as a whole, appeals to the prurient interest,[436] (b) whether the work depicts or describes, in a patently offensive way,[437] sexual conduct specifically defined by the applicable state law, and (c) whether

[431] D.C. Code § 22-2201(b)(2)(D).

[432] D.C. Code § 22-2201 is largely absent from modern District case law, with only one published opinion mentioning it in the past twenty-five years. *See Blackledge v. United States*, 871 A.2d 1193, 1196 (D.C. 2005) (wherein the defendant was found not guilty on the obscenity charge at trial and the issue was not examined on appeal). Otherwise, the statute only appears in the occasional footnote. *See, e.g.*, *Hawkins v. United States*, 119 A.3d 687, 691 n. 7 (D.C. 2015). Indeed, case law involving the statute has not been especially active since the late 1970s, following *Miller v. California*, 413 U.S. 15 (1973), in which the Court established the constitutional baseline, per the First Amendment, for criminal laws prohibiting obscenity.

[433] 413 U.S. 15 (1973); *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction); *see also Hudson v. United States*, 234 A.2d 903, 905 (D.C. 1967) (explaining that the word "obscene" is intended to have a meaning that varies from time to time as general notions of decency in attire and public entertainment tend to change).

[434] The phrase "average person" distinguishes the broader community from fetishists and persons with paraphilic disorders. *See also* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("The test is not whether it would arouse sexual desires or sexually impure thoughts in those comprising a particular segment of the community—the young, the immature or the highly prudish—or, would leave another segment—the scientific or highly educated or so-called worldly wise and sophisticated—indifferent and unmoved.").

[435] *See, e.g., 4934, Inc. v. Washington*, 375 A.2d 20, 24 (D.C. 1977) (holding that the performance of a dancer, Miranda, in which she wore "sheer-type negligee with bikini-type panties" was not prohibited by the District's obscenity statute and noting that, "in a jurisdiction where complete nudity in playhouses as well as in burlesque theatres seems to be accepted, the Miranda dance can scarcely be described as offensive to community standards"); *see also Hermann v. United States*, 304 A.2d 22, n. 3 (D.C. 1973); *see also* Ed Bruske, *Smut Work: Identifying Obscenity*, Washington Post (Feb. 16, 1982), pg. C1.

> More than four years have gone by since the last time prosecutors showed pornographic films to a jury in the city. As a result, prosecutors have no "community standards"—the benchmark established by the U.S. Supreme Court—on which to judge what is obscene.

[436] *See* 2 Modern Federal Jury Instructions-Criminal P 45.01 (2019) ("'Prurient interest' is a morbid, degrading, or unhealthy interest in sex.").

[437] In *Parks v. United States*, 294 A.2d 858, 859–60 (D.C. 1972), the court explained:

> [A] trial judge may rule, based on the 'autoptic' evidence, that a reasonable person could only conclude that the material affronts contemporary community standards relating to the description or representation of sexual matters, i. e., the material is obscene *per se*…[I]f the trial judge finds that the material is obscene *per se* on the Government's case-in-chief, the burden of going forward shifts to the defense. If the defense introduces no evidence, then…the Government prevails. However, it the defense introduces some evidence that the material does not violate contemporary national community standards, the finding of obscenity *per se* evaporates, much as a rebuttable presumption does, and the burden of proceeding shifts back to the Government to prove beyond a reasonable

the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. Although local and national community standards may be difficult to discern,[438] a person may be held criminally liable if they comprehend the material's content[439] or character,[440] even if they do not know it to be patently offensive. In contrast, the revised statute is more narrowly limited to depictions that are likely to or designed to appeal to the prurient interest, such as nudity and sexual activity. The revised statute only reaches body parts and conduct that are the subject of other sexual and privacy offenses: an actual or simulated sexual act; sadomasochistic abuse; masturbation; sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; sexual contact; or sexual or sexualized display of the breast below the top of the areola, or buttocks, when there is less than a full opaque covering. Since 1967, when this language was adopted, social mores regarding promiscuous and licentious behavior and popular fashion have changed considerably.[441] In modern America, it commonplace for swimwear or evening wear to expose the lower part of the buttocks or breast. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fourth, the revised statute criminalizes distribution or display of images only. Subsection (b) of current D.C. Code § 22-2201 applies to any "picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image,"[442] "book, magazine, or other printed matter however reproduced or sound recording,"[443] "explicit and detailed verbal description[] or narrative account[],"[444] and "motion picture,

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> doubt a violation of contemporary national community standards…Once the burden of proceeding has shifted back to the Government and the Government introduces evidence on the contemporary national community standards, it is for the trier of fact to weigh the conflicting evidence.

See also United States v. Gower, 316 F. Supp. 1390 (D.D.C. 1970); *but see Fennekohl v. United States*, 354 A.2d 238, 240 (D.C. 1976) (finding the trial court did not err in excluding testimony of proffered defense witness on community standards, since the subject of obscenity is not beyond the ken of the average layman).

[438] *See Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (J. Stewart concurring) (stating, "I know it when I see it.").

[439] *See* D.C. Code § 22-2201(a)(2)(B); *Lakin v. U. S.*, 363 A.2d 990, 998 (D.C. 1976); *Morris v. U. S.*, 259 A.2d 337, 340 (D.C. 1969); *Huffman v. United States*, 259 A.2d 342, 345 (D.C. 1969); *Smith v. People of the State of California*, 361 U.S. 147, 154-55 (1959).

[440] *Kramer v. United States*, 293 A.2d 272, 274 (D.C. 1972) (finding that for salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold).

[441] For example, in 1957, after vocal objections from audiences in Nashville and St. Louis about his wiggling hips, Elvis Presley was filmed from the waist up for a CBS broadcast of the Ed Sullivan Show. *See* Jordan Runtagh, *Elvis Presley on TV: 10 Unforgettable Broadcasts*, ROLLING STONE (January 28, 2016). In the year 2000, rapper Nelly released a music video on cable network BET for his song "Tip Drill," which depicted an orgy of topless women gyrating while men chewed on the women's thong underwear. In 2013, singer Robin Thicke release a video on YouTube featuring topless supermodels dancing around for men's entertainment.

[442] D.C. Code § 22-2201(b)(1)(A)(i).

[443] D.C. Code § 22-2201(b)(1)(A)(ii).

[444] *Id*.

show, or other presentation."[445] In contrast, the revised obscenity offense is limited to the defined term "image," which means a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.[446] Other mediums are less vivid, poignant, or memorable than visual representations, and it appears highly unlikely that they may be said to be "patently offensive" under modern community standards per *Miller v. California*.[447] This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

Fifth, the revised offense applies to adults only. Current D.C. Code § 22-2201(b) makes it unlawful to distribute obscene materials to any person under 17 years old.[448] It makes no exception for one child who gives obscene materials to another child, though a child may not be sophisticated enough to judge whether an item "affronts prevailing standards *in the adult community as a whole* with respect to what is suitable material for minors."[449] In contrast, the revised statute applies only to a person who is over 18 years old who shares obscene materials with a person who is both under 16 years old and four years younger than the accused. This change improves the consistency and proportionality of the revised offenses.

Sixth, the revised statute excludes liability for any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the internet and such systems operated or services offered by libraries or educational institutions. Current D.C. Code § 22-2201(d) provides, "Nothing in this section shall apply to a licensee[450] under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." In contrast, the revised offense excludes liability for a wider array of commercial information technology providers. Unlike radio stations, television broadcasters, and phone service providers, internet service providers are not licensed under the federal communications act. The revised statute better aligns itself with the practicalities of the information age by excepting these service providers as well as other remote communications providers.[451] This change improves the proportionality of the revised offense.

Seventh, the revised statute limits liability for online posts of obscene images. Current D.C. Code § 22-2201 does not directly address publishing sexual material to an online public forum. In contrast, the revised statute limits liability for obscene online

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[445] D.C. Code § 22-2201(b)(1)(B).

[446] RCC § 22E-701.

[447] 413 U.S. 15 (1973). In particular, many writings and sound recordings, excluded under the revised statute, are of "serious literary, artistic, political, or scientific value."

[448] *See* D.C. Code § 22-2201(b)(2)(A) (defining "minor").

[449] *See* D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii), and (B). (Emphasis added.)

[450] The term "licensee" is undefined and District case law has not addressed its meaning. 47 U.S.C. § 153(30) defines "licensee" to mean "the holder of a radio station license granted or continued in force under authority of this chapter." 47 U.S.C. § 153(49) defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."

[451] *See, e.g.*, D.C. Code § 22-3055(b).

publication to conduct that targets an online user. Subsection (b)(4) of the revised statute requires that either the obscene post be sent directly to another user without their effective consent (e.g., via direct message to that user) or purposely sent to the complainant without their effective consent (e.g., posting the image as a comment on that user's page,[452] tagging that user in the image or image caption[453]). A mere knowledge standard for online publication is insufficient because, in most instances a person who publishes pornography online can be said to be practically certain that they are displaying that pornography to every person who reaches that particular web address, whether the person consented to viewing sexual images or not. This change improves the proportionality of the revised offense.

Eighth, the revised statute revises the affirmative defense in current law for "individuals having scientific, educational, or other special justification for possession of such material." Current D.C. Code § 22-2201(c) states that it is an affirmative defense that "the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material." The term "special justification" is not defined and District case law has not addressed its meaning. In contrast, the revised offense establishes an affirmative defense for employees of schools, museums, libraries, and movie theaters who are acting within the reasonable scope of their professional duties.[454] Other general defenses in the RCC's general part may also apply to persons with special justification.[455] This change improves the clarity and consistency of the revised offense.

Ninth, the revised statute codifies an affirmative defense for marriage, domestic partnership, and other romantic relationships. The current obscenity statute[456] does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This is inconsistent with several of the current sex offense statutes[457] and the current

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[452] For example, if a person posts a comment below a Washington Post article that includes a .gif of an obscene display of bestiality, that person may have committed distribution of an obscene image to the author of the article but has not committed an offense against every viewer of the article.

[453] *Compare Matter of Welfare of A.J.B.*, 910 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) *with 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).

[454] The exclusions do not apply to a rogue employee who is acting *ultra vires*. For example, a projectionist in a movie theater who displays an obscene, X-rated film in lieu of a G-rated cartoon, commits an offense.

[455] RCC § 22E-408 includes defenses for parents, wards, and emergency health professionals. Consider, for example, a parent who gives a teenager a child birth video to warn them of the consequences of unprotected sexual intercourse. Such a parent may be able to avail themselves of the defense in RCC § 22E-408(a)(1).

[456] D.C. Code § 22-2201.

[457] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age

sexual performance of a minor offense.[458] In contrast, the revised distribution of an obscene image to a minor statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. This change improves the consistency and proportionality of the revised statute.

Beyond these nine substantive changes to current District law, one other aspect of the revised statute may constitute a substantive change of law.

The revised statute does not criminalize non-purposefully providing a minor access to an obscene exhibition. Current D.C. Code § 22-2201(b)(1)(B) makes it unlawful to "provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon" patently offensive materials are exhibited. This language is ambiguous in at least three ways. In contrast, consistent with other RCC offenses, the revised statute provides liability for such conduct only when the actor's role meets the standards for accomplice liability under RCC § 22E-210, which requires a more direct causal link between the actor's conduct and the resulting harm. An actor is subject to accomplice liability for purposely encouraging or assisting another person who displays obscene materials to a minor. The revised language eliminates liability for museum workers[459] and other employees who may knowingly, but not purposely, admit a minor to a display of obscene material. This change improves the consistency and proportionality of the revised offense and may ensure its constitutionality.

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

First, the revised offense clarifies the term "licensee" has the meaning specified in 47 U.S.C. § 153(30). Current D.C. Code § 22-2201(d) provides: "Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act." The term "licensee" is undefined and District case law has not addressed its meaning. However, Title 47 of the United States Code defines "licensee" to mean "the holder of a radio station license

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of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[458] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by…an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[459] For example, in 2018, the Smithsonian's Hirshhorn Museum and Sculpture Garden featured the work of Georg Baselitz, including "The Naked Man," which depicts a cadaverous man with a huge erection lying on his back on a table. The painting was confiscated by a state's attorney in 1963. *See* Sebastian Smee, *Georg Baselitz is an overrated hack. Art collectors fell for him — but you don't have to*, WASHINGTON POST (June 24, 2018).

granted or continued in force under authority of this chapter"[460] and defines "radio station license" to mean "that instrument of authorization required by this chapter or the rules and regulations of the Commission made pursuant to this chapter, for the use or operation of apparatus for transmission of energy, or communications, or signals by radio, by whatever name the instrument may be designated by the Commission."[461] The revised statute adopts this definition to clarify the meaning of the revised offense.

Second, the revised statute defines the term "obscene" consistent with U.S. Supreme Court precedent. D.C. Code § 22-2201(b)(1)(B) makes it unlawful to exhibit to a minor "a motion picture, show, or other presentation which, *in whole or in part*, depicts nudity, sexual conduct, or sado-masochistic abuse and which *taken as a whole* is patently offensive *because* it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors." (Emphasis added.) Current D.C. Code §§ 22-2201(b)(1)(A)(i), (A)(ii) contain similar language. District case law has not addressed the meaning of these phrases beyond stating generally[462] that the obscenity statute is to be interpreted consistent with the Supreme Court's ruling in *Miller*.[463] The *Miller* articulation of the standards for interpreting what is patently offensive and whether to assess obscenity in terms of the "whole" work varies[464] slightly from the current District statute. The revised statute, through use of the defined term "obscene," adopts the obscenity standard as articulated in the *Miller* opinion. This change clarifies the revised offense and may help ensure its constitutionality.

Relation to National Legal Trends. Staff did not comprehensively assess other jurisdiction statutes compared to each of the RCC's proposed changes in law. The wide variability in other states' statutory frameworks, definitions, and penalties was prohibitive given agency staffing constraints.

[460] 47 U.S.C. § 153(30).
[461] 47 U.S.C. § 153(49).
[462] *Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976)
[463] *Miller v. California*, 413 U.S. 15 (1973).
[464] Miller v. California, 413 U.S. 15, 24 (1973) ("A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.").

RCC § 22E-1807. Trafficking an Obscene Image of a Minor.

(a) *First Degree*. Except as provided in subsection (c) of this section, an actor commits first degree trafficking an obscene image of a minor when that actor:
  (1) Knowingly:
    (A) Creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image;
    (B) As a person with a responsibility under District civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image;
    (C) Displays, distributes, or manufactures with intent to distribute an image;
    (D) Makes an image accessible to another user on an electronic platform; or
    (E) Sells or advertises an image;
  (2) Reckless as to the fact that the image depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) A sexual act or simulated sexual act;
    (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
    (C) Masturbation or simulated masturbation; or
    (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second Degree*. Except as provided in subsection (c) of this section, an actor commits second degree trafficking an obscene image of a minor when that actor:
  (1) Knowingly:
    (A) Creates an image, other than a derivative image, by recording, photographing, or filming the complainant, or produces or directs the creation of such an image;
    (B) As a person with a responsibility under District civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image;
    (C) Displays, distributes, or manufactures with intent to distribute an image;
    (D) Makes an image accessible to another user on an electronic platform; or
    (E) Sells or advertises an image;
  (2) Reckless as to the fact that the image depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) An obscene sexual contact; or

(B) An obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.

(c) *Exclusions from Liability.*

(1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.

(2) Nothing in this chapter shall be construed to impose liability on a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.

(3) Nothing in this chapter shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.

(4) An actor who is under 18 years of age shall not be subject to prosecution under sub-paragraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(B), (b)(1)(C) or (b)(1)(D) of this section when that actor:

(A) Is the only person under 18 years of age who is, or who will be, depicted in the image; or

(B) Acted with the effective consent of every person under 18 years of age who is, or who will be, depicted in the image, or reasonably believed that every person under 18 years of age who is, or who will be, depicted in the image gave effective consent.

(d) *Affirmative Defenses.*

(1) It is an affirmative defense to subsection (a) of this section that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole.

(2) It is an affirmative defense to subparagraphs (a)(1)(A), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(C), or (b)(1)(D) of this section that:

(A) The actor:

(i) Is married to, or in a domestic partnership with, the complainant; or

(ii) Is no more than 4 years older than the complainant and in a romantic, dating, or sexual relationship with the complainant;

(B) The complainant is the only person who is, or who will be, depicted in the image, or the actor and the complainant are the only persons who are, or who will be, depicted in the image;

(C) The complainant gives effective consent to the conduct or the actor reasonably believes that the complainant gave effective consent to the conduct; and

(D) Under subparagraphs (a)(1)(C), (b)(1)(C), (a)(1)(D), or (b)(1)(D), the recipient, the intended recipient, or the user of the electronic platform was the complainant.

(3) It is an affirmative defense to displaying or distributing an image under subparagraphs (a)(1)(C) or (b)(1)(C) of this section that the actor:

(A) Distributes or displays the image to a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the creation of the image;

(B) With intent, exclusively and in good faith, to report possible illegal conduct or to seek legal counsel from any attorney.

(4) It is an affirmative defense to subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E) of this section that the actor:

(A) Is an employee of a school, museum, library, or movie theater;

(B) Is acting within the reasonable scope of that role; and

(C) Has no control over the creation or selection of the image.

(5) *Burden of Proof.* The actor has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(e) *Penalties.*

(1) First degree trafficking an obscene image of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree trafficking an obscene image of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "intent," "knowingly," and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "complainant," "domestic partnership," "effective consent," "image," "obscene," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

COMMENTARY[465]

Explanatory Note. *The RCC trafficking an obscene image of a minor offense prohibits creating, displaying, distributing, selling, or advertising images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under current District civil law for a complainant under the age of 18 years from giving effective consent for the*

[465] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

recording, photographing, or filming of a complainant engaged in specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted, in the image. The revised trafficking an obscene image of a minor statute has the same penalties as the RCC arranging a live sexual performance of a minor statute,[466] the main difference being that the RCC trafficking an obscene image of a minor offense is limited to images. Along with the possession of an obscene image of a minor offense,[467] the arranging a live sexual performance of a minor offense,[468] and the attending or viewing a live sexual performance of a minor offense,[469] the revised trafficking an obscene image of a minor statute replaces the current sexual performance using a minor offense[470] in the current D.C. Code, as well as the current definitions,[471] penalties,[472] and affirmative defenses[473] for that offense.

Subsection (a) specifies the various types of prohibited conduct in first degree trafficking an obscene image of a minor, the highest gradation of the revised offense. The prohibited conduct is specific to an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts. Paragraph (a)(1) requires a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that his or her conduct will cause the prohibited result, i.e., creating a specified image. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E). The "[e]xcept as provided in subsection (c) of this section" language in subsection (a) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires that the actor be "practically certain" that he or she creates an image, other than a derivative image, by recording, photographing, or filming the complainant or that he or she "produces" or "directs" the creation of such an image. The exclusion of derivative images, in conjunction with the requirements in paragraph (a)(2), requires the defendant to record, photograph, or film the complainant engaged in live sexual conduct. There is no liability in subparagraph (a)(1)(A) for recording, photographing, or filming a pre-existing image of the complainant or creating a composite image of the complainant.[474] However, if the defendant records, photographs, or films a pre-existing image or creates a composite image of the complainant with intent to distribute that image, there may be liability under subparagraph (a)(1)(D).

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[466] RCC § 22E-1809.
[467] RCC § 22E-1808.
[468] RCC § 22E-1809.
[469] RCC § 22E-1810.
[470] D.C. Code § 22-3102.
[471] D.C. Code § 22-3101.
[472] D.C. Code § 22-3103.
[473] D.C. Code § 22-3104.
[474] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image. The phrase "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she is giving effective consent for the complainant to engage in or submit to the recording, photographing, or filming of an image, other than a derivative image.[475] In conjunction with the requirements in paragraph (a)(2), the exclusion on derivative images requires the defendant to give effective consent for the complainant to engage in or submit to the recording, photographing, or filming of live sexual conduct, as opposed to recording, photographing, or filming a pre-existing image or creating a composite image.[476] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that an image actually be created; it is sufficient that the actor give effective consent for the complainant to engage in or submit to the creation of an image.[477]

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will display, distribute, or manufacture an image. "Display" has its ordinary meaning and is intended to indicate ways of showing an image without distributing it—i.e. showing an image to another person without actually relinquishing it. "Distribute has its ordinary meaning, involving a transfer of an item, more than a mere display.[478] Additionally, for

[475] Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

[476] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[477] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in or submitting to the creation of an image. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective consent. These responsible individuals may still claim that they are not violating their duty of care under the general defense in RCC § 22E-408 for special responsibility for care, discipline, or safety.

[478] RCC § 22E-701 defines a "live broadcast" as "a streaming video, or any other electronically transmitted image for viewing by an audience." Thus, transmitting a live broadcast is sufficient for distribution of those images if the other requirements of the revised trafficking offense are met. If the individual that transmits a live broadcast is the same individual that is directing the live sexual conduct being broadcast, the individual could also have liability for directing or creating a live sexual performance under the RCC

manufacturing in subparagraph (a)(1)(D), the actor must have the "intent" to distribute the image. Manufacturing images for personal use is characterized as possession and is penalized under the less serious offense of possession of an obscene image of a minor statute (RCC § 22E-1808). "Intent" is a defined term in RCC § 22E-206 that here means the actor was practically certain that he or she would distribute the image. Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant distributed the manufactured image, only that the defendant believed to a practical certainty that he or she would do so. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(C) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[479]

For subparagraph (a)(1)(D), the actor must be "practically certain" that he or she will make an image accessible to another user on an electronic platform. An accidental posting to an electronic platform[480] is insufficient for liability under the trafficking statute. The phrase "accessible to another user on an electronic platform" includes peer-to-peer sharing sites and web sites where it may be difficult to determine site views or membership or whether the image was actually displayed or distributed. It is sufficient that only one other user has access to the image. The term "user" excludes network administrators and others that are not also users of the electronic platform. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(D) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[481]

For subparagraph (a)(1)(E), the actor must be "practically certain" that he or she sells or advertises an image. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to an image without any expectation of financial gain. Unlike subparagraphs (a)(1)(A) and (a)(1)(B), subparagraph (a)(1)(E) applies to any image, including images derived from sources other than live conduct, such as a screenshot of a pre-existing video of the complainant, or a composite image of the complainant.[482]

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arranging a live sexual performance of a minor statute (RCC § 22E-1809), which has the same penalties as the revised trafficking offense. However, due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for both trafficking and arranging the same live performance.

[479] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[480] For example, accidentally uploading the wrong file.

[481] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

[482] A composite image of the complainant is comprised of sources other than recording, photographing, or filming live conduct, including sources such as: 1) pre-existing images or videos of the complainant; 2) images or videos of other individuals, regardless of whether they are adults or minors; and 3) computer-generated graphics or images, including graphics or images of "fake" minors.

Subparagraph (a)(2) specifies additional requirements for the image. First, the image must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes face, and part of the body or face of a real complainant under the age of 18 years is sufficient. The complainant must be a real minor, but there is no requirement that the government prove the identity of the minor. Second, the image must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[483] or anus, when there is less than a full opaque covering.[484] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in sub-paragraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree trafficking an obscene image of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), (b)(1)(C), (b)(1)(D), and (b)(1)(E), and paragraph (b)(2) have the same requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), and (a)(1)(E), and paragraph (a)(2). However, the types of prohibited sexual conduct are different in second degree trafficking an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and sub-paragraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[485] The terms "obscene" and "sexual contact"

[483] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[484] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree trafficking an obscene image. However, if the image depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised trafficking an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

[485] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree trafficking an obscene image. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304). [The CCRC expects to update the draft RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304) to include liability for engaging in or causing a minor to engage in a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.]

are defined in RCC § 22E-701. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display. The "[e]xcept as provided in subsection (c) of this section" language in subsection (b) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

Subsection (c) establishes four exclusions from liability for the RCC trafficking an obscene image offense. Paragraph (c)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (c)(2) provides that the statute does not apply to any licensee[486] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(3) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[487]

Paragraph (c)(4) establishes an exclusion from liability for an actor under the age of 18 years. The exclusion applies to subparagraphs (a)(1)(A), (a)(1)(B), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(B), (b)(1)(C), and (b)(1)(D)—i.e., all prohibited conduct in the offense except selling or advertising an image in subparagraphs (a)(1)(E) and (b)(1)(E). The exclusion applies if the actor is the only person under the age of 18 years who is, or who will be, depicted in the image. If there are multiple people under the age of 18 years who are, or who will be, depicted in the image, the exclusion applies if the actor acted with their effective consent, or reasonably believed that he or she had their effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (d) establishes several affirmative defenses for the RCC trafficking an obscene image statute. Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has, or will have, serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[488] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[489] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection.

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[486] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[487] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[488] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[489] *Miller v. California*, 413 U.S. 15, 24 (1973).

Paragraph (d)(2) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. The affirmative defense applies to subparagraphs (a)(1)(A), (a)(1)(C), (a)(1)(D), (b)(1)(A), (b)(1)(C), and (b)(1)(D). There are several requirements. First, the actor must be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the complainant and be no more than four years older than the complainant. The revised statute's reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[490] and is intended to have the same meaning. Second, the complainant must be the only person who is depicted, or who will be depicted, in the image, or the actor and the complainant must be the only persons who are depicted, or who will be depicted in the image. The marriage or romantic partner defense is not available when the image shows, or will show, third persons. The complainant must give "effective consent" to the prohibited conduct, or the actor must reasonably believe that the complainant gave "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Finally, for display, distribution, or manufacturing with intent to distribute the image under subparagraphs (a)(1)(C) and (b)(1)(C), the display or distribution must be only to the complainant or the defendant must manufacture the image with the intent to distribute it only to the complainant. Similarly, for making an image accessible to another user on an electronic platform under subparagraphs (a)(1)(D) and (b)(1)(D), the complainant must be the only other user.

Paragraph (d)(3) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations. The defense applies to the display or distribution of an image under subparagraphs (a)(1)(C) and (b)(1)(C). The recipient or recipients of the display or distribution must be "a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction" and the actor must have the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[491] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so.

Paragraph (d)(4) establishes an affirmative for school, museum, library, or movie theater employees. The affirmative defense applies to defense to subparagraphs

[490] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[491] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

(a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E).[492] The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Paragraph (d)(5) establishes that the defendant has the burden of proof for all the affirmative defenses in subsection (d) and must establish an affirmative defense by a preponderance of the evidence.

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

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised trafficking an obscene image statute substantively changes existing District law in twelve main ways.*

First, the revised trafficking an obscene image statute punishes creating, displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image. The current sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising, and possessing a prohibited image,[493] even though creating and distributing are direct forms of child abuse[494] and selling and advertising are "an integral part" of the market.[495] In contrast,

[492] This defense does not apply to creating images derived from recording, photographing, or filming live sexual conduct (subparagraphs (a)(1)(A), and (b)(1)(A)) because such actions create child pornography directly from the sexual abuse of minors (as compared to creating a composite image from pre-existing photographs). However, there may be a separate defense for first degree trafficking an obscene image for images that have serious artistic or other value (subsection (d)(1)), or an argument that the images are not "obscene" as required for second degree trafficking. In addition, the defense is available to live sexual conduct that is not filmed or broadcast under the RCC arranging a live sexual performance of a minor statute (RCC § 22E-1809).

This defense also does not apply to individuals that are responsible for the complainant under District civil law and give effective consent for the complainant to engage in the creation of an image derived from live sexual conduct (subparagraphs (a)(1)(B) and (b)(1)(B)) because these individuals are likely violating their duty of care to the complainant. These individuals can still argue that they are not violating their duty of care under the general defense in RCC § 22E-408 for special responsibility for care, discipline, or safety.

[493] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[494] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

the revised trafficking an obscene image statute penalizes creating,[496] displaying, distributing, selling, or advertising a prohibited image more severely than possessing a prohibited image in the revised possession statute (RCC § 22E-1808). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[497] The revised trafficking statute also prohibits in subparagraphs (a)(1)(D) and (b)(1)(D) making an image accessible to another user on an electronic platform because this kind of electronic access can be as harmful as actual distribution. As part of this revision, the revised statute no longer uses the current statute's defined term "promote" and splits the conduct referred to in that definition between the revised trafficking an obscene image and possession of an obscene image offenses.[498] This change improves the consistency and proportionality of the revised offense.

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[495] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[496] The revised trafficking an obscene image statute prohibits two ways of creating an image. First, subparagraphs (a)(1)(A) and (b)(1)(A) prohibit creating an image by filming, recording, or photographing the complainant engaging in live sexual conduct. Second, subparagraphs (a)(1)(D) and (b)(1)(D) prohibit manufacturing "with intent to distribute" an image. This is not limited to recording live conduct, and includes taking a screenshot of a pre-existing image or video and making a composite image, whether from "real" images, computer-generated images, or a combination of both, as long as there is the intent to distribute.

[497] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[498] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "distribute," "sell," and "advertise." In addition, the revised trafficking statute prohibits "present" and "exhibit" in the prohibitions on display and electronic platforms in subparagraphs (a)(1)(C), (b)(1)(C), (a)(1)(D), (b)(1)(D). However, instead of "manufacture" and "transmute," the revised statute requires manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)). Manufacturing or transmuting images, without more, is characterized as possession, and is criminalized by the less serious possession of an obscene image statute (RCC § 22E-1808). The remaining possessory aspect of the current definition, "procure," is criminalized in the less serious RCC possession of an obscene image offense.

"Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" and film a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture" a film of a sexual performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted trafficking of an obscene image (RCC § 22E-1807 (offers to "record[], photograph[], or film[]" the complainant).

Second, the revised trafficking an obscene image statute grades penalties based upon the type of sexual conduct depicted in the image. The current sexual performance of a minor statute prohibits images of "sexual conduct,"[499] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC trafficking an obscene image statute reserves the first degree gradation for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised trafficking an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[500] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised trafficking an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[501] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." The creation, distribution, or possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[502] The current D.C. Code obscenity statute is

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The remainder of the current definition is deleted as redundant with distribution (issue, give, provide, lend, mail, deliver, transfer, publish, circulate, disseminate).

[499] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[500] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[501] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[502] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

penalized as a misdemeanor for a first offense,[503] with no enhancements for the obscene materials depicting a minor.[504] In contrast, the first degree of the revised trafficking an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[505] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[506] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[507] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised trafficking an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, the creation, distribution, or possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[508] The current D.C. Code

[503] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[504] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[505] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised trafficking an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[506] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[507] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[508] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the creation, distribution, and possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United*

obscenity statute is punished as a misdemeanor for a first offense,[509] with no enhancements for the obscene materials depicting a minor.[510] In contrast, the RCC revised trafficking an obscene image of a minor statute criminalizes the creation and distribution of certain depictions of the pubic area[511] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[512] As defined, display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to

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States, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[509] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[510] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[511] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[512] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC trafficking an obscene statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC trafficking an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised trafficking an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised trafficking an obscene image statute expands the current exceptions to liability for conduct by persons under 18 years of age. In the current sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[513] or, if there are multiple minors depicted, all of the minors consent.[514] A minor that is not depicted,[515] or an adult that is not more than four years older than the minor or minors depicted,[516] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[517] and minors are still liable under the current statute for creating images of themselves or other minors[518] or engaging in sexual conduct.[519] There is no DCCA case law interpreting the current exclusion. In contrast, the revised trafficking an obscene image statute excludes from liability all

[513] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[514] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[515] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[516] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[517] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[518] A minor that creates a prohibited image of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[519] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

persons under the age of 18 years,[520] applies to all images,[521] and applies to all prohibited conduct, except selling or advertising images (subparagraphs (a)(1)(E) and (b)(1)(E)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[522] The only requirements of the revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the image;[523] or 2) The minor has the effective consent of every person under 18 years of age who is, or who will be, depicted in the image, or reasonably believes that he or she has that effective consent.[524] The "effective consent" requirements are consistent with the

[520] The revised trafficking statute excludes from liability minors that have a responsibility under District civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under sub-paragraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to engage in or submit to the recording, photographing, or filming of a non-derivative image. This exclusion ensures that the revised trafficking an obscene image statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

[521] The current exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format."). The revised trafficking an obscene image statute deletes the current definition of "still or motion picture."

[522] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[523] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the image, it is irrelevant under the exclusion if the image depicts, or will depict, an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1802), electronic stalking (RCC § 22E-1803), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[524] If both minors and adults are depicted, or will be depicted, in the image, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the

consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Per the revised statute, a minor still may be liable for selling or advertising images, even of himself or herself,[525] or for distribution or display of an image without the recipient's effective consent.[526] This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised trafficking an obscene image statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum and school employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[527] for a "librarian engaged in the normal course of his or her employment"[528] and certain movie theater employees[529] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[530] There is no DCCA case law interpreting this defense. In contrast, the revised trafficking an obscene image statute expands this affirmative defense to include employees at museums and schools who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[531] For reasons discussed the in explanatory note to this offense, the affirmative

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specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), unlawful disclosure of sexual recordings (RCC § 22E-1804), distribution of an obscene image (RCC § 22E-1805), or sexual assault (RCC § 22E-1301).

[525] For example, a sixteen year old who sells images of himself or herself masturbating to an online buyer may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual images such conduct supports the market for prohibited sexual images.

[526] The RCC distribution of an obscene image statute (RCC § 22E-1805) and RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) prohibit the distribution or display of an image without the recipient's effective consent. The RCC distribution of an obscene image to a minor statute (RCC § 22E-1806) requires that the defendant be at least 18 years of age, but the general distribution of an obscene image statute does not, and applies if the recipient is a minor.

[527] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[528] D.C. Code § 22-3104(b)(1)(A).

[529] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[530] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[531] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition or sells prints of the prohibited images at the museum gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection

defense is limited to the conduct prohibited in subparagraphs (a)(1)(C), (a)(1)(D), (a)(1)(E), (b)(1)(C), (b)(1)(D), and (b)(1)(E). Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised trafficking an obscene image statute expands the "innocent possession" affirmative defense in the current sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current sexual performance of a minor statute has an affirmative defense for possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[532] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for the distribution or display of any number of images to any number of recipients who are "a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction" when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[533] The number of images or motion pictures an individual displays or distributes is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

Eighth, the revised trafficking an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they

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(d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[532] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

[533] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[534] The current sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[535] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised trafficking an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. The defense only applies to creating an image by recording, photographing, or filming the complainant (subparagraphs (a)(1)(A) and (b)(1)(A)), displaying, distributing, or manufacturing with intent to distribute (subparagraphs (a)(1)(C) and (b)(1)(C)), and placing an image on an electronic platform (subparagraphs (a)(1)(D) and (b)(1)(D)). The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the complainant must give effective consent to the conduct or the actor must reasonably believe that the complainant gave effective consent to the conduct. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised trafficking statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes.[536] This change improves the consistency and proportionality of the revised statute.

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[534] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[535] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[536] The provision in sub-paragraph (d)(2)(A)(ii) of the revised defense for an actor that is no more than four years older than the complainant and in a romantic, dating, or sexual relationship is consistent with the current sexual abuse statutes (D.C. Code §§ 22-3008 through 22-3009.02; 22-3011) and RCC sexual abuse of a minor statute (RCC § 22E-1302), which do not apply to otherwise consensual sexual conduct unless there is at least four year age gap or a special relationship (i.e., the actor is a coach) between the actor and the complainant. However, under current District law and the RCC sexual abuse of a minor statute, if a spouse or domestic partner falls outside this four year age gap, or if there is a special relationship between the actor and the complainant, there is liability unless the marriage or domestic partnership defense applies. Although it is difficult to predict what the actual age gaps would be given the variety of marriage laws, in theory, under the current sexual abuse statutes and the RCC sexual abuse of a minor statute, a 22 year old

Ninth, the revised trafficking an obscene image statute has an affirmative defense for subsection (a) that the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the image has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the creation, sale, promotion, or possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with serious literary, artistic, political, or scientific value, when considered as a whole.[537] In contrast, first degree of the revised trafficking an obscene image statute has an affirmative defense that the image has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[538] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[539] This change improves the constitutionality of the revised statute.

Tenth, through the RCC definition of "image," the revised trafficking an obscene image statute excludes hand-rendered depictions. The current sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic

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spouse or domestic partner would not be liable for engaging in otherwise consensual sexual activity with a 16 year old. There would be liability, however, under the current sexual performance of a minor statute.

[537] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

[538] *Miller v. California*, 413 U.S. 14, 24 (1973).

[539] For example, a defendant that causes minors to engage in sexual intercourse for an artistic film may have a successful affirmative defense under subsection (d)(1) of the RCC trafficking offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301). If the sexual activity doesn't actually occur, there may still be liability under enticing a minor into sexual conduct (RCC § 22E-1305) or arranging for sexual conduct with a minor (RCC § 22E-1306).

representation, dance, or any other visual presentation or exhibition."[540] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[541] The Supreme Court struck down as unconstitutionally overbroad a federal statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[542] In contrast, through the definition of "image" in RCC § 22E-701, the revised trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[543] and, for second degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[544] This change improves the clarity, consistency, and constitutionality of the revised statute.

Eleventh, the revised trafficking an obscene image statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[545] The precise scope of conduct

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[540] D.C. Code § 22-3101(3).

[541] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

[542] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[543] As is discussed elsewhere in this commentary, in *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that sells or shares a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real" minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[544] 413 U.S. 15 (1973).

[545] D.C. Code § 22-3102(a)(1).

intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual image, employing, authorizing, or inducing a minor to engage in a sexual performance has the same 10 year penalty as actually filming or directing a sexual performance.[546] In contrast, the revised trafficking an obscene image statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that facilitates the minor engaging in the creation of an image instead is covered by the RCC solicitation offense (RCC § 22E-302),[547] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a sexual performance may also make the actor subject to attempt liability[548] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

Twelfth, the revised statute excludes liability for commercial telecommunications service providers. The current sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[549] The crime makes no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request.[550] District case law has not addressed the issue. In contrast, the revised trafficking an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[551] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[552] The revised offense also excludes liability for any interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934,[553] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[554] This change improves the consistency and proportionality of the revised offense.

Beyond these twelve substantive changes to current District law, eight other aspects of the revised trafficking an obscene image statute may be viewed as a substantive change of law.

First, the revised trafficking an obscene image statute requires a "knowingly" culpable mental state for the prohibited conduct—creating an image, giving consent for a

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[546] D.C. Code § 22-3102(1).

[547] [The RCC solicitation offense is currently limited to crimes of violence. In a future revision, the offense will be expanded to include the RCC trafficking an obscene image of a minor statute and possibly other offenses.] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.

[548] RCC § 22E-301.

[549] D.C. Code § 22-3102(d)(3).

[550] Consider, for example, a social media platform that "transmits" the obscene image one user posts to other users of the platform. Consider also a television station that "transmits" a live broadcast of local news coverage, during which two minors begin engaging in a sexual act in the background.

[551] 47 U.S.C. § 151 et seq.

[552] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

[553] 7 U.S.C. § 230(f)(2).

[554] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[555] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the image, and the definition of "knowingly"[556] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[557] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[558] Resolving this ambiguity, the revised trafficking an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—creating an image, giving consent for a minor to create an image, displaying, distributing, or manufacturing an image, making an image accessible on an electronic platform, and selling or advertising an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[559] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a

[555] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[556] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[557] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[558] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

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

"knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised trafficking an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[560] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[561] There is no DCCA case law interpreting the definition of "knowingly"[562] or how it applies to the current statute. The current obscenity statute has a substantively identical definition of "knowingly,"[563] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[564] Resolving this ambiguity, the revised trafficking an obscene image statute requires recklessness as to the content of the image,[565] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge

[560] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[561] D.C. Code § 22-3101(1).

[562] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[563] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[564] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[565] While the revised trafficking an obscene image statute requires "recklessness" as to the content of the image (whether it depicts or will depict part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[566] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[567] This change improves the clarity and consistency of the revised statute

Third, the revised trafficking an obscene image statute requires that the image depicts, or will depict, at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in an image must be a "real," i.e., not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[568] which arguably suggests that the complainant must be a "real," i.e., not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised trafficking an obscene image statute specifies that at least part[569] of a "real," i.e., not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[570] Distribution of obscene images of purely computer-generated or other fictitious minors[571] may be prohibited under the

[566] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[567] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[568] D.C. Code § 22-3101(2).

[569] The revised trafficking statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.

[570] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. *Ferber* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised trafficking offenses is constitutional.

[571] Under Supreme Court case law, images of computer-generated minors and other fake minors retain First Amendment protection and can only be prohibited if they are also obscene. *Ferber*, 458 U.S. at 764-65 ("We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances,

RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current sexual performance of a minor statute prohibits "simulated" sexual intercourse,[572] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[573] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[574] and is supported by Supreme Court case law.[575] Distribution of obscene

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retains First Amendment protection."). In *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that prohibited "any visual depiction" that "is, or appears to be, of a minor engaging in sexually explicit conduct," without any obscenity requirement, was overbroad and unconstitutional. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 249, 256 (2002). The Court noted that unlike *Ferber*, where the images were "the record of sexual abuse, [the federal statute at issue] prohibits speech that records no crime and creates no victims by its production." *Ashcroft*, 535 U.S. at 250. The Court found unpersuasive the Government's arguments about the need for the statute and held that it was overbroad and unconstitutional. *Id.* 250-51, 252-56. In *United States v. Williams*, the Court stated that a federal statute that prohibited "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008).

[572] D.C. Code § 22-3101(5)(A).

[573] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[574] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[575] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any

images that do not satisfy the definition of "simulated" may be prohibited under the RCC distribution of an obscene image statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised trafficking an obscene image statute provides liability for a person responsible for the complainant under District civil law giving "effective consent" to the complainant's participation in the recording, photographing, or filming, and requires a "knowingly" culpable mental state for this element.[576] The current sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[577] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised trafficking statute requires that the individual responsible under District civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under District civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[578] This change improves the clarity and consistency of the revised statute.

Sixth, the revised trafficking an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[579] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[580] It is unclear whether

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> possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[576] Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) and subsection (b)(1) also applies to the fact that the defendant is a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant."

[577] D.C. Code § 22-3102(a)(1).

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

[579] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[580] D.C. Code § 22-3101(1).

this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[581] and it is also unclear whether the mental state applies to the age of the complainant.[582] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[583] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised trafficking an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[584] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[585] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[586] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[587] This change improves the clarity and consistency of the revised statute.

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[581] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[582] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[583] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[584] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised trafficking an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the person, the actor's conscious disregard of it is clearly blameworthy. A reasonable mistake as to the complainant's age would negate the recklessness required.

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

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

[587] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the

Seventh, the revised trafficking an obscene image statute does not criminalize a person with specified responsibility under District civil law for the complainant giving effective consent for the complainant to aid the creation of derivative images. The definition of "performance"[588] in the current sexual performance of a minor statute includes live conduct as well as images (e.g. photographs) of live conduct, and appears to include derivative images (e.g. photographs of photographs). The current statute prohibits a parent, guardian, or custodian from giving consent for "participation by a minor in a sexual performance,"[589] but it is unclear what "participation" means and if this provision extends to giving consent for the minor to create an image derived from a source other than live conduct. There is no DCCA case law on these issues. Resolving this ambiguity, subparagraphs (a)(1)(B) and (b)(1)(B) of the revised statute exclude a "derivative image." Read in conjunction with the requirements in subsections (a)(2) and (b)(2), these subparagraphs require the defendant to give effective consent for the minor to engage in or submit to the recording, photographing, or filming of live sexual conduct. This change improves the clarity and consistency of the revised statute.

Eighth, the revised trafficking an obscene image statute no longer separately prohibits producing or directing a derivative image. The current sexual performance of a minor statute prohibits "produc[ing]" or "direct[ing]" a sexual performance of a minor.[590] The definition of "performance"[591] in the current sexual performance of a minor statute includes live conduct, as well as still images (e.g., photographs). There is no DCCA case law on the intended scope or meaning of "directing" or "producing," and whether the current statute criminalizes producing or directing the creation of a derivative image.[592] The legislative history notes that "producing a performance [includes] giving financial backing, making background arrangements for a performance such as buying or leasing equipment for a sexual performance or purchasing equipment to film or exhibit a sexual performance."[593] Resolving this ambiguity, the revised trafficking an obscene image statute eliminates separate liability for producing or directing a derivative image as a discrete means of liability. The revised trafficking an obscene image statute continues to criminalize knowingly producing or directing the creation of an image that involves recording, photographing, or filming the complainant.[594] However, a person who

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penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

[588] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[589] D.C. Code § 22-3102(a)(1).

[590] D.C. Code § 22-3102(a)(2).

[591] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[592] For example, knowingly providing a computer or internet services to a person who creates a compilation of sexualized images of minors copied from the internet.

[593] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[594] For example, an actor that gives money to another individual, knowing that the individual is buying video equipment and filming prohibited images would have liability for "producing" the creation of an image derived from recording, photographing, or filming live conduct. Producing or directing a live performance under the RCC arranging a live sexual performance of a minor statute RCC § 22E-1809 may also provide similar liability.

produces or directs the creation of a derivative image is not criminally liable under the revised trafficking statute unless they satisfy the requirements under the RCC accomplice liability statute (RCC § 22E-210).[595] This change improves the clarity and consistency of the revised statute.

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

First, the revised statute deletes subsection (a) of the current statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[596] It is unclear whether this is a general statement or part of the actual offense for which a person can be charged and convicted.[597] The revised trafficking an obscene image statute substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[598] However, it is counterintuitive to construe a "performance" as including a still image (e.g. a photograph). To clarify that both images and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or

[595] For example, if an actor knows that a person creates derivative images of minors engaging in sex acts on their computer, and *purposely* buys that person sophisticated software or pays the rent at their location to facilitate that conduct or to aid the distribution or sale of derivative, there may be accomplice liability for trafficking an obscene image under RCC § 22E-210.

[596] D.C. Code § 22-3102(a).

[597] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[598] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Third, the revised trafficking an obscene image statute no longer uses the defined term "minor."[599] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[600] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised trafficking an obscene image statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant." The current sexual performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[601] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether a formal legal arrangement exists."[602] The revised statute similarly uses a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised trafficking an obscene image statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[603] but otherwise refers generally to the complainant's sexual conduct.[604] The revised trafficking statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g. unconscious)

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[599] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[600] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[601] D.C. Code § 22-3102(a)(1).

[602] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[603] D.C. Code § 22-3102(a)(1).

[604] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised trafficking an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current sexual performance of a minor statute prohibits, including bestiality.[605] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[606] the revised trafficking an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current sexual performance of a minor statute does not define "lewd," but the DCCA has approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[607] The revised trafficking an obscene image statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

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[605] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[606] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[607] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

Eighth, the revised trafficking an obscene image statute assigns the burden of proof for affirmative defenses to the defendant. The current sexual performance of a minor statute has several "affirmative defense[s],"[608] but does not establish what burden of proof, if any, the defendant has. There is no DCCA case law on this issue. However, several current District statutes require that the defendant prove by a preponderance of the evidence an "affirmative defense"[609] or a "defense" that does not negate an element of the offense.[610] The revised trafficking an obscene image statute assigns the burden of proof to the defendant because these affirmative defenses do not negate an element of the offense.[611] This change improves the clarity and constitutionality of the revised statute.

Ninth, the revised trafficking an obscene image statute deletes the definitions of "transmit" and "transmission" in the current statute[612] because they are redundant with distribution. Deleting them clarifies the revised statute without changing current law.

Tenth, the revised trafficking an obscene image statute clarifies that filming live conduct is a discrete means of liability. The current sexual performance of a minor statute extends to filming live conduct, but it is not explicitly stated in the statute.[613] To

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[608] D.C. Code § 22-3104.

[609] *See, e.g.*, D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-933.01(b) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[610] *See, e.g.*, D.C. Code §§ 22-3011(b), 3017(b) (establishing a marriage or domestic partnership "defense," which the defendant must prove by a preponderance of the evidence, to several of the current sexual abuse statutes).

[611] Under Supreme Court case law, a state legislature may assign the burden of proof to a defendant for an affirmative defense that does not negate an element of the offense. *See Patterson v. New York*, 432 U.S. 197, 205, 206, 207 (1977) (upholding a murder conviction under a state statute that defined murder as causing the death of another person with intent to do so, with an affirmative defense for extreme emotional disturbance, because the affirmative defense did not "negative any facts of the crime which the State is to prove in order to convict of murder."); *Martin v. Ohio*, 480 U.S. 228, 230, 234 (1987) (upholding an aggravated murder conviction under a state statute that defined aggravated murder as "purposely, and with prior calculation and design" causing the death of another person, with an affirmative defense for self-defense, because the state did not "shift to the defendant the burden of disproving any element of the state's case."). The Court recognized that this "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes," but stated "there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210. The Court has not put forth a single test or guidelines for the scope of these constitutional limits.

[612] D.C. Code § 22-3102(d)(3) ("For the purposes of subsections (b) and (c) of this section, the term: . . . . 'Transmit' or 'transmission' includes distribution, and can occur by any means, including electronically.". [sic].").

[613] The current definitions of "performance" and "sexual performance" include both still images and live performances. D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18

better communicate in plain language the scope of the offense, the revised statute specifies that recording, photographing, or filming live conduct are all means of liability. This revision improves the clarity of the revised statute without changing current District law.

years of age."). Thus, each provision of the current statute extends to using a minor or giving consent for a minor to engage in or participate in live conduct. D.C. Code § 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

RCC § 22E-1808. Possession of an Obscene Image of a Minor.

(a) *First Degree*. Except as provided in subsection (c) of this section, an actor commits first degree possession of an obscene image of a minor when that actor:
  (1) Knowingly possesses an image;
  (2) Reckless as to the fact that the image depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) A sexual act or simulated sexual act;
    (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
    (C) Masturbation or simulated masturbation; or
    (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second Degree*. Except as provided in subsection (c) of this section, an actor commits second degree possession of an obscene image of a minor when that actor:
  (1) Knowingly possesses an image;
  (2) Reckless as to the fact that the image depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) An obscene sexual contact; or
    (B) An obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.

(c) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) Nothing in this section shall be construed to impose liability on a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) engaged in activities regulated pursuant to such Act.
  (3) Nothing in this section shall be construed to impose liability on an interactive computer service, as defined in section 230(e)(2) of the Communications Act of 1934, approved February 8, 1996 (110 Stat. 139; 47 U.S.C. § 230(f)(2)), for content provided by another person.
  (4) An actor who is under 18 years of age shall not be subject to prosecution under this section when that actor:
    (A) Is the only person under 18 years of age depicted in the image; or
    (B) Acted with the effective consent of every person under 18 years of age depicted in the image, or reasonably believed that every person under 18 years of age depicted in the image gave effective consent.

(d) *Affirmative Defenses.*
  (1) It is an affirmative defense to subsection (a) of this section that the image has serious literary, artistic, political, or scientific value, when considered as a whole.
  (2) It is an affirmative defense to this section that:

(A) The actor:
(i) Is married to, or in a domestic partnership with, the complainant; or
(ii) Is no more than 4 years older than the complainant and in a romantic, dating, or sexual relationship with the complainant;
(B) The complainant is the only person who is depicted in the image, or the actor and the complainant are the only persons who are depicted in the image; and
(C) The complainant gives effective consent to the conduct or the actor reasonably believes that the complainant gave effective consent to the conduct.

(3) It is an affirmative defense to this section that the actor:
(A) Promptly contacts a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image;
(B) With intent, exclusively and in good faith, to report possible illegal conduct or to seek legal counsel from any attorney; and
(C) Either:
(i) Promptly distributes the image to one of the authorities or individuals specified in sub-subparagraph (d)(3)(B)(i) of this section, without making or retaining a copy; or
(ii) Affords a law enforcement agency access to the image.

(4) It is an affirmative defense to this section that the actor:
(A) Is an employee of a school, museum, library, or movie theater;
(B) Is acting within the reasonable scope of that role; and
(C) Has no control over the creation or selection of the image.

(5) *Burden of Proof.* The actor has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(e) *Penalties.*

(1) First degree possession of an obscene image of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree possession of an obscene image of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*

(1) The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "complainant," "domestic partnership," "effective consent," "image," "obscene," "possesses," "sadomasochistic abuse," "sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

(2) In this section, the term "licensee" has the meaning specified in 47 U.S.C. § 153(30).

COMMENTARY[614]

Explanatory Note. *The RCC possession of an obscene image of a minor offense prohibits possessing images that depict complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the image. The revised possession of an obscene image of a minor statute has the same penalties as the RCC attending or viewing a live sexual performance of a minor statute,[615] the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the trafficking of an obscene image of a minor offense,[616] the arranging a live sexual performance of a minor offense,[617] and the attending or viewing a live sexual performance of a minor offense,[618] the revised possession of an obscene image of a minor statute replaces the current sexual performance using a minor offense[619] in the current D.C. Code, as well as the current definitions,[620] penalties,[621] and affirmative defenses[622] for that offense.*

Subsection (a) specifies the prohibited conduct in first degree possession of an obscene image of a minor, the highest gradation of the revised possession offense—"possesses" an "image." An "image," as defined in RCC § 22E-701, is a visual depiction, other than a depiction rendered by hand, and includes videos and live broadcasts.[623] "Possesses" is defined in RCC § 22E-701 as either to "hold or carry on one's person" or to "have the ability and desire to exercise control over."[624] The RCC definition of "knowingly" in RCC § 22E-206 here means the actor must be "practically

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[614] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[615] RCC § 22E-1810.

[616] RCC § 22E-1807.

[617] RCC § 22E-1809.

[618] RCC § 22E-1810.

[619] D.C. Code § 22-3102.

[620] D.C. Code § 22-3101.

[621] D.C. Code § 22-3103.

[622] D.C. Code § 22-3104.

[623] Depending on the facts of a given situation, there may also be liability for viewing a live broadcast under the RCC viewing a live performance of a minor statute (RCC § 22E-1810). However, due to the RCC merger provision in RCC § 22E-214, an individual may not be convicted of both possessing and viewing the same live broadcast on the same occasion.

[624] Read in conjunction with the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807), the RCC possession of an obscene image characterizes as possession: 1) manufacturing an image without an intent to distribute that image; and 2) uploading or making available an image on an electronic platform that is available only to the actor and no other user, i.e., an actor e-mailing himself or herself a prohibited image.

certain" that he or she will either hold or carry an image on his or her person or have the ability and desire to exercise control over an image. The "[e]xcept as provided in subsection (c) of this section" language in subsection (a) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

Subparagraph (a)(2) specifies additional requirements for the image. First, the image must depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes face, and part of the body or face of a real complainant under the age of 18 years is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the image must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area,[625] or anus, when there is less than a full opaque covering.[626] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "reckless." "Reckless" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the image depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rule of construction in RCC § 22E-207, the "reckless" culpable mental state also applies to the prohibited sexual conduct in sub-paragraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the image is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree possession of an obscene image of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2). However, the types of prohibited sexual conduct are different for second degree possession of an obscene image. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact" and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[627] RCC § 22E-701 defines "obscene" and "sexual contact." Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (b)(2) applies to the

[625] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[626] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised possession statute. However, if the image depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised possession of an obscene image statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

[627] If the specified part of the breast or the buttocks has a full opaque covering, and the image does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree possession of an obscene image.

prohibited sexual conduct and the actor must disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display. The "[e]xcept as provided in subsection (c) of this section" language in subsection (b) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

Subsection (c) establishes four exclusions from liability for the RCC trafficking an obscene image offense. Paragraph (c)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (c)(2) provides that the statute does not apply to any licensee[628] under the Communications Act of 1934, such as a radio, television, or phone service provider. Paragraph (c)(3) provides that the statute does not apply to any interactive computer service as defined in 47 U.S.C. § 230(f)(2).[629]

Paragraph (c)(4) establishes an exclusion from liability for an actor under the age of 18 years. The exclusion applies if the actor is the only person under the age of 18 years that is depicted in the image. If there are multiple people under the age of 18 years who are depicted in the image or live broadcast, the exclusion applies if the actor possesses the image with their effective consent, or reasonably believed that he or she had their effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (d) establishes several affirmative defenses for the RCC possession of an obscene image statute. Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[630] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, are not subject to the First Amendment requirements set out in *Miller v. California*.[631] However, the affirmative defense recognizes that there may be rare situations where images of such conduct warrant First Amendment protection.

Paragraph (d)(2) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. There are several requirements. First, the actor must be married to, or in a domestic partnership with, the complainant, or be in a "romantic, dating, or sexual relationship" with the

[628] The term "licensee" is defined in paragraph (c)(2) to have the same meaning specified in 47 U.S.C. § 153(30).

[629] The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

[630] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[631] *Miller v. California*, 413 U.S. 15, 24 (1973).

complainant and be no more than four years older than the complainant. The revised statute's reference to a "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[632] and is intended to have the same meaning. Second, the complainant must be the only person who is depicted in the image, or the actor and the complainant must be the only persons who are depicted in the image. The marriage or romantic partner defense is not available when the image shows third persons. Finally, the complainant must give "effective consent" to the prohibited conduct or the actor must reasonably believe that the complainant gave "effective consent" to this conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Paragraph (d)(3) establishes an affirmative defense for the innocent display or distribution of a prohibited image in certain socially beneficial situations.[633] The defense applies to possessing an image when the actor also promptly contacts "a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction" with the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney."[634] Per RCC § 22E-205, the object of the phrase "with intent to" is not an objective element that requires separate proof—only the actor's culpable mental state must be proven regarding the object of this phrase. It is not necessary to prove that the defendant successfully reported illegal conduct or sought legal counsel, only that the defendant believed to a practical certainty that he or she would do so. The actor must also promptly distribute the image to one of the specified individuals or authorities in subparagraph (d)(3)(A), without making or retaining a copy, or allow a law enforcement agency access to the image.

Paragraph (d)(4) establishes an affirmative defense for school, museum, library, or movie theater employees. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation[635] or selection of the image. The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

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[632] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[633] The CCRC is currently drafting a general defense for temporary innocent possession that may also address this conduct.

[634] In addition to criminal defense advice, legal advice can include civil proceedings such as custody and abuse and neglect.

[635] The affirmative defense includes "creation," because, as is discussed elsewhere in this commentary, the RCC obscenity offenses characterize manufacturing an image, without intent to distribute that image, as possession. However, it seems like unlikely that one of the specified employees would be instructed to manufacture a prohibited image in the normal course of his or her employment.

Paragraph (d)(5) establishes that the defendant has the burden of proof for all the affirmative defenses in subsection (d) and must establish an affirmative defense by a preponderance of the evidence.

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

Subsection (f) cross-references applicable definitions in the RCC and the federal code.

Relation to Current District Law. *The revised possession of an obscene image statute substantively changes existing District law in eleven main ways.*

First, the revised possession of an obscene image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising a prohibited image. The current sexual performance of a minor statute has the same penalties for creating, displaying, distributing, selling, advertising, and possessing an image,[636] even though creating and distributing are direct forms of child abuse[637] and selling and advertising are "an integral part" of the market.[638] In contrast, the revised possession of a prohibited image statute punishes possessing a prohibited image less severely than creating, displaying, distributing, selling, or advertising an image in the RCC trafficking an obscene image offense (RCC § 22E-1807). Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other current District offenses.[639] As part of this revision, the revised statute no longer uses the term "promote" or its definition in the current statute and splits the conduct referred to in that definition between the revised trafficking an

[636] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[637] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."); *id.* at 759 ("The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation. Second, the distribution network for child pornography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled.").

[638] *Ferber*, 458 U.S. at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[639] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

obscene image and possession of an obscene image offenses.[640] This change improves the consistency and proportionality of the revised offense.

Second, the revised possession of an obscene image statute grades penalties based upon the sexual conduct depicted in the image. The current sexual performance of a minor statute prohibits images of "sexual conduct,"[641] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC possession of an obscene image statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised possession of an obscene image statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[642] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised possession of an obscene image statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[643] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." The possession of images of minors engaging in "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code

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[640] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code §§ 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. The revised possession of an obscene image statute criminalizes as possession, with a lower penalty, certain aspects of the current definition of "promote": 1) "manufacture[s]" or "transmute[s]" an image; and 2) "procure"; and The commentary to the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807) discusses the remainder of the current definition of "promote."

[641] D.C. Code §§ 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attending, transmit, or possess a sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[642] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[643] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

obscenity statute.[644] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[645] with no enhancements for the obscene materials depicting a minor.[646] In contrast, first degree of the revised possession of an obscene image statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701, consistent with other RCC offenses. As defined, such sexual conduct may be as graphic[647] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[648] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[649] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised possession of an obscene image statute expands the prohibited sexual conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current sexual performance of a minor statute is limited to a "lewd exhibition of the genitals."[650] However, the possession of images of minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the

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[644] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[645] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[646] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[647] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised possession of an obscene image of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[648] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[649] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[650] D.C. Code § 22-3101(5)(E).

areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[651] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[652] with no enhancements for the obscene materials depicting a minor.[653] In contrast, the RCC revised possession of an obscene image statute criminalizes possessing certain depictions of the pubic area[654] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[655] As

[651] The current obscenity statute, D.C. Code § 22-2201 generally criminalizes the possession of "obscene, indecent, or filthy" images without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[652] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[653] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[654] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[655] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment, even when the defendant only possesses these images. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC possession of an obscene image statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC possession of an obscene image statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised possession of an obscene image statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity

defined, display of the pubic area or anus is as graphic as other conduct penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised possession of an obscene image statute expands the "innocent possession" affirmative defense in the current sexual performance of a minor statute to include conduct involving more images and display or distribution to authorities other than law enforcement, so long as the actor has a socially beneficial intent. The current sexual performance of a minor statute has an affirmative defense for possessing five or fewer images or one motion picture and requires either that the defendant take reasonable steps to destroy the material or report the material to a law enforcement agency and afford that agency access.[656] There is no DCCA case law interpreting the current defense. In contrast, the RCC affirmative defense is available for possessing any number of images, if the actor also promptly contacts "a law enforcement agency, prosecutor, attorney, school administrator, or person with a responsibility under District civil law for the health, welfare, or supervision of the complainant that the actor reasonably believed to be depicted in the image or involved in the depiction" when the actor has the intent "exclusively and in good faith, to report possible illegal conduct or seek legal counsel from any attorney." The actor must also distribute the image to one of the specified authorities or afford a law enforcement agency access. The current affirmative defense unnecessarily restricts the number of images or motion pictures and excludes well-intentioned individuals who seek legal advice or report images to authorities other than law enforcement. The expanded defense recognizes that parents, schools, and others have a vital interest in addressing wrongful creation, distribution, and sale of prohibited images, and good faith sharing of information such authorities should not be a crime.[657] The number of images or motion pictures an individual possesses is not limited, but may be relevant to a fact finders' determination of the actor's intent. This change improves the consistency and proportionality of the revised statute.

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requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[656] D.C. Code § 22-3104(c) ("It shall be an affirmative defense to a charge under § 22-3102 that the defendant: (1) Possessed or accessed less than 6 still photographs or one motion picture, however produced or reproduced, of a sexual performance by a minor; and (2) Promptly and in good faith, and without retaining, copying, or allowing any person, other than a law enforcement agency, to access any photograph or motion picture: (A) Took reasonable steps to destroy each such photograph or motion picture; or (B) Reported the matter to a law enforcement agency and afforded that agency access to each such photograph or motion picture.").

[657] For example, if a parent discovers multiple video clips on their child's phone of what appear to be another minor engaging in sexual conduct at the child's school, the parent should be able to send the video to school administrators, the parents of the minor, and/or possibly an attorney for further investigation and resolution without having committed a crime.

Sixth, the revised possession of an obscene image statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[658] The current sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[659] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised possession of an obscene image statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. The prohibited conduct must be limited to the actor and the complainant or just the complainant, and the complainant must give effective consent to the conduct or the actor must reasonably believe that the complainant gave effective consent to the conduct. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised possession statute would criminalize possessing images of consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes.[660] This change improves the consistency and proportionality of the revised statute.

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[658] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[659] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[660] The provision in sub-subparagraph (d)(2)(A)(ii) of the revised defense for an actor that is no more than four years older than the complainant and in a romantic, dating, or sexual relationship is consistent with the current sexual abuse statutes (D.C. Code §§ 22-3008 through 22-3009.02; 22-3011) and RCC sexual abuse of a minor statute (RCC § 22E-1302), which do not apply to otherwise consensual sexual conduct unless there is at least four year age gap or a special relationship (i.e., the actor is a coach) between the actor and the complainant. However, under current District law and the RCC sexual abuse of a minor statute, if a spouse or domestic partner falls outside this four year age gap, or if there is a special relationship between the actor and the complainant, there is liability unless the marriage or domestic partnership applies. Although it is difficult to predict what the actual age gaps would be given the variety of marriage laws, in

Seventh, the revised statute applies the current affirmative defense for a librarian or motion picture theater employee to possessing an image and expands the defense to include similarly positioned museum and school employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]"[661] any sexual performance of a minor[662] for a "librarian engaged in the normal course of his or her employment"[663] and certain movie theater employees[664] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[665] There is no DCCA case law interpreting this defense. In contrast, the revised possession of an obscene image statute applies this defense to possessing a prohibited image and expands the defense to include employees at museums and schools who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[666] Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Eighth, the revised possession of an obscene image statute has an affirmative defense for subsection (a) that the image has serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the image has serious literary, artistic, political, or

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theory, under the current sexual abuse statutes and the RCC sexual abuse of a minor statute, a 22 year old spouse or domestic partner would not be liable for engaging in otherwise consensual sexual activity with a 16 year old. There would be liability, however, under the current sexual performance of a minor statute.

[661] As is discussed elsewhere in this commentary, the current definition of "promote" appears to include purely possessory conduct, such as "procures." D.C. Code § 22-3101(4). Thus, it is possible that the current affirmative defense could be construed to include mere possession of prohibited images.

[662] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[663] D.C. Code § 22-3104(b)(1)(A).

[664] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[665] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[666] For example, the defense would not apply to the curator of an art museum who selects prohibited images for an exhibition and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who possesses the images while constructing the exhibition or arranging for-sale prints of the image in the gallery gift shop. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

scientific value, when considered as a whole. As a result, the current statute appears to criminalize the possession of materials like medical textbooks, pictures or videos of newsworthy events, or artistic films that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to images with serious literary, artistic, political, or scientific value, when considered as a whole.[667] In contrast, first degree of the revised possession of an obscene image statute has an affirmative defense that the image has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[668] This change improves the constitutionality of the revised statute.

Ninth, through the RCC definition of "image," the revised possession of an obscene image statute excludes hand-rendered depictions. The current sexual performance of a minor statute defines "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."[669] There is no DCCA case law on the precise scope of "any visual presentation or exhibition," but the legislative history for the current statute seems to indicate that paintings, sculptures, and other hand rendered depictions would be included.[670] The Supreme Court struck down as unconstitutionally overbroad a federal

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[667] In *Ferber*, the Court acknowledged that some applications of the statute at issue would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n 28.

The statute in *Ferber* prohibited the production and distribution of prohibited images, but the Court in *Osborne v. Ohio* recognized that overbreadth is also an issue in statutes that ban the possession of child pornography. *Osborne v. Ohio*, 495 U.S. 103, 112, 113, 114 (1990) (stating that "in light of the statute's exemptions and 'proper purposes' provisions, the statute [at issue] may not be substantially overbroad in our cases" and that the appellant's "overbreadth challenge, in any event, fails" because the Ohio Supreme Court had construed the statute to "avoid[] penalizing persons for viewing or possessing innocuous photographs of naked children.").

[668] *Miller v. California*, 413 U.S. 14, 24 (1973).

[669] D.C. Code § 22-3101(3).

[670] *See* Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8 (stating that the definition of "performance" is mean to "to include any visual presentation or exhibition without regard to the medium.").

statute on sexual images of minors in part because it applied to "any visual depiction" without regard to whether it was obscene, however, the ruling did not turn on the medium or method visual representation.[671] In contrast, through the definition of "image" in RCC § 22E-701, the revised trafficking an obscene image statute is limited to images that are not hand-rendered. Limiting the revised statute to images that are not hand-rendered helps ensure that the images feature "real" minors,[672] and, for second degree, that the images are "patently offensive" under modern community standards per *Miller v. California*.[673] This change improves the clarity, consistency, and constitutionality of the revised statute.

Tenth, the revised statute excludes liability for commercial telecommunications service providers. The current sexual performance of a minor statute makes it unlawful to "transmit" a still or motion picture depicting a sexual performance by a minor "by any means, including electronically."[674] The statutes make no exception for a company or employee who merely facilitates the transmission of an image or sound at a user's request, and in doing so, possesses it. District case law has not addressed the issue. In contrast, the revised possession of an obscene image offense excludes liability for any licensee under the Communications Act of 1934,[675] such as a radio station, television broadcaster, or phone service provider, consistent with the current and revised obscenity offenses.[676] The revised offense also excludes liability for any interactive computer

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[671] In *Aschcroft v. Free Speech Coalition*, the Supreme Court held that a provision in a federal statute that extended to "any visual depiction" that "is, or appears to be a minor engaging in sexually explicit conduct" was unconstitutionally overbroad. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241, 256 (2002). However, most of the Court's analysis focused on the "appears to be language," and it was in this context that the Court also discussed the problematic scope of "any visual depiction," noting that "the literal terms of the statute embrace a Renaissance painting depicting a scene from classical mythology" because it is a "picture" that "appears to be, of a minor engaging in sexually explicit conduct." *Free Speech Coalition*, 535 U.S. at 241. The Court in *Free Speech Coalition* also noted that these images "do not involve . . . let alone harm any children in the production process," *id.* at 241, and, accordingly found the Government's arguments for the restriction unpersuasive, *id.* at 246-56, 256. Although not squarely addressed in the opinion, it seems clear that the medium of a visual depiction is not dispositive in the constitutional analysis. A watercolor painting that is derived from painting live conduct is still a product of child sexual abuse and may be prohibited. *Id.* at 249 ("Where the images are themselves the product of child sexual abuse, *Ferber* recognized that the State had an interest in stamping it out without regard to any judgment about its content. . . . The fact that a work contained serious literary, artistic, or other value did not excuse the harm to its child participants.").

[672] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* did not explicitly state that the children must be "real" children, but in *Ashcroft v. Free Speech Coalition*, the Court held that a federal statute that banned possession of images of what "is, or appears to be" minors engaged in prohibited sexual conduct was overbroad, in part because it could extend to "virtual child pornography" that does not use or harm real children. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 239, 241, 256 (2002). However, for many hand-rendered depictions, such as paintings, it may be difficult to determine if the depiction was of a "real" minor or just an individual's artistic rendering. For example, a defendant that owns a realistic painting of female genitalia falls within the scope of the current statute, but without additional information, it is impossible to know if the painting is of a "real" minor. If the painting is not of a "real" minor, and is not otherwise obscene, it is unconstitutional to prohibit its creation, distribution, etc.

[673] 413 U.S. 15 (1973).

[674] D.C. Code § 22-3102(d)(3)

[675] 47 U.S.C. § 151 et seq.

[676] *See* D.C. Code § 22-2201(d); RCC §§ 22E-1805 and 1806.

service, as defined in section 230(e)(2) of the Communications Act of 1934,[677] for content provided by another person, consistent with the current and revised nonconsensual pornography offenses.[678] This change improves the consistency and proportionality of the revised offense.

Eleventh, the revised possession of an obscene image statute extends liability to the knowing possession of an "electronically received or accessible" image the same as to any other prohibited image of a minor. The current sexual performance of a minor statute states that possession "requires accessing the sexual performance if electronically received or available."[679] There is no DCCA case law on this language limiting possession liability. The definition does not impose any limitations on possession of any other type of image (i.e., not "electronically received or available"). In contrast, through use of the RCC definition of "possession,"[680] the revised offense includes liability for constructive possession of an "electronically received or accessible" image the same as other images. The plain language of the current statute appears to categorically exclude liability for a person who, "knowing the character and content thereof," retains possession of prohibited images without actually accessing them, regardless of the method of delivery.[681] Use of the standard RCC definition of "possession" and its constructive possession requirements to have "the ability and desire to exercise control over" the image assigns criminal liability consistent with other RCC and current D.C. law concerning contraband. This change improves the clarity and consistency of the revised offense, and closes a gap in liability.

Beyond these eleven substantive changes to current District law, six other aspects of the revised possession of an obscene image statute may be viewed as a substantive change of law.

First, the revised possession of an obscene image statute clarifies the requirements for "possession" and requires a "knowingly" culpable mental state for this element. Additionally, although the current statute requires the defendant to "know[] the character and content" of the sexual performance,[682] it does not specify whether this culpable mental state extends to possession, and the definition of "knowingly"[683] in the current

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[677] 7 U.S.C. § 230(f)(2).

[678] *See* D.C. Code § 22-3055(b); RCC § 22E-1804.

[679] D.C. Code § 22-3102(d)(1) ("For the purposes of subsections (b) and (c) of this section, the term 'possess,' 'possession,' or 'possessing requires accessing the sexual performance if electronically received or available.").

[680] The definition of "possession" in RCC § 22E-701 requires a person to "hold or carry on one's person" or to "have the ability and desire to exercise control over."

[681] It is unclear why a person who knowingly receives a package containing prohibited images, and without opening the package, stores them for future viewing should be liable for possession, but a person who knowingly receives electronic files or a password to an online vault containing prohibited images and stores the file or password for future viewing is not.

[682] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[683] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition.

statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[684] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[685] Resolving this ambiguity, the revised possession of an obscene image statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for possessing an image. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence[686] and is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised possession of an obscene image statute requires recklessness as to the content of the image and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[687] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[688] There is no DCCA case law interpreting the definition of "knowingly"[689] or how it applies to the current statute. The current

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The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[684] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[685] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

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

[687] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

[688] D.C. Code § 22-3101(1).

[689] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter

obscenity statute has a substantively identical definition of "knowingly,"[690] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[691] Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the content of the image,[692] and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[693] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[694] This change improves the clarity and consistency of the revised statute.

Third, the revised possession of an obscene image statute requires that the image depicts at least part of a real complainant under the age of 18 years, and excludes purely computer-generated or other fictitious minors. The current sexual performance of a minor statute does not specify whether the complainant that is depicted in an image must be a "real," i.e., not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[695] which arguably suggests that the complainant must be a "real," i.e., not fictitious, person. There is no

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on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[690] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[691] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[692] While the revised possession of an obscene image statute requires "recklessness" as to the content of the image (whether it depicts part or all of a real complainant under the age of 18 years engaging in the prohibited sexual conduct), the closely-related distribution of an obscene image statute (RCC § 22E-1805) and distribution of an obscene image to a minor statute (RCC § 22E-1806) require a higher "knowingly" culpable mental state for the equivalent element (whether an image depicts any person, real or fictitious, of any age, engaging in the prohibited sexual conduct). The higher culpable mental state in these offenses is warranted because they prohibit a much broader array of images.

[693] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[694] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[695] D.C. Code § 22-3101(2).

DCCA case law on this issue. Resolving this ambiguity, the revised possession of an obscene image statute specifies that at least part[696] of a "real," i.e., not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[697] The RCC does not ban possession of obscene images that depict entirely computer-generated or other fictitious minors, although there is liability for the distribution of these images under the RCC distribution of an obscene image to a minor statute (RCC § 22E-1805) or distribution of an obscene image to a minor statute (RCC § 22E-1806). This change improves the clarity, consistency, and proportionality of the revised statute.

Fourth, through use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for images of sexual conduct that is apparently fake. The current sexual performance of a minor statute prohibits "simulated" sexual intercourse,[698] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[699] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[700] and is supported by Supreme Court case law.[701] Possession of suggestive or

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[696] The revised possession statute includes composite images of minors if at least part of the composite is of a real minor, such as a real minor's head on an adult body, or an adult's head on a real minor's body. There is no requirement that the government prove the identity of a real minor.

[697] The Supreme Court held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography." *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). *Osborne* was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "[a]lthough morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further. The RCC requirement that the image is at least partially comprised of a real minor ensures the revised possession offense is constitutional.

[698] D.C. Code § 22-3101(5)(A).

[699] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[700] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[701] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual

obscene images that do not satisfy the definition of "simulated" is not prohibited in the RCC. This change improves the clarity, consistency, and constitutionality of the revised statute.

Fifth, the revised possession of an obscene image statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[702] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[703] The legislative history states that the defendant must "know that the performance will depict a minor,"[704] but it is unclear whether the current definition of "knowingly" requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence.[705] There is no DCCA case law on this issue. However, the current statute has an affirmative defense for a reasonable mistake of age,[706] which suggests that negligence is not sufficient for liability. Resolving this ambiguity, the revised possession of an obscene image statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[707] and

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> intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[702] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to . . . possess a sexual performance by a minor.")

[703] D.C. Code § 22-3101(1).

[704] Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This provision was added to the current sexual performance of a minor statute in 2010.

[705] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[706] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[707] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised possession of an obscene image statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances

clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[708] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[709] Throughout the RCC, recklessness as to age is a consistent basis for penalty enhancement.[710] This change improves the clarity and consistency of the revised statute.

Sixth, the revised possession of an obscene image statute clarifies the current exception to liability for conduct by persons under 18 years of age. Under the current sexual performance of a minor statute, minors are exempt from liability for possessing prohibited still images or motion pictures when the minor is the only person under 18 years of age that is depicted,[711] or when all the minors depicted in the still or motion picture consent.[712] The current exclusion does not define "consent" and does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent.[713] There is no DCCA case law on the current exclusion. Resolving these ambiguities, the revised statute consistently requires that the minor acted with the "effective consent" of every person under the age of 18 years[714] that is depicted in the image,[715] or reasonably believed that every person under the age of 18 years[716] gave

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known to the person, the actor's conscious disregard of it is clearly blameworthy. A reasonable mistake as to the complainant's age would negate the recklessness required.

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

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

[710] RCC § 22E-701 defines "protected person" to include certain individuals under the age of 18 years or over the age of 65 years and several RCC offenses, like assault (RCC § 22E-1202), require a "reckless" culpable mental state for the fact that the complainant is a "protected person." In addition, several of the penalty enhancements for the RCC sexual assault offense (RCC § 22E-1301) require a "reckless" culpable mental state for the age of the complainant.

[711] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[712] D.C. Code § 22-3102(c)(1), (c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission; . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[713] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[714] If a minor is the only person under the age of 18 years that is depicted in the image or live broadcast, it is irrelevant under the exclusion if the image depicts an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), or unlawful disclosure of sexual recordings (RCC § 22E-1804).

[715] The current "sexting" exclusion applies only to a "still or motion picture," but there is no substantive difference between the definition of "still or motion picture" and the RCC definition of "image." *Compare* D.C. Code § 22-3102(d)(2) (defining "still or motion picture" as "includ[ing] a photograph, motion picture,

effective consent. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

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

First, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[717] However, it is counterintuitive to construe a "performance" as including a still image (e.g., a photograph). To clarify that both images and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and attending a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Second, the revised possession of an obscene image statute no longer uses the defined term "minor."[718] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[719] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Third, the revised possession of an obscene image statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the

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electronic or digital representation, video, or other visual depiction, however produced or reproduced.") *with* RCC § 22E-701 (defining "image" as a "a visual depiction, other than a depiction rendered by hand, including a video, film, photograph, or hologram whether in print, electronic, magnetic, or digital format.").

[716] If both minors and adults are depicted in the image it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803), electronic stalking (RCC § 22E-1802), or unlawful disclosure of sexual recordings (RCC § 22E-1804).

[717] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[718] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[719] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

various forms of sexual penetration the current sexual performance of a minor statute prohibits, including bestiality.[720] This change clarifies the revised statute.

Fourth, instead of prohibiting a "lewd" exhibition,[721] first degree of the revised possession of an obscene image statute prohibits a "sexual or sexualized display" when there is less than a full opaque covering. The current sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[722] The revised possession of an obscene image statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Fifth, the revised possession of an obscene image statute requires that the image depict the complainant "engaging in or submitting to" the prohibited sexual conduct. The current sexual performance of a minor statute prohibits possessing a "sexual performance by a minor,"[723] and refers generally to the complainant's sexual conduct."[724] The revised

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[720] The current sexual performance of a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i) of the current statutory language. Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[721] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[722] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[723] D.C. Code § 22-3102(b).

possession statute prohibits images that depict the complainant "engaging in or submitting to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply to depictions of a complainant that is an active participant or a completely passive (e.g. unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised possession of an obscene image statute assigns the burden of proof for affirmative defenses to the defendant. The current sexual performance of a minor statute has several "affirmative defense[s],"[725] but does not establish what burden of proof, if any, the defendant has. There is no DCCA case law on this issue. However, several current District statutes require that the defendant prove by a preponderance of the evidence an "affirmative defense"[726] or a "defense" that does not negate an element of the offense.[727] The revised possession of an obscene image statute assigns the burden of proof to the defendant because these affirmative defenses do not negate an element of the offense.[728] This change improves the clarity and constitutionality of the revised statute.

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[724] "Sexual performance" is defined as "any performance or part thereof which includes sexual conduct by a person under 18 years of age" and the definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant. D.C. Code §" 22-3101(5), (6).

[725] D.C. Code § 22-3104.

[726] *See, e.g.*, D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-933.01(b) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[727] *See, e.g.*, D.C. Code §§ 22-3011(b), 3017(b) (establishing a marriage or domestic partnership "defense," which the defendant must prove by a preponderance of the evidence, to several of the current sexual abuse statutes).

[728] Under Supreme Court case law, a state legislature may assign the burden of proof to a defendant for an affirmative defense that does not negate an element of the offense. *See Patterson v. New York*, 432 U.S. 197, 205, 206, 207 (1977) (upholding a murder conviction under a state statute that defined murder as causing the death of another person with intent to do so, with an affirmative defense for extreme emotional disturbance, because the affirmative defense did not "negative any facts of the crime which the State is to prove in order to convict of murder."); *Martin v. Ohio*, 480 U.S. 228, 230, 234 (1987) (upholding an aggravated murder conviction under a state statute that defined aggravated murder as "purposely, and with prior calculation and design" causing the death of another person, with an affirmative defense for self-defense, because the state did not "shift to the defendant the burden of disproving any element of the state's case."). The Court recognized that this "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes," but stated "there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210. The Court has not put forth a single test or guidelines for the scope of these constitutional limits.

RCC § 22E-1809. Arranging a Live Sexual Performance of a Minor.

(a) *First Degree*. Except as provided in subsection (c) of this section, an actor commits first degree arranging a live sexual performance of a minor when that actor:
  (1) Knowingly:
    (A) Creates, produces, or directs a live performance;
    (B) As a person with a responsibility under District civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the creation of a live performance; or
    (C) Sells admission to or advertises a live performance;
  (2) Reckless as to the fact that the live performance depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) A sexual act or simulated sexual act;
    (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
    (C) Masturbation or simulated masturbation; or
    (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second Degree*. Except as provided in subsection (c) of this section, an actor commits second degree arranging a live sexual performance of a minor when that actor:
  (1) Knowingly:
    (A) Creates, produces, or directs a live performance;
    (B) As a person with a responsibility under District civil law for the health, welfare, or supervision of the complainant, gives effective consent for the complainant to engage in or submit to the creation of a live performance; or
    (C) Sells admission to or advertises a live performance.
  (2) Reckless as to the fact that the live performance depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) An obscene sexual contact; or
    (B) An obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.

(c) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) An actor under 18 years of age shall not be subject to prosecution under subparagraphs (a)(1)(A) or (b)(1)(A) of this section when that actor:
    (A) Is the only person under 18 years of age who is, or who will be, depicted in the live performance; or
    (B) Acted with the effective consent of every person under 18 years of age who is, or who will be, depicted in the live performance,

or reasonably believed that every person under 18 years of age who is, or who will be, depicted in the live performance gave effective consent.

(d) *Affirmative Defense.*

(1) It is an affirmative defense to subsection (a) of this section that the live performance has, or will have, serious literary, artistic, political, or scientific value.

(2) It is an affirmative defense to subparagraphs (a)(1)(A) or (b)(1)(A) of this section, that:

(A) The actor:

(i) Is married to, or in a domestic partnership with, the complainant; or

(ii) Is no more than 4 years older than the complainant and in a romantic, dating, or sexual relationship with the complainant;

(B) The complainant is the only person who is, or who will be, depicted in the live performance, or the actor and complainant are the only persons who are, or who will be, depicted in the live performance;

(C) The complainant gives effective consent to the conduct or the actor reasonably believes that the complainant gave effective consent to the conduct;

(D) The actor is the only audience for the live performance, other than the complainant, or the actor reasonably believes that the actor is the only audience for the live performance, other than the complainant.

(3) It is an affirmative defense to subparagraphs (a)(1)(A), (a)(1)(C), (b)(1)(A), and (b)(1)(C) that the actor:

(A) Is an employee of a school, museum, library, or movie theater;

(B) Is acting within the reasonable scope of that role;

(C) Has no control over the creation or selection of the live performance; and

(D) Does not record, photograph, or film the live performance.

(4) *Burden of Proof.* The actor has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(e) *Penalties.*

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

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

(f) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "complainant," "domestic partnership," "effective consent," "live performance," "obscene," "sadomasochistic abuse,"

"sexual act," "sexual contact," and "simulated" have the meanings specified in RCC § 22E-701.

COMMENTARY[729]

Explanatory Note. *The RCC arranging a live performance of a minor offense prohibits creating, selling admission to, and advertising a live performance that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The offense also prohibits a person that is responsible under District civil law for a complainant under the age of 18 years from giving effective consent for the complainant to engage in a live performance the depicts the specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted, or will be depicted in the live performance. The revised arranging a live performance of a minor statute has the same penalties as the RCC trafficking an obscene image of a minor statute,[730] the main difference being that the RCC arranging a live performance of a minor offense is limited to live performances. Along with the trafficking of an obscene image of a minor offense,[731] the possession of an obscene image of a minor offense,[732] and the attending a live performance of a minor offense,[733] the revised arranging a live performance of a minor statute replaces the current sexual performance using a minor offense[734] in the current D.C. Code, as well as the current definitions,[735] penalties,[736] and affirmative defenses[737] for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree arranging a live performance of a minor statute, the highest gradation of the revised offense. The prohibited conduct is specific to a "live performance." "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that his or her conduct will cause the prohibited result, i.e., creating a live performance. Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in paragraph (a)(1) applies to each type of prohibited conduct in subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C). The "[e]xcept as provided in subsection (c) of this section"

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[729] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

[730] RCC § 22E-1807.

[731] RCC § 22E-1807.

[732] RCC § 22E-1808.

[733] RCC § 22E-1810.

[734] D.C. Code § 22-3102.

[735] D.C. Code § 22-3101.

[736] D.C. Code § 22-3103.

[737] D.C. Code § 22-3104.

language in subsection (a) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

For subparagraph (a)(1)(A), the "knowingly" culpable mental state requires, in part, that the actor be "practically certain" the he or she is "creat[ing], produc[ing], or direct[ing]" a "live performance." The "knowingly" culpable mental state applies to the RCC definition of "live performance" and requires that the actor is "practically certain" that the visual presentation is "for an audience." An actor that "creates" or directs" a visual presentation will nearly always be sufficient for "an audience," even if the actor does not watch the presentation.[738] There may also be liability if the audience is not physically present for the presentation.[739] "Produc[ing]" a live performance in subparagraph (a)(1)(A) includes actions that facilitate the creation, sales, or advertising of a live performance, such as "giving financial backing" and "making background arrangements for a performance such as buying or leasing equipment for a sexual performance."[740]

Subparagraph (a)(1)(B) prohibits a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant" from giving "effective consent" for the complainant to engage in or submit to the creation of a live performance. "Person with a responsibility under District civil law for the health, welfare, or supervision of the complainant" is identical to the language in the special defense in RCC § 22E-408, and has the same meaning as discussed in that commentary. The "knowingly" culpable mental state in paragraph (a)(1) here requires that the actor be "practically certain" that he or she will give "effective consent" for the complainant to engage in or submit to the creation of a live performance.[741] "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." As is discussed in the commentary to the RCC definition of "consent," there are circumstances in which indirect types of agreement or inaction may be sufficient. There is no requirement for liability in subparagraph (a)(1)(B) that a live performance actually occur; it is sufficient that the

[738] When the actor creates or directs a visual presentation and also watches the visual presentation, the actor is clearly the audience. However, an actor cannot avoid liability for creating or directing a visual presentation simply because the actor does not also watch the visual presentation. For example, an actor that directs the complainant to perform a striptease or sexual dance, but does not watch it, still has liability because the striptease or dance is "for" the actor. If an actor creates or directs a visual presentation in an area where other individuals are present and can watch, such as a bar or a park, there is liability if the actor is "practically certain" that those other individuals might watch the performance because the performance is "for" them (and likely also the actor).

[739] An actor is liable if he or she creates or directs a visual presentation and is "practically certain" that a third party could watch from a physically distant location. For example, an actor that directs a play, knowing that a third party may be able to watch or is watching from across the street or several blocks away through a telescope is liable because the actor is "practically certain" that the presentation is "for" an audience. In addition, as previously noted, the actor is likely sufficient for "an audience."

[740] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[741] Per the rule of construction, the "knowingly" culpable mental state also applies to the fact that the actor is a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant." The actor must be "practically certain" that he or she is such a person.

actor give effective consent for the complainant to engage in or submit to the creation of a live performance.[742]

For subparagraph (a)(1)(C), the actor must be "practically certain" that he or she will sell admission to[743] or advertise a live performance. "Advertise" is not limited to commercial settings and includes promoting or drawing attention to a live performance without any expectation of financial gain.

Subparagraph (a)(2) specifies additional requirements for the live performance. First, the live performance must depict, or will depict, in part or whole, the body of a real complainant under the age of 18 years. "Body" includes face, and part of the body or face of a real complainant under the age of 18 years is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance must depict, or will depict, the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[744] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance depicts, or will depict, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in sub-paragraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted or will be depicted in the live performance is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

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[742] This provision is redundant in the case of a responsible individual who has a higher culpable mental state than "knowingly." In those cases, the RCC solicitation (RCC § 22E-302) and RCC accomplice (RCC § 22E-210) provisions would establish liability, as they would for any other defendant. However, the RCC solicitation and accomplice provisions require a culpable mental state of "purposely" and have other more stringent requirements. Subparagraph (a)(1)(B) is intended to provide liability for responsible individuals who are merely "practically certain" that they are giving effective consent to the complainant engaging in or submitting to the creation of a live performance. The lower culpable mental state is warranted because these responsible individuals are likely violating their duty of care to the complainant by giving effective consent. These responsible individuals may still claim that they are not violating their duty of care under the general defense in RCC § 22E-4XX for special responsibility for care, discipline, or safety.

[743] If a live performance is filmed, recorded, or photographed, and the resulting film or photograph is sold or distributed, there may be liability for distributing an "image" under the RCC trafficking an obscene image of a minor statute (RCC § 22E-1807).

[744] If the genitals, pubic area, or anus of the minor have a full opaque covering, or will have a full opaque covering, there is no liability under first degree arranging a live performance. However, if the live performance depicts, or will depict, a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised arranging a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

Subsection (b) specifies the prohibited conduct for second degree arranging a live performance of a minor. Paragraph (b)(1), subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C), and paragraph (b)(2) have the same requirements as paragraph (a)(1), subparagraphs (a)(1)(A), (a)(1)(B), and (a)(1)(C), and paragraph (a)(2). However, the types of prohibited sexual conduct are different. Sub-paragraph (b)(2)(A) prohibits an "obscene" "sexual contact," and sub-paragraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.[745] The terms "obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display. The "[e]xcept as provided in subsection (c) of this section" language in subsection (b) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

Subsection (c) establishes two exclusions from liability. Paragraph (c)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (c)(2) establishes an exclusion from liability for an actor under the age of 18 years. The exclusion applies to subparagraphs (a)(1)(A), (a)(1)(B), (b)(1)(A), and (b)(1)(B)—all prohibited conduct except selling admission to or advertising a live performance in subparagraphs (a)(1)(C) and (b)(1)(C). The exclusion applies if the actor is the only person under the age of 18 years or is, or who will be, depicted in the live performance. If there are multiple people under the age of 18 years who are, or who will be, depicted in the live performance, the exclusion applies if the actor acted with their effective consent, or reasonably believed that he or she had their effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (d) establishes several affirmative defenses for the RCC arranging a live performance statute. Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance has, or will have, serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California,*[746] but makes it an

[745] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict or will not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(B), there is no liability under second degree arranging a live performance. However, there may be liability for causing the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304). [The CCRC expects to update the draft RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304) to include liability for engaging in or causing a minor to engage in a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.]

[746] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which . . . taken as a whole, do not have serious literary, artistic, political, or scientific value.").

affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[747] However, the affirmative defense recognizes that there may be rare situations where live performances of such conduct warrant First Amendment protection.

Paragraph (d)(2) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. The affirmative defense applies to subparagraphs (a)(1)(A) and (b)(1)(A). There are several requirements. First, the actor must be married to, or in a domestic partnership with, the complainant, or be in a romantic, dating, or sexual relationship with the complainant and be no more than four years older than the complainant. The revised statute's reference to "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[748] and is intended to have the same meaning. Second, the complainant must be the only person who is depicted in the live performance, or the actor and the complainant must be the only persons who are depicted in the live performance. The marriage or romantic partner defense is not available when the live performance depicts, or will depict, third persons. Third, the complainant must give "effective consent" to the prohibited conduct, or the actor must reasonably believe that the complainant gave "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Finally, the actor must be the only audience for the live performance, other than the complainant, or the actor must reasonably believe that the actor is the only audience for the live performance, other than the complainant.[749]

Paragraph (d)(3) establishes an affirmative for school, museum, library, or movie theater employees. The affirmative defense applies to defense to subparagraphs (a)(1)(A), (a)(1)(C), (b)(1)(A), and (b)(1)(C). The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the live performance. The actor must not record, photograph, or film the live performance.[750] The defense is intended to shield from liability individuals who

[747] *Miller v. California*, 413 U.S. 15, 24 (1973).

[748] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[749] The "reasonably believes" requirement parallels the requirements of subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" element and require that the actor be "practically certain" that the visual presentation is "for an audience." The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[750] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC trafficking an obscene image offense (RCC § 22E-1807).

otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Paragraph (d)(4) establishes that the defendant has the burden of proof for all the affirmative defenses in subsection (d) and must establish an affirmative defense by a preponderance of the evidence.

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

Subsection (f) cross-references applicable definitions in the RCC.

Relation to Current District Law. *The revised arranging a live performance statute substantively changes existing District law in nine main ways.*

First, the revised arranging a live performance statute punishes creating, selling, or advertising a live performance more severely than attending or viewing a live performance.[751] The current sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[752] even though creating a live performance is a direct form of child abuse[753] and selling and advertising are "an integral part" of the market.[754] In contrast, the revised arranging a live performance of a minor statute penalizes the creating, selling, or advertising of a live performance more severely than viewing or attending a live performance in RCC § 22E-1810. The different penalties recognize that this conduct harms children and supports the market and are consistent with the penalty scheme in other current and RCC offenses. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[755] As part of this revision, the revised statute no longer uses the current statute's defined term "promote" and instead codifies directly in the revised statute the relevant conduct in that

[751] The RCC attending a live performance of a minor statute (D.C. Code § 22E-1810) prohibits attending or viewing a live performance, as well as viewing a live broadcast. However, for simplicity, this discussion will refer to attending or viewing a "live performance" only.

[752] D.C. Code §§ 22-3102(a)(1), (a)(2), (b) (prohibiting "employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance," "being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance," "produces, directs, or promotes" any sexual performance, and "attend, transmit, or possess" any sexual performance), 22-3104 (punishing a first violation "of this chapter" with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[753] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[754] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[755] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

definition.[756] This change improves the consistency and proportionality of the revised offense.

Second, the revised arranging a live performance statute grades punishments based upon the sexual conduct depicted in the live performance. The current sexual performance of a minor statute prohibits live performances of "sexual conduct,"[757] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC arranging a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised arranging a live performance of a minor statute is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in current District sex offenses.[758] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised arranging a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current sexual performance of a minor statute

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[756] The current statute prohibits "promot[ing]" any sexual performance of a minor and defines "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same." D.C. Code § 22-3102(a)(2), 22-3101(4). There is no DCCA case law on the scope of this definition. As is discussed in the commentary, the revised trafficking an obscene image statute retains "sell" and "advertise." The revised arranging a live performance statute also prohibits creating, producing, or directing a live performance, which covers "present" and "exhibit" in the current definition. "Offer or agree to do the same" is deleted from the current definition of "promote" because inchoate liability, such as attempt and conspiracy, provides more consistent and proportional punishment for this conduct. For example, under the current statute, a defendant that "offers" to "direct" a live sexual performance could be charged with attempted sexual performance of a minor, which, for a first offense, would have a maximum term of imprisonment of 180 days. D.C. Code §§ 22-1803; 22-3102(a)(2) (prohibiting "direct[ing]" a sexual performance of a minor); 22-3103(1). However, if this conduct were charged under the current definition of "promote" as offering to "manufacture," "present," or "exhibit" a live performance, the defendant would face a maximum term of imprisonment of 10 years. D.C. Code §§ 22-3102(a)(2); 22-3103(1). In the RCC, the defendant would be charged with attempted arranging a live sexual performance of a minor (offers to "create[], produce[], or direct[]" a live performance).
The remainder of the current definition of "promote" is inapplicable to a live performance. The commentaries to the revised trafficking an obscene image of a minor statute (RCC § 22E-1807) and revised possession of an obscene image of a minor statute (RCC § 22E-1808) discuss this prohibited conduct.

[757] D.C. Code §§ 22-3102(a)(1), (a)(2), (a)(3) (prohibiting a "sexual performance" or a "performance which includes sexual conduct by a person under 18 years of age."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[758] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

prohibits actual masturbation and sadomasochistic abuse,[759] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[760] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[761] with no enhancements for the obscene materials depicting a minor.[762] In contrast, first degree of the revised arranging a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[763] as other conduct penalized by the current statute, such as "simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[764] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[765] This change improves the consistency and proportionality of the revised statute.

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[759] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[760] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[761] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[762] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[763] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation, but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[764] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[765] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

Fourth, the revised arranging a live performance statute expands the prohibited conduct to include a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current sexual performance of a minor statute is limited to a "lewd exhibition of the genitals." However, creating, producing, or directing live performances that feature minors engaging in a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering" may be criminalized in the current D.C. Code obscenity statute.[766] The current D.C. Code obscenity statute is punished as a misdemeanor for a first offense,[767] with no enhancements for the obscene materials depicting a minor.[768] In contrast, the RCC criminalizes creating, producing, and directing live performances featuring certain depictions of the pubic area[769] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[770] As defined, display of the pubic area or anus is as graphic as other conduct

[766] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes the creation, production, or direction of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[767] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[768] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[769] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[770] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious

penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised arranging a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age. In the current sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[771] or, if there are multiple minors depicted, all of the minors consent.[772] A minor that is not depicted,[773] or an adult that is not more than four years older than the minor or minors depicted,[774] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[775] and minors are still liable under

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exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC arranging a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[771] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[772] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section:(1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[773] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[774] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[775] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

the current statute for creating live performances with themselves or other minors[776] or engaging in sexual conduct.[777] There is no DCCA case law interpreting the current exclusion. In contrast, the revised arranging a live performance statute excludes from liability all persons under the age of 18 years,[778] and applies to all prohibited conduct, except selling admission to or advertising live performance (subparagraphs (a)(1)(C) and (b)(1)(C)). Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[779] The only requirements of the revised exclusion are either: 1) The minor is the only person under the age of 18 years who is depicted, or who will be depicted, in the live performance;[780] or 2) The minor has the effective consent of every person under 18

[776] A minor that creates a prohibited live performance involving himself or herself or other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[777] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[778] The revised arranging a live performance statute excludes from liability minors that have a responsibility under District civil law for the health, welfare, or supervision of the complainant. These minors would otherwise have liability under subparagraphs (a)(1)(B) and (b)(1)(B) for giving effective consent for another minor to engage in or submit to the creation of a live performance. This exclusion ensures that the revised arranging a live performance statute is reserved for predatory adults. However, such a minor may still have liability under the RCC criminal abuse and criminal neglect of a minor statutes (RCC §§ 22E-1501 and 22E-1502) and the RCC sex offenses. In addition, the revised exclusion only applies if the minor that is under the care of the responsible minor gives effective consent to the actions of the responsible minor.

[779] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[780] If a minor is the only person under the age of 18 years that is depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the live performance depicts, or will depict, an adult.

years of age who is, or who will be, depicted in the live performance, or reasonably believes that he or she has that effective consent.[781] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. A minor may still be liable for selling admission to or advertising a live performance under the revised statute, even if the live performance is of himself or herself,[782] and there may be liability under the RCC indecent exposure statute (RCC § 22E-1312) for a live performance done without the effective consent of those that may view it. This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised arranging a live performance statute expands the current affirmative defense for a librarian or motion picture theater employee to include similarly positioned museum and school employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[783] for a "librarian engaged in the normal course of his or her employment"[784] and certain movie theater employees[785] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[786] There is no DCCA case law interpreting this defense. In contrast, the revised arranging a live performance statute expands this affirmative defense to include employees at museums and schools who may face similar situations, provided that the conduct is within the reasonable scope of employment and the employee has no control over the creation or selection of the image.[787] For reasons discussed the in explanatory note to this offense, the affirmative

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However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[781] If both minors and adults are depicted, or will be depicted, in the live performance, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[782] For example, a sixteen year old who sells admission to an exhibition of himself or herself masturbating may be liable under the revised statute. Even if the minor's conduct in such situations appears to be consensual, when a minor sells or advertises sexual performance such conduct supports the market for prohibited sexual performances.

[783] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[784] D.C. Code § 22-3104(b)(1)(A).

[785] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[786] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

[787] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum usher who escorts patrons to the exhibition. It should be noted

defense is limited to the conduct prohibited in subparagraphs (a)(1)(A) and (b)(1)(A), provided that the actor does not record, film, or photograph the live performance, and subparagraphs (a)(1)(C) and (b)(1)(C). Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (d)(1) to first degree for images with serious artistic or other value, or, in second degree, the argument that the images are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised arranging a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[788] The current sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[789] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference.[790] There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised arranging a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. The defense only applies to creating, producing, or directing a live performance (sub-paragraphs (a)(1)(A) and

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that for first degree of the revised offense, the curator would still be able to argue that the images had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[788] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[789] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[790] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

(b)(1)(B)). The live performance must be limited to the actor and the complainant or just the complainant, and the complainant must give effective consent to the conduct or the actor must reasonably believe that the complainant gave effective consent to the conduct. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Finally, the actor must be the only audience for the live performance, other than the complainant, or the actor must reasonably believe that he or she is the only audience for the live performance, other than the complainant. Without this defense, the revised arranging a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes.[791] This change improves the consistency and proportionality of the revised statute.

Eighth, the revised arranging a live performance statute has an affirmative defense for subsection (a) that the live performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the performance has, or will have, serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize the creation, sale, or promotion, of artistic films, or newsworthy events that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances with serious literary, artistic, political, or scientific value, when considered as a whole.[792]

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[791] The provision in sub-paragraph (d)(2)(A)(ii) of the revised defense for an actor that is no more than four years older than the complainant and in a romantic, dating, or sexual relationship is consistent with the current sexual abuse statutes (D.C. Code §§ 22-3008 through 22-3009.02; 22-3011) and RCC sexual abuse of a minor statute (RCC § 22E-1302), which do not apply to otherwise consensual sexual conduct unless there is at least four year age gap or a special relationship (i.e., the actor is a coach) between the actor and the complainant. However, under current District law and the RCC sexual abuse of a minor statute, if a spouse or domestic partner falls outside this four year age gap, or if there is a special relationship between the actor and the complainant, there is liability unless the marriage or domestic partnership applies. Although it is difficult to predict what the actual age gaps would be given the variety of marriage laws, in theory, under the current sexual abuse statutes and the RCC sexual abuse of a minor statute, a 22 year old spouse or domestic partner would not be liable for engaging in otherwise consensual sexual activity with a 16 year old. There would be liability, however, under the current sexual performance of a minor statute.

[792] In *Ferber*, the Court acknowledged that some applications of the statute, which extended to live performances, at issue would be unconstitutional:

> While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

In contrast, the revised arranging a live performance statute has an affirmative defense that the live performance has, or will have serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[793] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[794] This change improves the constitutionality of the revised statute.

Ninth, the revised arranging a live performance statute no longer separately prohibits "employ[ing]," "authoriz[ing]," or "induc[ing]" a minor to engage in a sexual performance, instead penalizing such conduct under the RCC solicitation statute at half the penalty of the completed offense. The current sexual performance of a minor statute specifically states that a person commits the offense if he "employs, authorizes, or induces" a minor to engage in a sexual performance.[795] The precise scope of conduct intended by these verbs, and whether such verbs are intended to equate with solicitation of a crime under common law, is unclear. There is no DCCA case law interpreting this provision. Regardless, although such conduct may be far-removed from an actual live performance, employing, authorizing, or inducing a minor to engage in a live performance has the same 10 year penalty as actually creating or directing a live performance.[796] In contrast, the revised arranging a live performance statute removes employing, authorizing, and inducing as a discrete means of liability. Conduct that facilitates the minor engaging in the creation of a live performance instead is covered by the RCC solicitation offense (RCC § 22E-302),[797] defined in a manner consistent with other serious offenses against persons, and subject to a penalty one-half of the completed offense. "Employing" a minor to engage in a live performance may also make the actor subject to attempt liability[798] depending on the facts of the case. This change improves the clarity, consistency, and proportionality of the revised statute.

Beyond these nine substantive changes to current District law, seven other aspects of the revised arranging a live performance statute may be viewed as a substantive change of law.

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[793] *Miller v. California*, 413 U.S. 14, 24 (1973).

[794] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

[795] D.C. Code § 22-3102(a)(1).

[796] D.C. Code § 22-3102(1).

[797] [The RCC solicitation offense is currently limited to crimes of violence. In a future revision, the offense will be expanded to include the RCC trafficking an obscene image of a minor statute and possibly other offenses.] Depending on the facts of the case, there may also be accomplice liability under RCC § 22E-210 or conspiracy liability under § 22E-301 for one who "employs, authorizes, or induces" in concert with others.

[798] RCC § 22E-301.

First, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[799] The statute does not specify whether this culpable mental state extends to the prohibited conduct, such as creating the live performance, and the definition of "knowingly"[800] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[801] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[802] Resolving this ambiguity, the revised arranging a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—creating a live performance, giving consent for a minor to engage in a live performance, or selling or advertising a live performance. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[803] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous

[799] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[800] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[801] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[802] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

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

other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised arranging a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for an audience," as required by the RCC definition of "live performance." The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance,[804] but neither the statute nor the current definition of "sexual performance"[805] specifies whether the visual presentation must be for an audience.[806] In addition, the definition of "knowingly"[807] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[808] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[809] Resolving these ambiguities, the revised arranging a live performance statute requires a "knowingly"

[804] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[805] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[806] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[807] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[808] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[809] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance" as defined in RCC § 22E-701.[810] The RCC definition of "live performance" requires that the visual presentation be "for an audience," and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the presentation is "for an audience."[811] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[812] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised arranging a live performance statute requires recklessness as to the content of the live performance and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[813] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[814] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[815] However, the current obscenity statute has a substantively identical definition of

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[810] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

[811] This requirement is discussed further in the explanatory note for the revised offense.

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

[813] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[814] D.C. Code § 22-3101(1).

[815] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

"knowingly,"[816] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[817] Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the content of the live performance, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[818] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[819] This change improves the clarity and consistency of the revised statute

Fourth, the revised arranging a live performance statute requires recklessness as to the age of the complainant and deletes the current affirmative defense for reasonable mistake of age. The current sexual performance of a minor statute requires that the defendant "know[] the character and content" of the sexual performance[820] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[821] It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence,[822] and it is also unclear whether

[816] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[817] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[818] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[819] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[820] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[821] D.C. Code § 22-3101(1).

[822] The legislative history notes that the definition of "knowingly" was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia

the mental state applies to the age of the complainant.[823] There is no DCCA case law on these issues. However, the current statute has an affirmative defense for a reasonable mistake of age,[824] which suggests that negligence is not sufficient for liability and that "recklessly" or "knowingly" applies to the age of the complainant. Resolving this ambiguity, the revised arranging a live performance statute requires recklessness as to the age of the complainant. A reckless culpable mental state preserves the substance of the affirmative defense[825] and clarifies that the defendant must have some subjective knowledge as to the age of the complainant. Requiring, at a minimum, a knowing culpable mental state for the elements of an offense that make otherwise legal conduct illegal is a generally accepted legal principle.[826] However, recklessness has been upheld in some cases as a minimal basis for punishing morally culpable crime.[827] This change improves the clarity and consistency of the revised statute.

Fifth, the revised arranging a live performance statute requires that the live performance depicts, or will depict, at least part of a real complainant under the age of 18 years and excludes purely computer-generated or other fictitious minors. The current sexual performance of a minor statute does not specify whether the complainant that is depicted, or will be depicted, in a live performance must be a "real," i.e., not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[828] which arguably suggests that the complainant must be a "real," i.e., not fictitious, person. There is no DCCA case law on this issue.

Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[823] The legislative history for the prohibition in the current statute against attending, transmitting or possessing a sexual performance by a minor (D.C. Code § 22-3102(b)), states that the defendant "must know that the performance will depict a minor." Council of the District of Columbia, Report of the Committee on Public Safety and the Judiciary on Bill 18-70, The "Prohibition Against Human Trafficking Amendment Act of 2010" at 10. This prohibition was added to the current statute in 2010 and there is no discussion of how the "knowing" culpable mental state in pre-existing parts of the statute applies to the age of the complainant. Regardless, it is persuasive authority that the defendant must "know" the age of the complainant in the other parts of the statute, although the meaning of that definition remains unclear.

[824] D.C. Code § 22-3104(a) ("Under this chapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over.").

[825] The current affirmative defense is that "the defendant in good faith reasonably believed the person appearing in the performance was 18 years of age or over." D.C. Code § 22-3104(a). In the revised arranging a live performance statute, it must be proven that an actor was reckless that the complainant was under the age of 18 years. As defined in RCC § 22E-206, "recklessness" requires that the actor must disregard a substantial risk that the complainant was under the age of 18 years; and the risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to the person, the actor's conscious disregard of it is clearly blameworthy. A reasonable mistake as to the complainant's age would negate the recklessness required.

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

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

[828] D.C. Code § 22-3101(2).

Resolving this ambiguity, the revised arranging a live performance statute specifies that at least part[829] of a "real," i.e., not fictitious, complainant under the age of 18 years must be depicted or will be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[830] The RCC does not criminalize an obscene live performance with computer-generated minors or other "fake" minors, such as youthful looking adults, although there may be liability under the RCC indecent exposure statute (RCC § 22E-1312).[831] This change improves the clarity, consistency, and proportionality of the revised statute.

Sixth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current sexual performance of a minor statute prohibits "simulated" sexual intercourse,[832] but does not define the term. It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[833] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[834] and is supported by Supreme Court case law.[835] This change improves the clarity, consistency, and constitutionality of the revised statute.

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[829] The revised arranging a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[830] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

[831] The actor would have to meet the requirements of the RCC indecent exposure statute, as well an RCC inchoate offense, such as solicitation (RCC § 22E-302) or accomplice liability (RCC § 22E-210), unless the actor was also directly involved in the performance.

[832] D.C. Code § 22-3101(5)(A).

[833] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[834] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[835] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held

Seventh, the revised arranging a live performance statute provides liability for a person responsible for the complainant under District civil law giving "effective consent" to the complainant's participation in the live performance, and requires a "knowingly" culpable mental state for this element.[836] The current sexual performance using a minor statute prohibits a "parent, legal guardian, or custodian" of a minor from "consent[ing] to the participation by a minor in a sexual performance."[837] The statute does not define "consent" or specify a culpable mental state for this element and there is no DCCA case law on this issue. Resolving this ambiguity, the revised arranging a live performance statute requires that the individual responsible under District civil law for the health, welfare, or supervision of the complainant give "effective consent," as defined in RCC § 22E-701, and requires a "knowing" culpable mental state for this element. The term "under District civil law for the health, welfare, or supervision of the complainant" includes parents, legal guardians, and custodians who at the time have a legal duty of care for the complainant. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception" and is used consistently throughout the RCC. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[838] This change improves the clarity and consistency of the revised statute.

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

First, the revised statute deletes subsection (a) of the current statute: "It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor."[839] It is unclear whether

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constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[836] Per the rule of construction in RCC § 22E-207, the "knowingly" culpable mental state in subsection (a)(1) and subsection (b)(1) also applies to the fact that the defendant is a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant."

[837] D.C. Code § 22-3102(a)(1).

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

[839] D.C. Code § 22-3102(a).

this is a general statement or part of the actual offense for which a person can be charged and convicted.[840] The revised arranging a live performance statute substantively encompasses the "use" of a minor in a sexual performance and "promot[ing]" a sexual performance by a minor, rendering current subsection (a) superfluous. This improves the clarity of the revised offense without changing the law.

Second, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current D.C. Code definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still images and live performances.[841] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Third, the revised arranging a live performance statute no longer uses the defined term "minor."[842] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[843] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fourth, the revised arranging a live performance statute replaces "parent, legal guardian, or custodian of a minor" with a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant." The current sexual

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[840] The current statute substantively encompasses the "use" and "promot[ion] of a minor in a sexual performance, regardless of the meaning of subsection (a). D.C. Code §§ 22-3102(a)(1), (a)(2) ("(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance. (2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age."); 22-3101(4) (defining "promote" as "to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.").

[841] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[842] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[843] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

performance of a minor statute prohibits a "parent, legal guardian, or custodian of a minor" from "consent[ing] to the participation by a minor in a sexual performance."[844] There is no DCCA case law on the scope of "parent, legal guardian, or custodian" in the current statute. However, the legislative history for the current statute indicates a broad scope: "[A] parent, whether natural, or adoptive, or a foster parent, a legal guardian defined in D.C. Code, sec. 21-101 to 103 or custodian . . . [c]ustodian means any person who has responsibility for the care of a child without regard to whether a formal legal arrangement exists."[845] The revised statute uses a "person with a responsibility under District civil law for the health, welfare, or supervision of the complainant," which is used elsewhere in the RCC, such as the special defenses in RCC § 22E-408. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised arranging a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[846] but otherwise refers generally to the complainant's actions.[847] The revised arranging a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g. unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised arranging a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the various forms of sexual penetration the current sexual performance of a minor statute prohibits and includes bestiality.[848] This change clarifies the revised statute.

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[844] D.C. Code § 22-3102(a)(1).

[845] Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 9.

[846] D.C. Code § 22-3102(a)(1).

[847] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

[848] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

Seventh, instead of prohibiting a "lewd" exhibition,[849] the revised arranging a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[850] The revised arranging a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the revised arranging a live performance statute assigns the burden of proof for affirmative defenses to the defendant. The current sexual performance of a minor statute has several "affirmative defense[s],"[851] but does not establish what burden of proof, if any, the defendant has. There is no DCCA case law on this issue. However, several current District statutes require that the defendant prove by a preponderance of the evidence an "affirmative defense"[852] or a "defense" that does not negate an element

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[849] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[850] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[851] D.C. Code § 22-3104.

[852] *See, e.g.*, D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-933.01(b) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

of the offense.[853] The revised arranging a live performance statute assigns the burden of proof to the defendant because these affirmative defenses do not negate an element of the offense.[854] This change improves the clarity and constitutionality of the revised statute.

Ninth, the revised arranging a live performance statute prohibits selling "admission to" a live performance. The current sexual performance of a minor statute prohibits "sell[ing]" a live performance,[855] but in the context of a live sexual performance, it is more accurate to say selling "admission to."[856] This change improves the clarity of the revised statute without changing current District law.

[853] *See, e.g.*, D.C. Code §§ 22-3011(b), 3017(b) (establishing a marriage or domestic partnership "defense," which the defendant must prove by a preponderance of the evidence, to several of the current sexual abuse statutes).

[854] Under Supreme Court case law, a state legislature may assign the burden of proof to a defendant for an affirmative defense that does not negate an element of the offense. *See Patterson v. New York*, 432 U.S. 197, 205, 206, 207 (1977) (upholding a murder conviction under a state statute that defined murder as causing the death of another person with intent to do so, with an affirmative defense for extreme emotional disturbance, because the affirmative defense did not "negative any facts of the crime which the State is to prove in order to convict of murder."); *Martin v. Ohio*, 480 U.S. 228, 230, 234 (1987) (upholding an aggravated murder conviction under a state statute that defined aggravated murder as "purposely, and with prior calculation and design" causing the death of another person, with an affirmative defense for self-defense, because the state did not "shift to the defendant the burden of disproving any element of the state's case."). The Court recognized that this "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes," but stated "there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210. The Court has not put forth a single test or guidelines for the scope of these constitutional limits.

[855] D.C. Code §§ 22-3102(a)(2) (prohibiting "promotes" any sexual performance with a minor); 22-3101(4) (defining "promote" to include "sell.").

[856] If a live performance is filmed, photographed, etc., and the resulting image is sold, there is liability under the RCC trafficking an obscene image statute (RCC § 22E-1807).

RCC § 22E-1810. Attending or Viewing a Live Sexual Performance of a Minor.

(a) *First Degree*. Except as provided in subsection (c) of this section, an actor commits attending or viewing a live sexual performance of a minor when that actor:
  (1) Knowingly attends or views a live performance or views a live broadcast;
  (2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) A sexual act or simulated sexual act;
    (B) Sadomasochistic abuse or simulated sadomasochistic abuse;
    (C) Masturbation or simulated masturbation; or
    (D) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.

(b) *Second Degree*. Except as provided in subsection (c), an actor commits attending or viewing a live sexual performance of a minor when that actor:
  (1) Knowingly attends or views a live performance or views a live broadcast;
  (2) Reckless as to the fact that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age engaging in or submitting to:
    (A) An obscene sexual contact; or
    (B) An obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering.

(c) *Exclusions from Liability.*
  (1) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (2) An actor under 18 years of age shall not be subject to prosecution under this section when that actor:
    (A) Is the only person under 18 years of age who is depicted in the live performance or live broadcast; or
    (B) Acted with the effective consent of every person under 18 years of age who is depicted in the live performance or live broadcast, or reasonably believed that every person under 18 years of age who is depicted in the live performance or live broadcast gave effective consent.

(d) *Affirmative Defense.*
  (1) It is an affirmative defense to this section that the live performance or live broadcast has serious literary, artistic, political, or scientific value, when considered as a whole.
  (2) It is an affirmative defense to this section that:
    (A) The actor:
      (i) Is married to, or in a domestic partnership with, the complainant; or

(ii) Is no more than 4 years older than the complainant and in a romantic, dating, or sexual relationship with the complainant;

(B) The complainant is the only person that is depicted in the live performance, or the actor and the complainant are the only persons that are depicted in the live performance;

(C) The complainant gives effective consent to the conduct or the actor reasonably believes that the complainant gave effective consent to the conduct; and

(D) The actor was the only audience for the live performance or live broadcast, other than the complainant, or the actor reasonably believed that he or she was the only audience for the live performance or live broadcast, other than the complainant.

(3) It is an affirmative defense to this section that the actor:

(A) Is an employee of a school, museum, library, or movie theater;

(B) Is acting within the reasonable scope of that role;

(C) Has no control over the creation or selection of the live performance or live broadcast; and

(D) Does not record, photograph, or film the live performance or live broadcast.

(4) *Burden of Proof.* The actor has the burden of proof for an affirmative defense and must prove the affirmative defense by a preponderance of the evidence.

(e) *Penalties.*

(1) First degree attending a live performance of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(2) Second degree attending a live performance of a minor is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.* The terms "knowingly" and "reckless" have the meanings specified in RCC § 22E-206; and the terms "actor," "complainant," "domestic partnership," "effective consent," "live broadcast," "live performance," "sexual act," "sexual contact," "simulated," have the meanings specified in RCC § 22E-701.

COMMENTARY[857]

[857] Unless otherwise noted, when discussing the current sexual performance of a minor statute, this commentary uses the terms "performance" and "sexual performance" interchangeably. These terms have distinct definitions in the current statute (D.C. Code § 22-3101(3), (6)), but the current statute does not use the terms consistently. *Compare* D.C. Code § 22-3102(a)(1), (b) (referring to a "sexual performance.") *with* (a)(2) (referring to "any performance which includes sexual conduct by a person under 18 years of age.").

Explanatory Note. *The RCC attending or viewing a live sexual performance of a minor offense prohibits attending or viewing a live performance or live broadcast that depicts complainants under the age of 18 years engaging in or submitting to specified sexual conduct. The penalty gradations are based on the type of sexual conduct that is depicted in the live performance or live broadcast. The revised attending or viewing a live sexual performance of a minor statute has the same penalties as the RCC possession of an obscene image of a minor statute,*[858] *the main difference being that the RCC possession of an obscene image of a minor offense is limited to images. Along with the trafficking of an obscene image of a minor offense,*[859] *the possession of an obscene image of a minor offense,*[860] *and the arranging a live sexual performance of a minor offense,*[861] *the revised attending or viewing a live sexual performance of a minor statute replaces the current sexual performance using a minor offense*[862] *in the current D.C. Code, as well as the current definitions,*[863] *penalties,*[864] *and affirmative defenses*[865] *for that offense.*

Subsection (a) specifies the various types of prohibited conduct in first degree attending or viewing a live sexual performance of a minor statute, the highest gradation of the revised offense. Paragraph (a)(1) specifies the prohibited conduct—attending or viewing a "live performance" or "live broadcast."[866] "Live performance" is defined in RCC § 22E-701 as a "play, dance, or other visual presentation or exhibition for an audience." "Live broadcast" is defined in RCC § 22E-701 as "a streaming video, or any other electronically transmitted image for viewing by an audience." Paragraph (a)(1) specifies a culpable mental state of "knowingly," a defined term in RCC § 22E-206 that here means the actor must be "practically certain" that he or she attends or views a "live performance" or "live broadcast."[867] As applied to the elements "live performance" and "live broadcast," the "knowingly" culpable mental state requires that the actor be "practically certain" that the visual presentation is "for an audience."[868] The "[e]xcept as

[858] RCC § 22E-1808.
[859] RCC § 22E-1807.
[860] RCC § 22E-1808.
[861] RCC § 22E-1809.
[862] D.C. Code § 22-3102.
[863] D.C. Code § 22-3101.
[864] D.C. Code § 22-3103.
[865] D.C. Code § 22-3104.
[866] It is arguably redundant to prohibit attending or viewing a live broadcast because an actor that attends or views a live broadcast has likely also attended or viewed a live performance. As defined in the RCC, a "live broadcast" is essentially a "live performance" that is streamed or electronically transmitted. RCC § 22E-701 defining "live broadcast" as "a streaming video, or any other electronically transmitted image for viewing by an audience." However, the revised statute includes both live performances and live broadcasts for clarity.
[867] The revised statute prohibits both attending and viewing a live performance or live broadcast because it is possible to attend such a visual presentation without viewing it. An actor that is "practically certain" that he or she is attending a live performance or live broadcast cannot avoid liability by avoiding watching the performance, i.e., closing his or her eyes, or leaving the room, but staying in reasonably close physical proximity to the performance or broadcast. In addition, an actor cannot avoid liability for being in reasonably close physical proximity to the live performance or live broadcast, but in another part of the facility, venue, or area if the other requirements of the offense are met.
[868] The actor must be "practically certain" that the visual presentation is "for an audience" and the visual presentation must, in fact, be "for an audience." It is a fact-specific inquiry as to whether a visual

provided in subsection (c) of this section" language in subsection (a) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met

Subparagraph (a)(2) specifies additional requirements for the live performance or live broadcast. First, the live performance or live broadcast must depict the body of a real complainant under the age of 18 years. "Body" includes face, and part of the body or face of a real complainant under the age of 18 years is sufficient. The complainant must be a real minor but there is no requirement that the government prove the identity of the minor. Second, the live performance or live broadcast must depict the complainant engaging in or submitting to specific types of sexual conduct: 1) an actual "sexual act," actual "sadomasochistic abuse," or actual masturbation; 2) a "simulated" "sexual act," "simulated" "sadomasochistic abuse," or "simulated" masturbation; or 3) a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.[869] The terms "simulated," "sexual act" and "sadomasochistic abuse" are defined in RCC § 22E-701. There is no obscenity requirement for any of the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D).

Paragraph (a)(2) specifies that the culpable mental state for the requirements in paragraph (a)(2) is "recklessly." "Recklessly" is a defined term in RCC § 22E-206 that here means the actor is aware of a substantial risk that the live performance or live broadcast depicts, in part or whole, the body of a real complainant under the age of 18 years of age. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state also applies to the prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D). The actor must be aware of a substantial risk that the conduct that is depicted in the live performance or live broadcast is one of the types prohibited in subparagraphs (a)(2)(A) through (a)(2)(D), such as an actual sexual act or a prohibited sexualized display.

Subsection (b) specifies the prohibited conduct for second degree attending or viewing a live sexual performance of a minor. Paragraph (b)(1) and paragraph (b)(2) have the same requirements as paragraph (a)(1) and paragraph (a)(2). However, the types of prohibited sexual conduct are different in second degree. Subparagraph (b)(2)(A) prohibits an "obscene" "sexual contact," and subparagraph (b)(2)(B) prohibits an "obscene" sexual or sexualized display of any breast below the top of the areola, or the

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presentation is "for an audience." For example, a couple having sex in the privacy of their bedroom, or the relative privacy of a car or their backyard, are likely not having sexual activity "for an audience." An actor that spies on them may be liable for voyeurism under RCC § 22E-1803, but there is no liability for attending a live performance with the effective consent of the participants. In contrast, if the actor views a live visual presentation that is happening openly in a public park, or if he or she has to pay for admission or seek permission to enter a venue or area where the presentation occurs, the visual presentation likely is "for an audience" and likely satisfies the RCC definition of "live performance." It should be noted that in many instances, the actor is the only "audience" and is the same individual that creates, produces, or directs the live performance. Due to the RCC merger provision in RCC § 22E-214, the actor cannot have liability for creating, producing, directing, and attending the same live performance.

[869] If the genitals, pubic area, or anus of the minor have a full opaque covering, there is no liability under first degree of the revised attending a live performance statute. However, if the live performance depicts a minor engaging in a "sexual contact" that is also "obscene," there is liability under second degree of the revised attending a live performance statute. The RCC definition of "sexual contact" prohibits the touching of genitalia, anus, groin, breast, inner thigh, or buttocks, whether clothed or unclothed (RCC § 22E-701).

buttocks, when there is less than a full opaque covering.[870] "Obscene" and "sexual contact" are defined in RCC § 22E-701. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must disregard a substantial risk that the conduct is an "obscene" "sexual contact" or a specified "obscene" sexual display. Per the rule of construction in RCC § 22E-207, the "recklessly" culpable mental state in paragraph (a)(2) applies to the prohibited sexual conduct and the actor must disregard a substantial risk that the conduct is an "obscene sexual contact" or a specified "obscene" sexual display. The "[e]xcept as provided in subsection (c) of this section" language in subsection (b) references the exclusions in subsection (c) that will exclude an actor from liability even if the elements of the offense are otherwise met.

Subsection (c) establishes two exclusions from liability. Paragraph (c)(1) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged. Not all conduct involved in the offense, of course, will implicate First Amendment rights. Paragraph (c)(2) establishes an exclusion from liability for an actor under the age of 18 years. The exclusion applies if the actor is the only person under the age of 18 years who is depicted in the live performance or live broadcast. If there are multiple people under the age of 18 years who are depicted in the live performance or live broadcast, the exclusion applies if the actor acted with their effective consent, or reasonably believed that he or she had their effective consent. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception."

Subsection (d) establishes several affirmative defenses for the RCC attending or viewing a live sexual performance of a minor statute. Paragraph (d)(1) establishes an affirmative defense to subsection (a) of the revised statute that the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language matches one of the requirements for obscenity in *Miller v. California*,[871] but makes it an affirmative defense. The prohibited sexual conduct in subparagraphs (a)(2)(A) through (a)(2)(D), when it involves real complainants under the age of 18 years, is not subject to the First Amendment requirements set out in *Miller v. California*.[872] However, the affirmative defense recognizes that there may be rare situations where live performances or live broadcasts of such conduct warrant First Amendment protection.

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[870] If the specified part of the breast or the buttocks has a full opaque covering, and the live performance does not depict an "obscene sexual contact" as prohibited by subparagraph (b)(2)(A), there is no liability under second degree attending a live performance. However, there may be liability if the actor caused the minor to engage in the underlying sexual conduct in the RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304). [The CCRC expects to update the draft RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304) to include liability for engaging in or causing a minor to engage in a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.]

[871] *Miller v. California*, 413 U.S. 15, 24 (1973) ("A state [obscenity] offense must also be limited to works which…taken as a whole, do not have serious literary, artistic, political, or scientific value.").

[872] *Miller v. California*, 413 U.S. 15, 24 (1973).

Paragraph (d)(2) establishes an affirmative defense if the actor and the complainant are in a marriage, domestic partnership, or dating relationship. The affirmative defense applies to subparagraphs (a)(1)(A) and (b)(1)(A). There are several requirements. First, the actor must be married to, or in a domestic partnership with, the complainant, or be in a romantic, dating, or sexual relationship with the complainant and be no more than four years older than the complainant. The revised statute's reference to "romantic, dating, or sexual relationship" is identical to the language in the District's current definition of "intimate partner violence"[873] and is intended to have the same meaning. Second, the complainant must be the only person who is depicted in the live performance or live broadcast, or the actor and the complainant must be the only persons who are depicted in the live performance or live broadcast. The marriage or romantic partner defense is not available when the live performance or live broadcast depicts third persons. Third, the complainant must give "effective consent" to the prohibited conduct, or the actor must reasonably believe that the complainant gave "effective consent" to the prohibited conduct. "Effective consent" is a defined term in RCC § 22E-701 that means "consent other than consent induced by physical force, a coercive threat, or deception." Finally, the actor must be the only audience for the live performance or live broadcast, other than the complainant, or the actor must reasonably believe that the actor is the only audience for the live performance or live broadcast, other than the complainant.[874]

Paragraph (d)(3) establishes an affirmative for school, museum, library, or movie theater employees. The employee must be acting in the reasonable scope of his or her employment and have no control over the creation or selection of the live performance or live broadcast. The actor must not record, photograph, or film the live performance.[875] The defense is intended to shield from liability individuals who otherwise meet the elements of the offense, but only because it was part of the ordinary course of employment.

Paragraph (d)(4) establishes that the defendant has the burden of proof for all the affirmative defenses in subsection (d) and must establish an affirmative defense by a preponderance of the evidence.

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

Subsection (f) cross-references applicable definitions in the RCC.

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[873] D.C. Code § 16-1001(7) ("'Intimate partner violence' means an act punishable as a criminal offense that is committed or threatened to be committed by an offender upon a person: (A) To whom the offender is or was married; (B) With whom the offender is or was in a domestic partnership; or (C) With whom the offender is or was in a romantic, dating, or sexual relationship.").

[874] The "reasonably believes" requirement parallels the requirements of subparagraphs (a)(1)(A) and (b)(1)(A) of the offense. As is discussed earlier in the explanatory note, those subparagraphs apply a "knowingly" culpable mental state to the "live performance" element and require that the actor be "practically certain" that the visual presentation is "for an audience." The "audience" can extend beyond the actor or the complainant to include other people that are watching or may watch the performance as long as the actor is "practically certain" of this fact. For the defense, if an actor reasonably believes that the actor, the complainant, or both of them, are the only audience for the performance, it is irrelevant that there may be other people watching.

[875] If an actor records, photographs, or films the live performance, he or she is creating a prohibited image of a minor and there may be liability under the RCC trafficking an obscene image offense (RCC § 22E-1807).

Relation to Current District Law. *The revised attending a live performance statute substantively changes existing District law in eight main ways.*

First, the revised attending a live performance statute punishes attending or viewing a live performance or live broadcast less severely than the creating, selling, or advertising a live performance. The current sexual performance of a minor statute has the same penalties for creating, selling, advertising, attending, and viewing a live performance,[876] even though creation of a live performance is a direct form of child abuse[877] and selling and advertising are "an integral part" of the market.[878] In contrast, the revised attending a live performance statute penalizes attending or viewing a live performance or a live broadcast less severely than creating, selling or advertising a live performance or a live broadcast in the revised arranging a live performance statute (RCC § 22E-1809) or revised trafficking an obscene image statute (RCC § 22E-1807). The different penalties recognize that creating, selling, or advertising a live performance directly harms children and supports the market. Having the same penalties for this wide spectrum of conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[879] This change improves the consistency and proportionality of the revised offense.

Second, the revised attending a live performance statute grades punishments based upon the sexual conduct depicted in the live performance or live broadcast. The current sexual performance of a minor statute prohibits attending live performances of "sexual conduct,"[880] a defined term including both penetration and lewd exhibition, with no distinction in penalty between the different types of sexual conduct. In contrast, the RCC attending a live performance statute reserves first degree for actual or simulated sexual acts, sadomasochistic abuse, or masturbation, as well as sexual displays of the

[876] D.C. Code § 22-3102(a)(1), (a)(2), (b) (prohibiting "employ[ing], authoriz[ing], or induc[ing] a person under 18 years of age to engage in a sexual performance, the parent, legal guardian, or custodian giving such consent, "produc[ing], direct[ing], or promot[ing]" any sexual performance, and "attend[ing], direct[ing], or promot[ing] any sexual performance"), 22-3104 (punishing a first violation with a maximum term of imprisonment of 10 years and a second or subsequent offense with a maximum term of imprisonment of 20 years).

[877] *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 758, (1982) ("The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.").

[878] *Id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation.").

[879] *See, e.g.*, D.C. Code §§ 22-3231 and 22-3232 (trafficking in stolen property offense with a maximum term of imprisonment of 10 years and receiving stolen property offense with a maximum term of imprisonment of either seven years or 180 days, depending on the value of the property); 48-904.01(a)(1), (a)(2), (d)(1), (d)(2) (penalizing the manufacture, distribution, or possession with intent to manufacture or distribute a controlled substance with a maximum term of imprisonment of 30 years, 5 years, 3 years, or 1 year, depending on the type of controlled substance, but penalizing the possession of any drug other than liquid PCP with a maximum term of imprisonment of 180 days).

[880] D.C. Code §§ 22-3102(b) (prohibiting a attending a "sexual performance by a minor."), 22-3101(5), (6) (defining "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age," and "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

genitals, pubic area, or anus, when there is less than a full opaque covering. Second degree of the revised attending a live performance is limited to an "obscene," as defined in RCC § 22E-701, sexual contact or sexualized display of the breast below the top of the areola or the buttocks, when there is less than a full opaque covering. Having the same penalties for different types of sexual conduct is disproportionate and inconsistent with the penalty scheme in other District offenses.[881] This change improves the consistency, proportionality, and constitutionality of the revised statute.

Third, the revised attending a live performance statute expands the prohibited sexual conduct to include "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact." The current sexual performance of a minor statute prohibits actual masturbation and sadomasochistic abuse,[882] but does not extend to "simulated" masturbation or sadomasochistic abuse, or to sexual touching beyond that required for masturbation or a "lewd exhibition of the genitals." However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[883] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[884] with no enhancements for the obscene materials depicting a minor.[885] In contrast, first degree of the revised attending a live performance statute includes "simulated" masturbation and "simulated" sadomasochistic abuse, and second degree includes an obscene "sexual contact." "Simulated," "obscene," and "sexual contact" are defined in RCC § 22E-701. As defined, such sexual conduct may be as graphic[886] as other conduct penalized by the current statute, such as

[881] The District's current sex offenses generally penalize a "sexual act," which requires penetration, more severely than "sexual contact." D.C. Code §§ 22-3001(8), (9), 22-3002 through 22-3005, 22-3008 through 22-3009.04, 22-3013 through 22-3016.

[882] D.C. Code § 22-3101(5) (defining "sexual conduct" as "(A) Actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva; (B) Masturbation; (C) Sexual bestiality; (D) Sadomasochistic sexual activity for the purpose of sexual stimulation; or (E) Lewd exhibition of the genitals.").

[883] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[884] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[885] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[886] Examples of "simulated" sadomasochistic abuse, "simulated" masturbation, and an obscene "sexual contact" that are not covered by the current sexual performance of a minor statute but would be covered under the revised arranging a live performance of a minor statute include: 1) an adult dressed in a sexual leather outfit wielding an actual whip towards a crying 9 year old, but, due to the camera angle, it is impossible to see if the whip is actually making contact; 2) A 12 year old sitting provocatively, legs spread, naked except for underwear, making rubbing gestures around his or her genitalia that suggest masturbation,

"simulated" sexual penetration, as well as sexual contact involved in masturbation and a "lewd exhibition of the genitals."[887] Criminalization of this conduct is within the bounds of Supreme Court First Amendment case law.[888] This change improves the consistency and proportionality of the revised statute.

Fourth, the revised attending a live performance statute includes a sexual display of the "pubic area or anus, when there is less than a full opaque covering" and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks, when there is less than a full opaque covering." The current sexual performance of a minor statute is limited to a "lewd exhibition of the genitals," and does not include a lewd exhibition of the pubic area, anus, breast, or buttocks. However, attending or viewing a live performance or live broadcast that features "simulated" sadomasochistic abuse, "simulated" masturbation, and obscene "sexual contact" may be criminalized in the current D.C. Code obscenity statute.[889] The current D.C. Code obscenity statute is penalized as a misdemeanor for a first offense,[890] with no enhancements for the obscene materials depicting a minor.[891] In contrast, the RCC criminalizes attending or viewing live performances or live broadcasts that feature certain depictions of the pubic area[892] and anus in first degree, and an "obscene sexual or sexualized display of the breast below the top of the areola, or the buttocks" in second degree.[893] As defined, display of the pubic area or anus is as graphic as other conduct

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but it is impossible to tell if there is actual contact with the genitalia; and 3) A prepubescent girl wearing skimpy lingerie or a sexual leather outfit that fully covers her breasts, but she is rubbing them and making suggestive facial expressions.

[887] *See* D.C. Code § 22-3101(5) (defining "sexual conduct.").

[888] In *United States v. Williams*, the Court held that a child pornography statute that defined "sexually explicit conduct" to include simulated masturbation and simulated sadistic or masochistic abuse was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 290, 307 (2008). The obscenity requirement for "obscene sexual contact" ensures that this provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.").

[889] The current obscenity statute, D.C. Code § 22-2201, generally criminalizes "participat[ing] in the preparation or presentation" of "obscene, indecent, or filthy" live performances without further specification of the relevant conduct. The current obscenity statute does not define the terms "obscene," "indecent," or "filthy," but the DCCA has stated that they must meet the standard for obscenity in *Miller v. California*. *See Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (stating that *Miller* made it clear that any vagueness defects in the statute's terminology may be cured by judicial construction).

[890] D.C. Code § 22-2201(e) ("A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than the amount set forth in § 22-3571.01 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than $1,000 and not more than the amount set forth in § 22-3571.01 or imprisoned not less than 6 months or more than 3 years, or both.").

[891] Obscenity is not a "crime of violence," so there is no penalty enhancement for a minor victim under D.C. Code § 22–3611.

[892] Reference to "pubic area" is intended to include liability for a frontal nude image of a minor where the groin is visible but not the external genitalia.

[893] There is no obscenity requirement for the prohibited sexual displays of the pubic area or anus in first degree because the harm inflicted on the complainant in creating or distributing these images is sufficient under the First Amendment. Conversely, there is an obscenity requirement for the prohibited sexual display of the breast or buttocks in second degree because the conduct otherwise may not be sufficiently graphic to survive constitutional scrutiny. In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to be "obscene" and are not entitled to First

penalized by the current statute, such as a "lewd exhibition of the genitals," and obscene images of the breast or buttock of a minor warrant greater punishment than other forms of obscene materials concerning adults. The RCC criminalizes obscene displays of any breast, as opposed to only the female breast, to recognize that the display of a male breast may be sexualized to the point of being obscene under a *Miller* standard and, if that occurs, more severe punishment than other forms of obscene materials concerning adults is warranted. This change improves the consistency and proportionality of the revised statute.

Fifth, the revised attending a live performance statute expands the current exceptions to liability for conduct by persons under 18 years of age. In the current sexual performance of a minor statute, minors that are depicted in prohibited images are not liable for possessing or distributing those images if the minor is the only minor depicted,[894] or, if there are multiple minors depicted, all of the minors consent.[895] A

Amendment protection. Specifically, the Court held that a New York statute did not violate the First Amendment when the statute banned the production and distribution of live or visual depictions of specified sexual conduct with minors and had a mental state requirement for the defendant. *New York v. Ferber*, 458 U.S. 747, 764-66 (1982). Although *Ferber* was specific to the creation and distribution of visual sexual depictions of minors, the Court later held in *Osborne v. Ohio* that a state can constitutionally proscribe "the possession and viewing of child pornography" due, in part, to the same rationales the Court accepted in *Ferber*. *Osborne v. Ohio*, 459 U.S. 103, 111 (1990). It is unclear if the Court intended "viewing" to include viewing a live performance. At the time *Osborne* was decided, the relevant Ohio statute prohibited possessing or viewing "any material or performance," but it is unclear whether the statute then defined "performance" to include live conduct, like it does now. Ohio Rev. Code Ann. § 2907.01(K) ("'Performance' means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience."). Regardless, it seems unlikely that the Court would strike down a state law that prohibits viewing a live sexual performance of minors after upholding Ohio's ban on possessing images of that conduct.

The Supreme Court has not established bright line rules for what sexual conduct involving children, without an obscenity requirement, satisfies the First Amendment. However, in *Ferber*, the Court noted that the prohibited sexual conduct at issue "represent[s] the kind of conduct that, if it were the theme of a work, could render it legally obscene: actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." In *United States v. Williams*, the Court held that the child pornography statute at issue was not overbroad. *United States v. Williams*, 553 U.S. 285, 288, 307 (2008). In *Williams*, the federal statute at issue defined "sexually explicit conduct" as "actual or simulated—(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex; (ii) bestiality; (iii) masturbation; (iv) sadistic or masochistic abuse; or (v) lascivious exhibition of the genitals or pubic area of any person." *Id.* at 290. First degree of the RCC arranging a live performance statute prohibits the same conduct as the statute in *Williams* with two exceptions: 1) It includes a sexualized display of the anus and for all sexualized displays in first degree, explicitly requires less than a full opaque covering; and 2) It does not extend "simulated" to a sexual or sexualized display. These are not significant differences. In sum, first degree of the RCC attending a live performance statute prohibits sexual conduct that is graphic enough without an obscenity requirement. Second degree of the revised arranging a live performance statute prohibits conduct that is generally less graphic than the conduct in *Ferber* and *Williams*. However, the obscenity requirement ensures that the provision is constitutional. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 250, 251 (2002) (stating that *Ferber* "reaffirmed that where the speech is neither obscene nor the product of sexual abuse, it does not fall outside the protection of the First Amendment.")

[894] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the minor . . . depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

minor that is not depicted,[896] or an adult that is not more than four years older than the minor or minors depicted,[897] is not liable for possessing an image that he or she receives from a depicted minor, unless he or she knows that at least one of the depicted minors did not consent. The current exclusion does not consistently require a "knowingly" culpable mental state as to a depicted minor's lack of consent,[898] and minors are still liable under the current statute for creating or viewing live performances or live broadcasts with themselves or other minors[899] or engaging in sexual conduct.[900] There is no DCCA case law interpreting the current exclusion. In contrast, the revised attending a live performance statute excludes from liability all persons under the age of 18 years from attending or viewing a live performance or a live broadcast. Legal scholarship has noted the inconsistencies and possible constitutional issues in statutes that criminalize minors producing images of otherwise legal sexual encounters.[901] The minor must be the only

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[895] D.C. Code § 22-3102(c)(1) ("If the sexual performance consists solely of a still or motion picture, then this section: (1) Shall not apply to the . . . minors depicted in a still or motion picture who possess it or transmit it to another person unless at least one of the minors depicted in it does not consent to its possession or transmission.").

[896] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (2) Shall not apply to possession of a still or motion picture by a minor . . . who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[897] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: . . . (c) If the sexual performance consists solely of a still or motion picture, then this section: . . (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[898] D.C. Code § 22-3102(c)(1) ("unless at least one of the minors depicted in it does not consent to its possession or transmission."), (c)(2) ("unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

[899] A minor that creates a live performance of himself or herself or of other minors has "produce[d], direct[ed], or promote[d]" a "performance which includes sexual conduct by a person under 18 years of age." D.C. Code §§ 22-3102(a)(2); 22-3101(4) (defining "promote," in part, as "to manufacture . . . transmute.").

[900] The current definition of "performance" extends to live conduct. D.C. Code § 22-3101(3) ("'Performance' means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition."). Thus, under a plain language reading, when a minor engages in "sexual conduct" with themselves, another minor, or an adult, they are "produc[ing], direct[ing], or promot[ing]" a "performance that includes sexual conduct by a person under 18 years of age" or "attend[ing]" a sexual performance by a minor. D.C. Code §§ 22-3102(a)(2), (b); 22-3101(4) (defining "promote," in part, as "to present [or] exhibit.").

[901] *See, e.g.*, Sarah Wastler, *The Harm in "Sexting"?: Analyzing the Constitutionality of Child Pornography Statutes That Prohibit the Voluntary Production, Possession, and Dissemination of Sexually Explicit Images by Teenagers*, 33 HARV. J. L. & GENDER 687, 688 (2010) ("These cases not only give rise to a contentious debate regarding the appropriate methods of prevention and response to adolescents who voluntarily produce and disseminate sexually explicit images of themselves, but also raise serious questions regarding the constitutionality of prosecuting such juveniles under existing child pornography frameworks."); Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 Va. J. Soc. Pol'y & L. 505, 544 (2008) ("To funnel into the criminal or juvenile justice systems cases of self-produced child pornography--material that, at its root, steps from the undeniable fact that today's teenagers are sexually active well before they turn eighteen--is unjustified. To do so would expose minors to the severe stigma and penalties afforded by child pornography laws. It would also cause minors to be

person under the age of 18 years who is depicted in the live performance or live broadcast;[902] or 2) The minor must have the effective consent of every person under 18 years of age who is depicted in the live performance or live broadcast, or reasonably believes that he or she has that effective consent.[903] The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. This change improves the clarity, consistency, and proportionality of the revised offense.

Sixth, the revised attending a live performance statute applies the current affirmative defense for a librarian or motion picture theater employee to attending or viewing a live performance or live broadcast and expands it to include similarly positioned museum and school employees. The current D.C. Code statute has an affirmative defense to "produc[ing], direct[ing], or promot[ing]" any sexual performance of a minor[904] for a "librarian engaged in the normal course of his or her employment"[905] and certain movie theater employees[906] if the librarian or movie theater employee does not have a financial interest in the sexual performance.[907] There is no DCCA case law interpreting this defense. In contrast, the revised attending a live performance statute applies this defense to attending or viewing a live performance or a live broadcast and expands this affirmative defense to include employees at museums and schools who may face similar situations, provided that the conduct is within the reasonable scope of

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branded as registered sex offenders and to incur the onerous legal disabilities and restrictions that were passed with sexual predators in mind, not minors engaged in consensual sex with their peers."); Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMMLAW CONSPECTUS 1, 6 (2009) ("Sexting constitutes a technologically-driven social phenomenon among minors that tests the boundaries of minors' First Amendment speech rights, as well as long-standing laws and judicial opinions that prohibit the manufacture, distribution, and possession of child pornography as a category of speech that, like obscenity, is not protected by the First Amendment.").

[902] If a minor is the only person under the age of 18 years that is depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the live performance or live broadcast depicts an adult. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[903] If both minors and adults are depicted in the live performance or live broadcast, it is irrelevant under the exclusion if the adults give effective consent to the conduct. However, depending on the facts and the specific conduct at issue, the minor may face liability under other RCC offenses, such as voyeurism (RCC § 22E-1803) or sexual assault (RCC § 22E-1301).

[904] The affirmative defense only applies to "D.C. Code § 22-3102(2)." D.C. Code § 22-3104(b)(1). However, "D.C. Code § 22-3102(2)" is not an accurate citation for the current sexual performance using a minor statute. Given the remainder of the current sexual performance using a minor statute and the additional requirements of this affirmative defense, the correct citation should be "D.C. Code § 22-3102(a)(2)." The organic act for the current sexual performance using a minor statute confirms this interpretation, and the omission of subsection (a) appears to be a codification error.

[905] D.C. Code § 22-3104(b)(1)(A).

[906] The specific movie theater employees are a "motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater." D.C. Code § 22-3104(b)(1)(B).

[907] D.C. Code § 22-3104(b)(2) ("The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in: (A) The promotion of a sexual performance for sale, rental, or exhibition; (B) The direction of any sexual performance; or (C) The acquisition of the performance for sale, retail, or exhibition.").

employment and the employee has no control over the creation or selection of the live performance or live broadcast.[908] Practically, the expanded defense provides a clearer safe-harbor for these employees but may do little or no work in reducing liability beyond that provided by the revised statute's defense in subsection (d)(1) to first degree for live performances or live broadcasts with serious artistic or other value, or, in second degree, the argument that the live performances or live broadcasts are not "obscene." This change improves the clarity and consistency of the revised statute.

Seventh, the revised attending a live performance statute codifies an affirmative defense for conduct that occurs in the context of marriage, domestic partnership, and other romantic relationships. The current sexual performance of a minor statute does not have a defense for actors that engage in the prohibited conduct with minors to whom they are married or with whom they are in a domestic partnership or romantic relationship. This approach differs from several of the current sexual abuse statutes, which have a marriage or domestic partnership defense that decriminalizes sexual conduct that only involves the defendant and the minor.[909] The current sexual performance of a minor statute does have a "sexting" exception that includes an adult not more than four years older than a minor, but it is limited to possessing an image[910] and excludes marriages, domestic partnerships, and romantic relationships with a greater than four year age difference. There is no DCCA case law interpreting the scope of this "sexting" exception. In contrast, the revised attending a live performance statute makes it an affirmative defense that the actor is married to, or in a domestic partnership or "romantic, dating, or sexual relationship" with the complainant. The live performance or live broadcast must be limited to the actor and the complainant or just the complainant, and the complainant must give effective consent to the conduct or the actor must reasonably believe that the complainant gave effective consent to the conduct. The actor must be the

[908] For example, the defense would not apply to the curator of an art museum who decides to feature an exhibition of prohibited sexual conduct and otherwise meets the elements of the revised offense. However, the defense would apply to an art museum employee who attends the live performance as an usher. It should be noted that for first degree of the revised offense, the curator would still be able to argue that the live performance or live broadcast had serious artistic value under the affirmative defense in subsection (d)(1) and, in second degree of the revised offense, that the images are not "obscene," as defined in RCC § 22E-701.

[909] D.C. Code § 22-3011(b) ("Marriage or domestic partnership between the defendant and the child or minor at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-3008 to 22-3010.01, prosecuted alone or in conjunction with charges under § 22-3018 or § 22-403, involving only the defendant and the child or minor."). In the current sexual abuse statutes a "child" is a person under the age of 16 years and a "minor" is a person under the age of 18 years. D.C. Code § 22-3001(3), (5A). The marriage and domestic partnership defense applies to the current child sexual abuse statutes (D.C. Code §§ 22-3008 and 22-3009), the sexual abuse of a minor statutes (D.C. Code §§ 22-3009.01 and 22-3009.02), enticing a child or minor (D.C. Code § 22-3010), and misdemeanor sexual abuse of a child or minor (D.C. Code § 22-3010.01). These current sex offenses are based on the ages of the complainant and the defendant, as opposed to whether force, coercion, etc., was present.

[910] D.C. Code § 22-3102(c)(2) ("If the sexual performance consists solely of a still or motion picture, then this section: (2) Shall not apply to possession of a still or motion picture by . . . an adult not more than 4 years older than the minor or minors depicted in it, who receives it from a minor depicted in it unless the recipient knows that at least one of the minors depicted in the still or motion picture did not consent to its transmission.").

only person that attended or viewed the live performance or live broadcast, other than the complainant, or the actor must reasonably believe that the actor was the only person that attended or viewed the live performance or live broadcast, other than the complainant. The "effective consent" requirements are consistent with the consent defense in the revised sexual assault statute (RCC § 22E-1301) and other RCC offenses. Without this defense, the revised attending a live performance statute would criminalize consensual sexual behavior between spouses and domestic partners that may not be criminal under the current or RCC age-based sexual abuse statutes.[911] This change improves the consistency and proportionality of the revised statute.

Eighth, the revised attending a live performance statute has an affirmative defense for subsection (a) that the live performance or live broadcast has serious literary, artistic, political, or scientific value, when considered as a whole. The current sexual performance of a minor statute does not have any defense if the performance has serious literary, artistic, political, or scientific value, when considered as a whole. As a result, the current statute appears to criminalize attending or viewing artistic films or newsworthy events that display real minors engaging in the prohibited sexual conduct. There is no DCCA case law on whether the current statute would be unconstitutional in these and other similar situations, but Supreme Court case law indicates that the current statute may be unconstitutional as applied to live performances or live broadcasts with serious literary, artistic, political, or scientific value, when considered as a whole.[912] In contrast, the revised attending a live performance statute has an affirmative defense that

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[911] The provision in sub-paragraph (d)(2)(A)(ii) of the revised defense for an actor that is no more than four years older than the complainant and in a romantic, dating, or sexual relationship is consistent with the current sexual abuse statutes (D.C. Code §§ 22-3008 through 22-3009.02; 22-3011) and RCC sexual abuse of a minor statute (RCC § 22E-1302), which do not apply to otherwise consensual sexual conduct unless there is at least four year age gap or a special relationship (i.e., the actor is a coach) between the actor and the complainant. However, under current District law and the RCC sexual abuse of a minor statute, if a spouse or domestic partner falls outside this four year age gap, or if there is a special relationship between the actor and the complainant, there is liability unless the marriage or domestic partnership applies. Although it is difficult to predict what the actual age gaps would be given the variety of marriage laws, in theory, under the current sexual abuse statutes and the RCC sexual abuse of a minor statute, a 22 year old spouse or domestic partner would not be liable for engaging in otherwise consensual sexual activity with a 16 year old. There would be liability, however, under the current sexual performance of a minor statute.

[912] In *Ferber*, the Court acknowledged that some applications of the statute at issue, which extended to live performances would be unconstitutional:

> We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. . . .While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

Ferber, 458 U.S. at 773. The Court found that the statute was not substantially overbroad and any overbreadth that exists could be addressed through as-applied constitutional challenges. *Id.* at 773-74. The material at issue in *Ferber* was two films that "almost entirely" depicted prohibited sexual activity and the Court determined the statute was not overbroad as applied to the respondent. *Id.* at 752, 774 & n. 28.

the live performance or live broadcast has serious literary, artistic, political, or scientific value when considered as a whole. This language is taken from the *Miller* standard for obscenity, which requires the absence of these characteristics to be proven as an element of an obscenity offense.[913] Despite this defense, however, there may still be liability under the RCC sex offenses for causing or attempting to cause a minor to engage in the prohibited sexual conduct.[914] This change improves the constitutionality of the revised statute.

Beyond these eight substantive changes to current District law, five other aspects of the revised attending a live performance statute may be viewed as a substantive change of law.

First, the revised attending a live performance statute requires a "knowingly" culpable mental state for the prohibited conduct—attending or viewing a live performance or live broadcast. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance.[915] The statute does not specify whether this culpable mental state extends to attending or viewing a live performance or live broadcast, and the definition of "knowingly"[916] in the current statute is unclear. There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[917] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[918] Resolving this ambiguity, the revised

[913] *Miller v. California*, 413 U.S. 14, 24 (1973).

[914] For example, a defendant that causes minors to engage in sexual intercourse for a live play may have a successful affirmative defense under the RCC arranging a live performance offense or RCC attending a live performance offense. However, depending on the ages of the minors, causing them to engage in sexual intercourse may lead to liability for sexual abuse of a minor (RCC § 22-1302), or, independent of the ages of the minors, if there was force involved, there may be liability for sexual assault (RCC § 22E-1301), as either a principal or an accomplice (RCC § 2E-210).

[915] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[916] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[917] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[918] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to

attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the prohibited conduct—attending or viewing a live performance or live broadcast. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[919] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Second, the revised attending a live performance statute requires a "knowingly" culpable mental state for the fact that a visual presentation is "for an audience," as required by the RCC definitions of "live performance" and "live broadcast." The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance,[920] but neither the statute nor the current definition of "sexual performance"[921] specifies whether the visual presentation must be for an audience.[922] In addition, the definition of "knowingly"[923] in the current statute is unclear.

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indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

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

[920] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[921] D.C. Code § 22-3101(3) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.").

[922] D.C. Code § 22-3102(a)(1) ("A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 18 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance."), (a)(2) ("A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 18 years of age.").

[923] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of 'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

There is no DCCA case law on these issues. The current obscenity statute has a substantively identical definition of "knowingly,"[924] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[925] Resolving these ambiguities, the revised attending a live performance statute requires a "knowingly" culpable mental state, as defined in RCC § 22E-206, for the fact that the visual presentation is a "live performance"[926] or "live broadcast" as defined in RCC § 22E-701. The RCC definitions of "live performance" and "live broadcast" require that the visual presentation be "for an audience," and read in conjunction with the RCC definition of "knowingly," requires that the defendant be "practically certain" that the presentation is "for an audience."[927] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[928] A "knowingly" culpable mental state for the prohibited conduct is consistent with numerous other RCC offenses that apply a "knowingly" culpable mental state to prohibited conduct. This change improves the clarity and consistency of the revised offense.

Third, the revised attending a live performance statute requires recklessness as to the content of the live performance or live broadcast and, in second degree, as to whether the content is obscene. The current sexual performance of a minor statute requires the defendant to "know[] the character and content" of the sexual performance[929] and defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both."[930] There is no DCCA case law interpreting the definition of "knowingly" or how it applies to the current statute.[931] However, the current obscenity statute has a substantively identical definition

[924] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[925] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.").

[926] The RCC definition of "live performance" is substantively identical to the current definition of "performance" as it pertains to live conduct, differing only in the explicit requirement that the presentation be "for an audience." *Compare* D.C. Code § 22-3101(3) (defining "performance" as "any play . . . electronic representation, dance, or any other visual presentation or exhibition.") *with* RCC § 22E-701 (defining "live performance" as a "play, dance, or other visual presentation or exhibition for an audience.").

[927] This requirement is discussed further in the explanatory note for the revised offense.

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

[929] D.C. Code § 22-3102(b) ("It shall be unlawful in the District of Columbia for a person, knowing the character and content thereof, to attend, transmit, or possess a sexual performance by a minor.").

[930] D.C. Code § 22-3101(1).

[931] The current statute defines "knowingly" as "having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both." D.C. Code § 22-3101(1). It is unclear whether this definition requires the defendant to have subjective knowledge, or requires a lower culpable mental state akin to recklessness or negligence. There is no DCCA case law on this definition. The legislative history notes that the definition was used "as opposed to the more general definition of

of "knowingly,"[932] which the DCCA has interpreted as requiring subjective knowledge of the sexual nature of the material at issue.[933] Resolving this ambiguity, the revised attending a live performance statute requires recklessness as to the content of the live performance or live broadcast, and, in second degree, as to whether the content is "obscene," as defined in RCC § 22-701. Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence,[934] but courts have also recognized that recklessness regarding a risk of serious harm is wrongful conduct.[935] This change improves the clarity and consistency of the revised statute.

Fourth, the revised attending a live performance statute requires that the live performance or live broadcast depicts at least part of a real complainant under the age of 18 years and excludes purely computer-generated or other fictitious minors. The current sexual performance of a minor statute does not specify whether the complainant that is depicted in a live performance must be a "real," i.e., not fictitious, complainant under the age of 18 years. The statute does define "minor," however, as "any person under 18 years of age,"[936] which arguably suggests that the complainant must be a "real," i.e., not fictitious, person. There is no DCCA case law on this issue. Resolving this ambiguity, the revised attending a live performance statute specifies that at least part[937] of a "real,"

'knowing or having reasonable grounds to believe'" and that the definition was used to "comport with the scienter requirement in [*New York v. Ferber*, 458 U.S. 747 (1982)]." Council of the District of Columbia, Report of the Committee of the Judiciary, Bill 4-305, The "District of Columbia Protection of Minors Act of 1982" at 8. *Ferber*, however, did not state a specific mental state, only that "some element of scienter on the part of the defendant" was required. *New York v. Ferber*, 458 U.S. 747, 765 (1982) (citing *Smith v. California*, 361 U.S. 147 (1959) and *Hamling v. United States*, 418 U.S. 87 (1974)). Presumably then, per *Ferber*, the District's statutory definition of "knowledge" was not intended to equate to negligence, and requires some degree of subjective awareness by the actor, either recklessness or knowledge.

[932] D.C. Code § 22-2201(a)(2)(B) (defining "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.").

[933] *See Kramer v. U. S.*, 293 A.2d 272, 274 (D.C. 1972) ("The officer's testimony regarding the nature of poses of nudes in the pictures readily visible on the magazine and box covers would be sufficient to indicate to a customer or a salesman the nature of the merchandise offered for sale. It is sufficient if the accused had such knowledge of the material that he should have suspected its sale might violate the law and inspected or inquired further as to its character and content.")

[934] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[935] *See Elonis v. United States*," 135 S. Ct. 2001, 2015 (2015) (J. Alito, concurring) ("In a wide variety of contexts, we have described reckless conduct as morally culpable.").

[936] D.C. Code § 22-3101(2).

[937] The revised attending a live performance statute includes performances that show at least part of a real minor, such as a real minor's head that seems to be attached to an adult body, or an adult's head that seems

i.e., not fictitious, complainant under the age of 18 years must be depicted. Requiring at least part of a "real" complainant under the age of 18 years ensures that the statute satisfies the First Amendment.[938] The RCC does not criminalize attending or viewing an obscene live performance or live broadcast with computer-generated minors or other "fake" minors, such as youthful looking adults. This change improves the clarity, consistency, and proportionality of the revised statute.

Fifth, through the use of the defined term "simulated" in RCC § 22E-701, the revised statute excludes liability for live performances of sexual conduct that is apparently fake. The current sexual performance of a minor statute prohibits "simulated" sexual intercourse, but does not define the term.[939] It is unclear whether "simulated" includes suggestive but obviously staged sex scenes like one might find in a commercially screened "R" or "NC-17" movie, or theatrical or comic portrayals of a sexual act that are clearly fake. There is no DCCA case law on this issue. Resolving this ambiguity, the RCC defines "simulated" as "feigned or pretended in a way which realistically duplicates the appearance of actual conduct to the perception of an average person." Under this definition, only highly explicit depictions where it is unclear due to lighting, etc., if the prohibited conduct is actually occurring are included in the revised statute,[940] not other portrayals that are clearly staged. This definition is similar to another jurisdiction's definition[941] and is supported by Supreme Court case law.[942] This change improves the clarity, consistency, and constitutionality of the revised statute.

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to be attached to a real minor's body. There is no requirement that the government prove the identity of a real minor.

[938] In *New York v. Ferber*, the Supreme Court established that live or visual sexual depictions of real children do not have to meet the *Miller* standard for obscenity. *New York v. Ferber*, 458 U.S. 747, 764-65 (1982). Crucial to the Court's decision was its acceptance of several arguments and legislative findings, including that "the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child," *id.* at 758, and that "the materials are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation," *id*. at 759. The opinion was not specific to images of minors where only part of the minor is real, but the Court stated in a later opinion that "morphed images may fall within the definition of virtual child pornography, [but] they implicate the interests of real children and are in that sense closer to the images in *Ferber*." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 242, (2002). The respondents in *Ashcroft* did not challenge the morphed images provision of the statute at issue and the Court did not discuss it further.

[939] D.C. Code § 22-3101(5)(A).

[940] For example, a simulated sexual act may clearly show male genitalia, female genitalia, and movement between two actors but, due to the angle of the camera, not show whether there was penetration.

[941] Utah Code Ann. § 76-5b-103(11) ("'Simulated sexually explicit conduct' means a feigned or pretended act of sexually explicit conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.").

[942] In *United States v. Williams*, the Supreme Court stated that a federal statute that prohibited pandering or soliciting "an obscene visual depiction of a minor engaging in sexually explicit conduct" or "a visual depiction of an actual minor engaging in sexually explicit conduct," "precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller:* obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct." *United States v. Williams*, 553 U.S. 285, 294 (2008). In dicta, the Court discussed the scope of "simulated sexual intercourse" in the statute's definition of "sexually explicit conduct":

> 'Sexually *explicit* conduct' connotes actual depiction of the sex act rather than merely the suggestion that it is occurring. And 'simulated' sexual intercourse is not sexual intercourse that is merely suggested, but rather sexual intercourse that is explicitly

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

First, the revised attending a live performance statute clarifies that viewing a "live performance" is a discrete form of liability.[943] The current sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[944] There is no DCCA case law or legislative history interpreting the scope of "attending." However, limiting "attending" to being physically in the immediate vicinity of a live performance would lead to counterintuitive results and disproportionate penalties for similar conduct.[945] This change clarifies current law without changing it.

Second, the revised attending a live performance statute clarifies that attending or viewing a "live broadcast" is a discrete form of liability. The current sexual performance of a minor statute prohibits "attend[ing]" or "possess[ing]" a sexual "performance."[946] The current definition of "performance" includes any "visual representation or exhibition,"[947] which would appear to include live broadcasts. This change clarifies current law without changing it.

Third, organizationally, the RCC has separate statutes for still images of minors and live performances of minors and no longer uses the general terms "performance" and "sexual performance." Due to the current definitions of "performance" and "sexual performance," the current sexual performance of a minor statute includes both still

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> portrayed, even though (through camera tricks or otherwise) it may not actually have occurred. The portrayal must cause a reasonable viewer to believe that the actors actually engaged in that conduct on camera. Critically . . . [the statute's] requirement of a 'visual depiction of an actual minor' makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene). This . . . eliminates any possibility that virtual child pornography or sex between youthful-looking adult actors might be covered by the term "simulated sexual intercourse.

Williams, 553 U.S. at 296–97.

[943] For example, an actor that views from across the street a live sexual performance that is taking place in a park could be said to have "viewed" the performance without also attending it. Similarly, an actor several blocks away that views a live sexual performance in a park through a telescope has also "viewed" the performance without attending it.

[944] D.C. Code § 22-3102(b).

[945] For the purposes of the possession offense, the current sexual performance of a minor statute defines "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2). In addition, for possession of an "electronically received or available" still image or motion picture, the current statute requires that the defendant "access" the still image or motion picture. D.C. Code § 22-3102(b), (d)(3). Thus, a defendant that views a live sexual performance that is being streamed over the Internet would be liable for possessing the resulting images or the motion picture. However, if the defendant were watching the live sexual performance through means other than electronic transmission, such as from across the street or several blocks away through a telescope, it is arguable that the defendant has not "attended" that performance and there would be no liability under the current statute.

[946] D.C. Code § 22-3102(b).

[947] D.C. Code § 22-3101(3). In addition to the general definition of "performance," the current sexual performance of a minor statute, for the possession and attendance prongs, defines a "still or motion picture" to "include[] a photograph, motion picture, electronic or digital representation, video, or other visual depiction, however produced or reproduced." D.C. Code § 22-3102(d)(2).

images and live performances.[948] However, it is counterintuitive to construe a "performance" as including a still image (e.g., photograph). To clarify that both images and live performances fall within the revised statutes, the RCC trafficking an obscene image of a minor and RCC possession of an obscene image of a minor statutes (RCC §§ 22E-1807 and 22E-1808) are specific to still images and the RCC arranging a live performance of a minor and viewing a live performance of a minor statutes (RCC §§ 22E-1809 and 22E-1810) are specific to live sexual conduct. The two sets of statutes, however, have equivalent penalties—trafficking an obscene image and arranging a live exhibition have the same penalty, and possessing an image and viewing an exhibition or broadcast have the same penalty. This change improves the clarity of the revised statutes without changing current District law.

Fourth, the revised attending a live performance statute no longer uses the defined term "minor."[949] Instead, consistent with the current statute's definition, the revised statute refers to a "complainant under the age of 18 years." Other statutes in the D.C. Code refer to a person under 18 years of age as a "child,"[950] and the use of different labels for persons of the same age is confusing. This change improves the clarity and consistency of the revised statute without changing current District law.

Fifth, the revised attending a live performance statute requires that the complainant "engage in or submit to" the prohibited sexual conduct. The current sexual performance of a minor statute prohibits inducing a minor to "engage in" a sexual performance,[951] but otherwise refers generally to the complainant's actions.[952] The revised attending a live performance statute consistently refers to the complainant "engag[ing] in or submit[ing] to" the prohibited sexual conduct, which is consistent with the language in the RCC sex offenses and recognizes that the revised statute may apply in situations where the complainant is an active participant or a completely passive (e.g. unconscious) participant. This clarifies the scope of the revised statute without changing current District law.

Sixth, the revised attending a live performance statute uses the definition of "sexual act" in RCC § 22E-701. The RCC definition is substantively identical to the

[948] D.C. Code § 22-3101(3), (6) (defining "performance" as "any play, motion picture, photograph, electronic representation, dance, or any other visual presentation of exhibition" and "sexual performance" as "any performance or part thereof which includes sexual conduct by a person under 18 years of age.").

[949] D.C. Code § 22-3101(2) (defining "minor" as "any person under 18 years of age."). Despite this definition, the current sexual performance using a minor statute inconsistently uses the term "minor" and instead refers to a "person under 18 years of age." D.C. Code § 22-3102.

[950] *See, e.g.*, D.C. Code § 22-1101 (a) ("A person commits the crime of cruelty to children in the first degree if that person …willfully maltreats a child under 18 years of age….").

[951] D.C. Code § 22-3102(a)(1).

[952] D.C. Code § 22-3102(a)(1) ("participation by a minor in a sexual performance."), (a)(2) ("any performance which includes sexual conduct by a person under 18 years."), (b) ("a sexual performance by a minor."). In addition to the variable statutory language, the definition of "sexual performance" merely requires that the performance "includes sexual conduct" by a minor. D.C. Code § 22-3101(6). The current definition of "sexual conduct" lists specific types of behavior, but does not define the precise requirements for the complainant.

various forms of sexual penetration the current sexual performance of a minor statute prohibits and includes bestiality.[953] This change clarifies the revised statute.

Seventh, instead of prohibiting a "lewd" exhibition,[954] the revised attending a live performance statute prohibits a "sexual or sexualized display" of certain body parts when there is less than a full opaque covering. The current sexual performance of a minor statute does not define "lewd," but the DCCA approved a jury instruction for the offense that stated "lewd exhibition of the genitals means that the minor's genital or pubic area must be visibly displayed," that "mere nudity is not enough," and "the exhibition must have an unnatural or unusual focus on the minor's genitalia regardless of the minor's intention to engage in sexual activity or whether the viewer is sexually aroused."[955] The revised attending a live performance statute's reference to "sexual or sexualized display" is intended to restate the meaning of "lewd exhibition" in more modern, plain language while preserving this DCCA case law. Mere nudity is not sufficient for a "sexual or sexualized display" in subparagraphs (a)(2)(D) or (b)(2)(D). There must be a visible display of the relevant body parts with an unnatural or unusual focus on them, regardless of the minor's intention to engage in sexual activity or the effect on the viewer. This change clarifies current law.

Eighth, the revised attending a live performance statute assigns the burden of proof for affirmative defenses to the defendant. The current sexual performance of a minor statute has several "affirmative defense[s],"[956] but does not establish what burden of proof, if any, the defendant has. There is no DCCA case law on this issue. However,

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[953] The current sexual performance using a minor statute prohibits "actual or simulated sexual intercourse: (i) Between the penis and the vulva, anus, or mouth; (ii) Between the mouth and the vulva or anus; or (iii) Between an artificial sex organ or other object or instrument used in the manner of an artificial sex organ and the anus or vulva" as well as "bestiality." D.C. Code § 22-3101(5) (defining "sexual conduct."). Subsection (A) of the RCC definition of "sexual act" encompasses penile penetration of the vulva or anus in subsection (i) of the current statutory language. Subsection (B) of the RCC definition of "sexual act" encompasses penile penetration of the mouth in subsection (ii) of the current statutory language as well as contact between the mouth and the vulva or anus in subsection (i). Subsection (C) of the RCC definition of "sexual act" encompasses the object sexual penetration described in subsection (iii) of the current statutory language. Finally, subsection (D) of the RCC definition of "sexual act" encompasses specific forms of bestiality.

[954] D.C. Code § 22-3101(5)(E) (definition of "sexual conduct" including a "lewd exhibition of the genitals.").

[955] *Green v. United States*, 948 A.2d 554, 562 (D.C. 2008). The DCCA further noted that the jury instruction at issue was similar to instructions from other jurisdictions. *Id*. n. 10. In addition, the DCCA noted that "some courts look to multiple factors to determine whether a photograph contains a lewd depiction of genitalia, [but] one of the factors routinely considered is whether the picture focuses on the genitalia in an unnatural way." *Id.* In particular, the DCCA cited a Tenth Circuit case, *Wolf*, listing factors such as "whether the focal point of the visual depiction is on the child's genitalia or pubic area;" "whether the child is fully or partially clothed, or nude;" and "whether the visual depiction is intended or designed to elicit a sexual response in the viewer." *Id.* (quoting *United States v. Wolf*, 890 F.2d 241, 244 (10th Cir. 1989). The *Wolf* case, in turn, cites *United States v. Dost*, 636 F.Supp. 828, 831 (S.D.Cal. 1986)), which has an extensive list of factors.

The DCCA noted that the *Wolf* court held that an image "does not need to be meet every factor in order to be lewd," *id.*, but also noted that the record in *Green* "contains evidence to support the presence of other enumerated factors, such as the children being naked and the pictures being taken to elicit a sexual response from appellant." *Green*, 948 A.2d 562 n.10.

[956] D.C. Code § 22-3104.

several current District statutes require that the defendant prove by a preponderance of the evidence an "affirmative defense"[957] or a "defense" that does not negate an element of the offense.[958] The revised attending a live performance statute assigns the burden of proof to the defendant because these affirmative defenses do not negate an element of the offense.[959] This change improves the clarity and constitutionality of the revised statute.

[957] *See, e.g.*, D.C. Code § 22-3601(c) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not 65 years old or older at the time of the offense, or could not have known or determined the age of the victim because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-3601(b) ("It is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense. This defense shall be established by a preponderance of the evidence."); D.C. Code § 22-933.01(b) ("It is an affirmative defense that the accused knew or reasonably believed the victim was not a vulnerable adult or elderly person at the time of the offense, or could not have known or determined that the victim was a vulnerable adult or elderly person because of the manner in which the offense was committed. This defense shall be established by a preponderance of the evidence.").

[958] *See, e.g.*, D.C. Code §§ 22-3011(b), 3017(b) (establishing a marriage or domestic partnership "defense," which the defendant must prove by a preponderance of the evidence, to several of the current sexual abuse statutes).

[959] Under Supreme Court case law, a state legislature may assign the burden of proof to a defendant for an affirmative defense that does not negate an element of the offense. *See Patterson v. New York*, 432 U.S. 197, 205, 206, 207 (1977) (upholding a murder conviction under a state statute that defined murder as causing the death of another person with intent to do so, with an affirmative defense for extreme emotional disturbance, because the affirmative defense did not "negative any facts of the crime which the State is to prove in order to convict of murder."); *Martin v. Ohio*, 480 U.S. 228, 230, 234 (1987) (upholding an aggravated murder conviction under a state statute that defined aggravated murder as "purposely, and with prior calculation and design" causing the death of another person, with an affirmative defense for self-defense, because the state did not "shift to the defendant the burden of disproving any element of the state's case."). The Court recognized that this "may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes," but stated "there are obviously constitutional limits beyond which the States may not go in this regard." *Patterson*, 432 U.S. at 210. The Court has not put forth a single test or guidelines for the scope of these constitutional limits.

RCC § 22E-1811. Limitations on Liability for RCC Chapter 18 Offenses.

Notwithstanding any other provision of law, a person under the age of 12 is not subject to prosecution for offenses in this subchapter.

COMMENTARY

Explanatory Note. *RCC § 22E-1811 establishes a limitation on liability for all the offenses in RCC Chapter 18 for persons under the age of 12 years.*

RCC § 22E-1811 establishes that persons under the age of 12 years are not subject to liability for any offense in RCC Chapter 18.

Relation to Current District Law. *The limitations on liability for RCC Chapter 13 offenses statute substantively changes existing District law in one main way.*

The limitations on liability for RCC Chapter 18 offenses statute (limitations on liability statute) prohibits liability for RCC Chapter 18 offenses for defendants under the age of 12 years. The current equivalent offenses in the District[960] do not have a general statutory provision that addresses the age at which a person is liable, and the DCCA has not discussed an age limit for liability. In contrast, the RCC prohibits a person under the age of 12 years from being convicted of any offenses in RCC Chapter 18.[961] Excluding liability for a person under 12 years of age ensures that the offenses do not capture exploratory or nascent sexual behavior by children who may not fully comprehend the importance of sexual norms. This change improves the proportionality of the revised statutes.

[960] [need to insert citations to current statutes]

[961] RCC Chapter 13, Sexual Assault and Related Provisions, has a similar limitation on liability, but makes an exception for RCC § 22E-1303(a), first degree sexual assault, and RCC § 22E-1303(c), third degree sexual assault because these offenses involve the use of physical force, weapons, serious threats, or involuntary intoxication of the complainant. Conceivably, many of the offenses in RCC Chapter 18 could involve these aggravating circumstances as well. However, in those instances, liability for the offenses in Chapter 18 is still inappropriate. Chapter 18 offenses are intended to address predatory behavior by adults, not children. However, there may still be liability for the underlying sexual assault, threats, etc.

RCC § 22E-4205. Breach of Home Privacy.

(a) *Offense.* An actor commits breach of home privacy when that actor:
  (1) Knowingly and surreptitiously looks inside a dwelling; and
  (2) In fact, an occupant of the dwelling would have a reasonable expectation of privacy.
(b) *Prosecutorial Authority*. The Attorney General shall prosecute violations of this section.
(c) *Penalty.* Invasion of home privacy is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(d) *Definitions*. The term "knowingly" has the meaning specified in RCC § 22E-206; the term "in fact" has the meaning specified in RCC § 22E-207; and the terms "actor," "dwelling," "effective consent," have the meanings specified in RCC § 22E-701.

COMMENTARY

Explanatory Note. *This section establishes the invasion of home privacy offense and penalty for the Revised Criminal Code (RCC). The offense prohibits peering into a dwelling without permission. The offense replaces a subsection of the current disorderly conduct offense, D.C. Code § 22-1321(f).*[962]

Paragraph (a)(1) specifies that a person must act knowingly and surreptitiously. "Knowingly" is a defined term[963] and, applied here, means that the person must be practically certain that they are looking into a dwelling. The term "dwelling" is defined in RCC § 22E-701 to include any structure that is designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight.[964] The dwelling may be occupied or unoccupied at the time of the offense. Unlike a trespass,[965] the offense does not require a physical intrusion into the dwelling. Unlike a burglary,[966] the offense does not require other criminal intent such as an intent to commit theft or voyeurism.

Paragraph (a)(2) uses the term "in fact" to specify that there is no culpable mental state required as to whether a person in the occupant's circumstances would reasonably expect that such an observation would not occur. A person does not commit an offense where it is objectively reasonable to peer into the dwelling of another.[967]

Subsection (b) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (c) provides the penalty for the revised offense. [RESERVED.]

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[962] Other subsections of the current disorderly conduct statute have been addressed elsewhere in the revised code.
[963] "Knowingly" is defined in RCC § 22E-206.
[964] This includes motor vehicles, watercraft, and tents that are designed or used as a residence.
[965] RCC § 22E-2601.
[966] RCC § 22E-2701.
[967] For example, it may be reasonable for a prospective buyer to peer into a window that is uncovered of a building that is for sale.

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

Relation to Current District Law. *One aspect of the revised invasion of home privacy offense may constitute a substantive change of District law.*

The revised statute defines the term "dwelling" differently than in the current statute to address multi-unit buildings. Current D.C. Code § 22-1321(f) refers to the definition of "dwelling" in D.C. Code § 6-101.07(4). This provision, in turn, states: "The term 'dwelling' means any building or structure used or designed to be used in whole or in part as a living or a sleeping place by 1 or more human beings." In contrast, the definition of "dwelling" in RCC § 22E-701 more precisely states: "'Dwelling' means a structure that is either designed for lodging or residing overnight at the time of the offense, or that is actually used for lodging or residing overnight. In multi-unit buildings, such as apartments or hotels, each individual unit is a dwelling." This change improves the consistency of the revised statutes.

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

The revised statute substitutes the word "surreptitiously" for "stealthily," for continuity with the revised burglary offense.[968] This change is not intended to substantively change the offense elements.

Relation to National Legal Trends. *The revised invasion of home privacy statute does not substantively change current District law.*

[968] RCC § 22E-2701.

RCC § 22E-4206. Indecent Exposure.

(a) *First Degree.* An actor commits first degree indecent exposure when that actor:
  (1) Knowingly engages in:
    (A) A sexual act;
    (B) Masturbation; or
    (C) A sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering; and
  (2) The conduct:
    (A) Is visible to the complainant;
    (B) Is without the complainant's effective consent; and
    (C) Is with the purpose of alarming or sexually abusing, humiliating, harassing, or degrading the complainant.

(b) *Second Degree.* An actor commits second degree indecent exposure when that actor:
  (1) Knowingly engages in:
    (A) A sexual act;
    (B) Masturbation; or
    (C) A display of the genitals, pubic area, or anus, when there is less than a full opaque covering;
  (2) In, or visible from, a location that is:
    (A) Open to the general public at the time of the offense;
    (B) A communal area of multi-unit housing;
    (C) A public conveyance; or
    (D) A rail transit station; and
  (3) Reckless as to the fact that the conduct:
    (A) Is visible to the complainant;
    (B) Is without the complainant's effective consent; and
    (C) Alarms or sexually abuses, humiliates, harasses, or degrades any person.

(c) *Exclusions from Liability.*
  (1) A person under 12 years of age is not subject to prosecution under this section.
  (2) Nothing in this section shall be construed to prohibit conduct protected by the U.S. Constitution.
  (3) A person shall not be subject to prosecution under subsection (a) of this section if that person's conduct occurs inside the actor's dwelling and is not visible to a person outside such dwelling.
  (4) A person shall not be subject to prosecution under this section if that person is:
    (A) An employee of a licensed sexually-oriented business establishment; and
    (B) Acting within the reasonable scope of that role.

(d) *Prosecutorial Authority.* The Attorney General for the District of Columbia shall prosecute violations of this section.

(e) *Penalty.*

(1) First degree indecent exposure is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.
(2) Second degree indecent exposure is a Class [X] crime subject to a maximum term of imprisonment of [X], a maximum fine of [X], or both.

(f) *Definitions.*
(1) The terms "knowingly," "purpose," and "recklessly" have the meaning specified in RCC § 22E-206; and the terms "complainant," "dwelling," "effective consent," "open to the general public," "public conveyance," "rail transit station," and "sexual act" have the meanings specified in RCC § 22E-701.
(2) The term "sexually-oriented business establishment" has the meaning specified in 11 DCMR § 199.1.

COMMENTARY

Explanatory Note. *This section establishes the indecent exposure offense and penalty gradations for the Revised Criminal Code (RCC). The offense prohibits public nudity and sex acts that are lewd. The offense replaces the current lewd, indecent, or obscene acts offense in the first sentence of D.C. Code § 22-1312.*[969]

Subsection (a) specifies the elements of first degree indecent exposure. Paragraph (a)(1) requires that the accused knowingly engage in a sexual act, masturbation, or a sexual or sexualized display of the genitals, pubic area,[970] or anus, when there is less than a full opaque covering. "Knowingly" is a defined term[971] and applied here means that the person must be practically certain that they are engaging in the prohibited conduct.[972] The term "sexual act" is defined in RCC § 22E-701 and does not include a mere simulation.[973]

Subparagraph (a)(2)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[974] Per the rules

[969] The second sentence of the current statute (pertaining to sexual proposal to a minor) is addressed in RCC § 22E-1313 (Indecent Sexual Proposal to a Minor) [forthcoming].
[970] Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia.
[971] "Knowingly" is defined in RCC § 22E-206.
[972] Consider, for example, a person who is wearing a skirt that they believe is opaque but is actually sheer in natural sunlight. Such a person does not commit an indecent exposure offense. "The exposure must be intentional and not accidental…" *Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953). "Ordinary acts involving exposure as a result of carelessness or thoughtlessness, particularly when such acts take place within the privacy of one's home, do not in themselves establish the offense of indecent exposure." *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 826-27 (D.C. 2007) (citing *Selph v. District of Columbia*, 188 A.2d 344, 345 (D.C.1963)).
[973] *See* Report on Bill 18-425, "Disorderly Conduct Amendment Act of 2009," Council of the District of Columbia Committee on Public Safety and the Judiciary (November 19, 2010) at Pages 7-8 (rejecting a proposal by USAO, OAG, and MPD to include simulations).
[974] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are visible to the complainant.

Subparagraph (a)(2)(B) requires that the person act without the complainant's effective consent. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they do not have the complainant's effective consent to engage in the prohibited sexual activity in that place and at that time.[975]

Subparagraph (a)(2)(C) specifies that the accused must also act with the purpose of alarming or sexually abusing, humiliating, harassing, or degrading the complainant. As applied here, "purpose," a term defined in RCC § 22E-206, requires a conscious desire to alarm or sexually abuse, humiliate, harass, or degrade the complainant. The phrase "with the purpose" indicates that it need not be proven that the complainant was actually alarmed, sexually abused, sexually humiliated, sexually harassed, or sexually degraded, so long as the actor consciously desired such a result.[976] The actor's behavior must be directed at the complainant to whom the actor's behavior is visible and who has not given effective consent, not a third party.

Subsection (b) specifies the elements of second degree indecent exposure. Paragraph (b)(1) is nearly identical to paragraph (a)(1), except that paragraph (b)(1)(C) does not require that a display of a person's genitals, pubic area, or anus be "sexual or sexualized." For example, a person may commit second degree indecent exposure by merely walking naked in a location open to the general public at the time of the offense. Although the other elements of second degree indecent exposure differ from first degree, these offenses are intended to merge when they arise from a single act or course of conduct.[977]

Paragraph (b)(2) requires that a person is either located in or visible from a location that is open to the general public; communal area of multi-unit housing; a public conveyance; or a rail transit station. The terms "open to the general public," "public conveyance," and "rail transit station" are defined in RCC § 22E-701. A location is open to the general public only if no payment, membership, affiliation, appointment, or special permission is required to enter.[978] The word "visible" means within the complainant's

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[975] A person does not commit first degree indecent exposure if they subjectively believe—reasonably or unreasonably—that the recipient consents to viewing the conduct. The indecent exposure statute was not intended to apply to an act committed in private in the presence of a single and consenting person. *Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 827 (D.C. 2007) (citing *Rittenour v. District of Columbia*, 163 A.2d 558, 559 (D.C.1960); *District of Columbia v. Garcia*, 335 A.2d 217, 224 (D.C.1975)).

[976] The phrase "with the purpose," like the phrase "with intent," makes the language that follows inchoate. *See* RCC § 22E-205(b).

[977] *See* RCC § 22E-214. Absent a contrary legislative intent, 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 test, if it possible to commit one offense without necessarily committing the other, the offenses do not merge.

[978] For example, a person who undresses inside a private theater or poses nude for a private art class does not commit indecent exposure. *See also, Bolz v. D.C.*, 149 A.3d 1130, 1143 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a

sightline and does not require proof that the complainant actually viewed the indecent display.[979] Per the rules of interpretation in RCC § 22E-207, the person must know—that is, be practically certain—that they are either in one of those locations or visible from one of those locations.

Paragraph (b)(3) specifies that the person must also be reckless as to three circumstances being present. The term "reckless" is defined in the revised code and here means the person must be aware of a substantial risk that they are visible to the complainant and behave in a manner that is clearly blameworthy under the circumstances.[980]

Subparagraph (b)(3)(A) specifies that the person's conduct must be visible to the complainant. The word "visible" means within the complainant's sightline and does not require proof that the complainant actually viewed the indecent display.[981] Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is visible to the complainant.[982]

Subparagraph (b)(3)(B) requires that the person act without the complainant's effective consent. The term "effective consent" is defined in RCC § 22E-701 and means consent other than consent induced by physical force, a coercive threat, or deception. Per the rules of interpretation in RCC § 22E-207, the person must be reckless as to the fact that they do not have the complainant's effective consent to engage in the prohibited conduct.

Subparagraph (b)(3)(C) requires that the person actually alarm or sexually abuse, humiliate, harass, or degrade the complainant. Per the rules of interpretation in RCC § 22E-207, the person must be at least reckless as to the fact that their conduct is alarming, abusive, humiliating, harassing, or degrading to the complainant.

Subsection (c) establishes four exclusions from liability for the indecent exposure offense. Paragraph (c)(1) provides that a young child, under 12 years of age, is not liable for indecent exposure. Paragraph (c)(2) cross-references the U.S. Constitution. This conflict-of-laws provision is intended to encourage readers to consider what First Amendment policies, if any, are implicated by prosecutions of the offense and makes clear that this language leaves all rights conferred under the Constitution unchanged.[983] Not all conduct involved in the offense, of course, will implicate First Amendment rights.[984] Paragraph (c)(3) excludes liability for a person who is engaging in conduct that

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number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket.").

[979] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[980] RCC § 22E-206.

[981] For example, it is not a defense that the complainant closed her eyes or turned away before the defendant fully exposed himself.

[982] *See Peyton v. Dist. of Columbia*, 100 A.2d 36, 37 (D.C. 1953).

[983] Sexual expression which is indecent but not obscene is protected by the First Amendment. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

[984] *See Bolz v. D.C.*, 149 A.3d 1130, 1144 (D.C. 2016) ("On the whole, the reach of the indecent exposure provision into constitutionally protected territory is limited and thus not 'substantial ... in relation to the statute's plainly legitimate sweep.' *Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908. Accordingly, we conclude that the indecent exposure statute is not substantially overbroad. To the extent that constitutionally protected conduct is prosecuted under § 22-1312, plaintiffs can follow the 'traditional rules of practice,'

is visible only to people who are inside the actor's home. This provision provides a clear safe harbor for nudity within one's dwelling that is not visible to anyone outside the dwelling. Paragraph (c)(4) excludes liability for employees of licensed adult entertainment businesses (e.g., a gentlemen's club) who are acting within the reasonable scope of their professional duties.[985] This provision provides a clear safe harbor for nudity within a business licensed for such conduct and within the normal scope of that business. The term "sexually-oriented business establishment" is defined in paragraph (f)(2) to have the meaning specified in 11 DCMR § 199.1.

Subsection (d) states that the Attorney General for the District of Columbia is responsible for prosecuting violations of the statute.

Subsection (e) provides the penalty for each gradation of the revised offense. [RESERVED.]

Paragraph (f) cross-references applicable definitions in the RCC and the D.C. Code.

Relation to Current District Law. *The revised indecent exposure statute changes current District law in four main ways.*

First, the revised statute establishes two distinct penalties for indecent exposure. Current D.C. Code § 22-1312 provides only one sentencing gradation: 90 days in jail. In contrast, the revised statute punishes purposeful conduct directed at a complainant more severely than reckless conduct in a location open to the general public. For example, a person who confronts a complainant in an office building and masturbates in front of them, with a desire to alarm or sexually harass or sexually degrade the complainant, commits first degree indecent exposure. A couple having sex in a car in a public park, reckless as to the fact that passersby see them and are alarmed, commits second degree indecent exposure. This change improves the proportionality of the revised offense.

Second, the revised statute expands liability to conduct that occurs in a location that is not public. Current D.C. Code § 22-1312 requires that an indecent exposure offense occur "in public." The term "public" is not defined in the statute. District case law—relying on legislative history—has explained that "in public" means "in open view; before the people at large."[986] In contrast, the revised statute provides liability for conduct that is calculated to offend an individual complainant in any location (first degree) and conduct that more broadly offends order in specified locations "open to the general public" (second degree). Sexual conduct described in the statute that is without

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Broadrick, 413 U.S. at 615, 93 S.Ct. 2908, by bringing as-applied challenges that seek to invalidate applications of the statute to their particular expressive conduct.").

[985] The exclusion does not apply to a rogue employee who is acting *ultra vires*.

[986] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143-44 (D.C. 2016) ("Even as to expressive nudity, the provision's imposition on First Amendment rights is limited. It applies only "in public," a phrase that the legislative history defines as "in open view; before the people at large," D.C. Council, Report on Bill 18–425 at 7 (Nov. 19, 2010). Thus, the challenged provision does not encompass a number of the settings cited by Mr. Givens, for example, an in-studio display of nudity for a painting class or an indoor theatrical performance that requires the purchase of a ticket. Instead, the revised statute confines this provision's reach to settings wherein expressive nudity can be constitutionally regulated because minors might be present or nonconsenting adults are not easily shielded from displays of nudity.31 Cf. Parnigoni v. District of Columbia, 933 A.2d 823 (D.C. 2007) (upholding, under an earlier form of § 22–1312 that lacked an express "in public" element, a conviction for conduct that occurred in a private home).").

effective consent and targets a complainant may not be otherwise criminal,[987] but may be extremely alarming or sexually degrading whether or not the conduct occurs in a non-public setting. Unlike the current statute's undefined reference to a location that is "in public," for second degree liability under the revised statute a person must also be in a location that is "open to the general public" at the time of the offense, a communal area of multi-unit housing, a "public conveyance," or a "rail transit station," as these terms are defined in the RCC § 22E-701. The revised statute also provides clear exceptions to liability for a person who disrobes inside their own home or inside an adult entertainment business, without exposing themselves to others outside.[988] This change improves the clarity and consistency of the revised offense and eliminates an unnecessary gap in law.

Beyond these two substantive changes to current District law, three other aspects of the revised statute may constitute substantive changes of law.

First, the revised statute applies standardized definitions for the culpable mental states required for indecent exposure liability. Current D.C. Code § 22-1312 does not specify a culpable mental state for any element of the offense. The sole appellate decision interpreting the current version of the statute does not address the issue.[989] In contrast, the revised statute uses the RCC's general provisions that define "purposefully," "knowingly," and "recklessly"[990] and specify that culpable mental states apply until the occurrence of a new culpable mental state in the offense.[991] Applying a knowledge culpable mental state requirement to statutory elements that distinguish innocent from criminal behavior is a well-established practice in American jurisprudence.[992] These changes clarify and improve the consistency of District statutes.

Second, the revised statute defines the type of nudity that is prohibited in public, consistent with other privacy offenses. Current D.C. Code § 22-1312 makes it unlawful for a person to publicly "make an obscene or indecent exposure of his or her genitalia or anus." The terms "obscene," "indecent," and "genitalia" are not defined in the statute. District case law has not addressed the meaning of "obscene" or "indecent" in the context of the indecent exposure statute.[993] However, the DCCA has held that the term

[987] For example, masturbating in front of another person is not otherwise criminal under the current D.C. Code or RCC unless there is a minor complainant, or the conduct has additional characteristics that make it constitute a criminal threat, menacing, disorderly conduct, or attempted sexual crime.

[988] RCC §§ 22E-4206(c)(3) and (4).

[989] *Bolz v. Dist. of Columbia*, 149 A.3d 1130, 1143 (D.C. 2016).

[990] RCC § 22E-206.

[991] RCC § 22E-207(a).

[992] There is a presumption that the legislature intends to require a defendant to possess a degree of knowledge sufficient to "mak[e] a person legally responsible for the consequences of his or her act or omission" regarding "each of the statutory elements that criminalize otherwise innocent conduct," even when the legislature does not specify any scienter in the statutory text. *Rehaif v. United States*, 17-9560, 2019 WL 2552487, at *3 (U.S. June 21, 2019) (citing *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Morissette* v. *United States*, 342 U. S. 246, 256–258 (1952); *Staples v. United States*, 511 U. S. 600, 606 (1994); Black's Law Dictionary 1547 (10th ed. 2014)); *see also 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)).

[993] The DCCA's sole ruling on the current indecent exposure statute indicates that the statute covers non-obscene nudity. *Bolz v. D.C.*, 149 A.3d 1130, 1144 (D.C. 2016) ("Moreover, the challenged provision does

"genitalia" in a prior version of D.C. Code § 22-1312 includes the "front vaginal area."[994] It is not clear whether frontal nudity that does not show female genitalia is covered by the current statute. Resolving these ambiguities, the revised statute includes liability for display of the pubic area and the statute's gradations provide liability for both sexual and non-sexual displays of the genitals, pubic area, and anus. Reference to "pubic area" is intended to include liability for frontal nudity where the groin is visible but not the external genitalia. This change improves the clarity, consistency, and proportionality of the revised offense.

Third, the revised statute applies the standardized definition of "sexual act" in RCC § 22E-701. Current D.C. Code § 22-1312 makes it unlawful to publicly "engage in a sexual act as defined in § 22-3001(8)." The definition of "sexual act" in D.C. Code § 22-3001(8) requires in subsection (C) an "intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire." It is unclear whether penetration of the sort described in the current statute can be done with an intent that is not sexual in nature. There is no DCCA case law on point. Resolving this ambiguity, the revised statute applies the standardized RCC definition of "sexual act" which, in relevant part,[995] requires the intent to abuse, humiliate, etc. be sexual in nature. However, practically, it would be an exceedingly rare fact pattern where penetration-type conduct would occur that is with intent to abuse, humiliate, harass, degrade, or arouse or gratify that is not also done with intent to sexual abuse, humiliate, harass, degrade, or arouse or gratify.[996] This revision improves the clarity and consistency of the revised statute.

Relation to National Legal Trends. *The revised indecent exposure statute's above-mentioned changes to current District law have mixed support in national legal trends.* Twenty-nine states (hereafter "reform jurisdictions") with stalking statutes also have comprehensively modernized their criminal laws based in part on the Model Penal Code.[997] All 29 reform jurisdictions criminalize lewdness or indecent exposure.[998]

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not prohibit all nudity in public. It prohibits the exposure only of one's genitals or anus, thereby directing the prohibition at certain kinds of nudity that tend to be sexually evocative even if not "obscene." See *Miller v. California*, 413 U.S. 15, 24, 27, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (defining obscene materials as "works which depict or describe [hard core] sexual conduct,…appeal to the prurient interest," and lack "serious literary, artistic, political, or scientific value").). *But see Retzer v. United States*, 363 A.2d 307, 309 (D.C. 1976) (narrowly construing "obscene" and "indecent" to ensure the constitutionality of the District's obscenity statute).

[994] *Rolen-Love v. Dist. of Columbia*, 980 A.2d 1063, 1066 (D.C. 2009) (The external organs "include the mons veneris…[and] the labia majora…").

[995] Other differences between D.C. Code § 22-3001(8) and the revised definition of "sexual act" in RCC § 22E-701—e.g. the specific inclusion of bestiality and elimination of the "of another" requirement in subsection (A) of the current statute—do not appear to change the operation of the revised indecent exposure offense as compared to D.C. Code § 22-1312.

[996] While there can be virtually no penetration or oral contact that satisfies the definition of "sexual act" that is not sexual in nature, defining the term in this way aligns the revised definition of "sexual act" with the revised definition of "sexual contact" where requiring a sexual intent does have practical impact on distinguishing liability for an assault (e.g. hitting someone with a bicycle or car on their buttocks) and a sexual assault (e.g. hitting someone on their buttocks while commenting on their sexual attractiveness).

[997] 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;

Twenty-five out of 29 reform jurisdictions[999] do not require that the exposure occur in a public place. Eight reform jurisdictions[1000] have multiple penalty gradations for indecent exposure based on something other than age[1001] or prior criminal history.[1002]

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).

[998] Ala. Code § 13A-6-68; Alaska Stat. Ann. §§ 11.41.458; 11.41.460; Ariz. Rev. Stat. Ann. §§ 13-1402; 13-1403; Ark. Code Ann. § 5-14-112; Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302; Conn. Gen. Stat. Ann. § 53a-186; Del. Code Ann. tit. 11, §§ 764; 765; Haw. Rev. Stat. Ann. § 707-734; 720 Ill. Comp. Stat. Ann. 5/11-30; Ind. Code Ann. §§ 35-45-4-1; 35-45-4-1.5; Kan. Stat. Ann. § 21-5513; Ky. Rev. Stat. Ann. §§ 510.148; 510.150; Me. Rev. Stat. tit. 17-A, § 854; Mo. Ann. Stat. §§ 566.093; 566.095; Minn. Stat. Ann. § 617.23; Mont. Code Ann. § 45-5-504; N.H. Rev. Stat. Ann. § 645:1; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; N.J. Stat. Ann. § 2C:14-4; N.D. Cent. Code Ann. § 12.1-20-12.1; Ohio Rev. Code Ann. § 2907.09; Or. Rev. Stat. Ann. § 163.465; 18 Pa. Stat. and Cons. Stat. Ann. § 3127; S.D. Codified Laws §§ 22-24-1.1; 22-24-1.2; 22-24-1.3; Tenn. Code Ann. § 39-13-511; Tex. Penal Code Ann. § 21.08; Utah Code Ann. § 76-9-702; Wash. Rev. Code Ann. § 9A.88.010; Wis. Stat. Ann. § 944.20.

[999] Ala. Code § 13A-6-68; Alaska Stat. Ann. §§ 11.41.458; 11.41.460; Ariz. Rev. Stat. Ann. §§ 13-1402; 13-1403; Ark. Code Ann. § 5-14-112 ("in a public place or public view"); Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302 ("where the conduct may reasonably be expected to be viewed by members of the public"); Conn. Gen. Stat. Ann. § 53a-186 ("where the conduct may reasonably be expected to be viewed by others"); Del. Code Ann. tit. 11, §§ 764; 765; Haw. Rev. Stat. Ann. § 707-734; 720 Ill. Comp. Stat. Ann. 5/11-30 ("where the conduct may reasonably be expected to be viewed by others"); Ky. Rev. Stat. Ann. §§ 510.148; 510.150; Me. Rev. Stat. tit. 17-A, § 854; Mo. Ann. Stat. §§ 566.093; 566.095 ("open and obscene exposure"); Minn. Stat. Ann. § 617.23; Mont. Code Ann. § 45-5-504; N.H. Rev. Stat. Ann. § 645:1; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; N.J. Stat. Ann. § 2C:14-4; Ohio Rev. Code Ann. § 2907.09; Or. Rev. Stat. Ann. § 163.465 ("in, or in view of, a public place"); 18 Pa. Stat. and Cons. Stat. Ann. § 3127; S.D. Codified Laws § 22-24-1.2 ("in a public place, or in the view of a public place"); Tenn. Code Ann. § 39-13-511; Tex. Penal Code Ann. § 21.08; Utah Code Ann. § 76-9-702; Wash. Rev. Code Ann. § 9A.88.010; Wis. Stat. Ann. § 944.20.

[1000] Alaska Stat. Ann. §§11.41.458; Ark. Code Ann. § 5-14-112; Colo. Rev. Stat. Ann. §§ 18-7-301; 18-7-302; Ind. Code Ann. §§ 35-45-4-1; 35-45-4-1.5; Minn. Stat. Ann. § 617.23; N.Y. Penal Law §§ 245.00; 245.01; § 245.03; S.D. Codified Laws § 22-24-1.3; Tenn. Code Ann. § 39-13-511.

[1001] [The CCRC expects to update the draft RCC sexually suggestive conduct with a minor offense (RCC § 22E-1304) to include liability for engaging in a sex act or masturbation in view of a minor, or engaging in or causing a minor to engage in a sexual or sexualized display of the genitals, pubic area, or anus, when there is less than a full opaque covering.]

[1002] RCC § 22E-606.